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	18	P L T	166	314	1937	P W N	202		1937	P W N	271		18	P L T	607
220	1936	P W N	871		18	P L T	239		169	I C	495		1937	P W N	596
	168	I C	608		16	Pat	239		38	Cr L J	777		170	I C	464
222	161	I C	164		169	I C	350	374	169	I C	756		38	Cr L J	919
224	169	I C	38	316	18	P L T	18		18	P L T	945	444	170	I C	677
	18	P L T	559		1937	P W N	57	380	1937	P W N	216		1937	P W N	649
	1937	P W N	602		167	I C	134		170	I C	139	453	167	I C	874
	38	Cr L J	685		16	Pat	290		18	P L T	621	454	170	I C	475
226	18	P L T	118	317	169	I C	489	382	1937	P W N	306		18	P L T	911
	1937	P W N	128		18	P L T	628		169	I C	801		1937	P W N	928
	168	I C	332		38	Cr L J	790		18	P L T	637	455	18	P L T	527
	16	Pat	244	319	170	I C	66	384	1937	P W N	351		16	Pat	441
	38	Cr L J	540	321	18	P L T	341		170	I C	146		1937	P W N	563
229	1937	P W N	47		16	Pat	316	386	1937	P W N	337		170	I C	357
	170	I C	84		1937	P W N	521		18	P L T	326	458	18	P L T	477
232	1937	P W N	51		169	I C	872		16	Pat	408		1937	P W N	526
	169	I C	741	324	1937	P W N	305		169	I C	877		170	I C	754
235	168	I C	597		18	P L T	397	387	18	P L T	345	462	167	I C	914
237	18	P L T	162		169	I C	736		1937	P W N	371	463	18	P L T	575
	16	Pat	184	325	169	I C	813		169	I C	1000		1937	P W N	446
	168	I C	502	328	1937	P W N	309	388	1937	P W N	320		171	I C	115
239	168	I C	346		18	P L T	491		18	P L T	348	467	16	Pat	21
242	1937	P W N	79		169	I C	822		16	Pat	389		18	P L T	271
	18	P L T	182	330	1937	P W N	175		169	I C	971		1937	P W N	286
	16	Pat	251		169	I C	901	391	18	P L T	652		38	Cr L J	1011
	169	I C	312	331	167	I C	481		170	I C	316		170	I C	997
	38	Cr L J	750	333	1937	P W N	261	399	171	I C	461	469	1937	P W N	223
245	168	I C	364		170	I C	187	406	167	I C	511		18	P L T	593
	18	P L T	626	334	170	I C	61		18	P L T	329		171	I C	438
246	168	I C	979	337	18	P L T	231		38	Cr L J	407	475	1937	P W N	427
	18	P L T	483		1937	P W N	263	408	18	P L T	187		18	P L T	613
	38	Cr L J	657		16	Pat	306		1937	P W N	210		170	I C	783
	1937	P W N	519		169	I C	581		16	Pat	281	476	18	P L T	357
247	168	I C	605	341	169	I C	729		169	I C	964		170	I C	955
250	169	I C	309	343	1937	P W N	142	409	1937	P W N	279	477	1937	P W N	281
252	168	I C	524		170	I C	351		18	P L T	314		167	I C	938
253	170	I C	99	345	18	P L T	523		170	I C	64		18	P L T	434
257	18	P L T	146		170	I C	134	410	16	Pat	27	479	1937	P W N	236
	1937	P W N	167	347	18	P L T	88		18	P L T	309		167	I C	817
	168	I C	795		1937	P W N	78		170	I C	130	481	167	I C	798
	38	Cr L J	602		167	I C	352	413	170	I C	90		16	Pat	190
	16	Pat	323		38	Cr L J	409		1937	P W N	755		18	P L T	459
260	168	I C	627	348	167	I C	652		18	P L T	824				
261	1937	P W N	60	349	18	P L T	321		38	Cr L J	842	483	1937	P W N	419
	169	I C	75		1937	P W N	340	414	1937	P W N	98		170	I C	777
263	15	Pat	817		169	I C	359		18	P L T	289	486	1937	P W N	392
	169	I C	48	351	18	P L T	202		169	I C	897		16	Pat	459
	18	P L T	535		1937	P W N	209	417	16	Pat	377		18	P L T	717
	1937	P W N	454		16	Pat	288		1937	P W N	588		171	I C	65
	38	Cr L J	673		169	I C	399		18	P L T	554	493	1937	P W N	205
275	168	I C	548	352	167	I C	665		170	I C	760		171	I C	73
	38	Cr L J	572		18	P L T	332	418	171	I C	317	495	18	P L T	250
	18	P L T	468		38	Cr L J	416	422	170	I C	385		1937	P W N	284
276	18	P L T	352	353	1937	P W N	144	425	18	P L T	587		167	I C	941
	1937	P W N	388		170	I C	1005		170	I C	484	497	18	P L T	416
	168	I C	840	357	167	I C	492	428	18	P L T	337		170	I C	785
	38	Cr L J	608		1937	P W N	489		1937	P W N	344		38	Cr L J	1007

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500	18	P L T	734	542	171	I C	668	591	171	I C	589	639	1937	P W N	843
	16	Pat	495	546	16	Pat	230		38	Cr L J	1091		18	P L T	812
	1937	P W N	759		18	P L T	569	593	171	I C	706		172	I C	202
	171	I C	143		169	I C	906	594	16	Pat	360	640	1937	P W N	675
	38	Cr L J	1054	550	1937	P W N	667		1937	P W N	710		172	I C	215
501	18	P L T	398	SB	18	P L T	665		171	I C	720		39	Cr L J	136
	1937	P W N	377		16	Pat	600	598	1937	P W N	376	642	1937	P W N	762
	170	I C	784		172	I C	138		171	I C	711		18	P L T	814
	38	Cr L J	982	554	18	P L T	518	599	18	P L T	747		172	I C	198
502	1937	P W N	429		1937	P W N	573		1937	P W N	775	643	18	P L T	553
	171	I C	110		171	I C	818		171	I C	984		172	I C	159
506	16	Pat	500	557	1937	P W N	571		16	Pat	672		1937	P W N	1029
	18	P L T	700		171	I C	593	603	18	P L T	760	644	18	P L T	728
	1937	P W N	742		38	Cr L J	1096		171	I C	894		1937	P W N	780
	171	I C	306	558	18	P L T	715		1938	P W N	97		172	I C	147
514	18	P L T	438		171	I C	689	605	1937	P W N	723	646	1937	P W N	706
	1937	P W N	532		1938	P W N	47		18	P L T	731		172	I C	175
	16	Pat	491	559	1937	P W N	636		171	I C	953	647	18	P L T	826
	170	I C	959		18	P L T	714	607	1937	P W N	717		1937	P W N	836
516	18	P L T	466		171	I C	604		172	I C	100		172	I C	225
	1937	P W N	665		38	Cr L J	1099	609	1936	P W N	898		16	Pat	729
	171	I C	45	560	1937	P W N	663		170	I C	353	651	18	P L T	817
517	1937	P W N	807		171	I C	591	612	172	I C	741		1937	P W N	823
	171	I C	232		39	Cr L J	181	614	172	I C	120		172	I C	195
519	18	P L T	454	561	172	I C	129	615	18	P L T	833	652	18	P L T	683
	1937	P W N	540	562	18	P L T	443		172	I C	4		172	I C	171
	16	Pat	476		171	I C	665	616	1937	P W N	708	654	18	P L T	834
	171	I C	457	563	171	I C	715		171	I C	946		1937	P W N	830
522	171	I C	99		16	Pat	622	617	172	I C	166		172	I C	234
523	171	I C	124		1938	P W N	101	618	172	I C	125	656	172	I C	744
	18	P L T	932	567	18	P L T	464	619	18	P L T	765	657	1937	P W N	698
524	170	I C	797		171	I C	732		171	I C	964		16	Pat	545
525	170	I C	800	568	18	P L T	486	620	18	P L T	737		18	P L T	848
	18	P L T	913		1937	P W N	535		171	I C	933		172	I C	19
	1937	P W N	932		171	I C	828	621	18	P L T	753	662	18	P L T	857
526	1937	P W N	36	572	18	P L T	640		1937	P W N	803		1937	P W N	868
	168	I C	986		16	Pat	527		16	Pat	643		172	I C	780
528	171	I C	700		1937	P W N	677		172	I C	115		39	Cr L J	156
530	1937	P W N	756		171	I C	881	624	172	I C	155	665	18	P L T	839
	18	P L T	763	578	18	P L T	632	625	1937	P W N	720		1937	P W N	865
	171	I C	607		16	Pat	519		172	I C	513		172	I C	737
531	166	I C	689		1937	P W N	731	626	18	P L T	585		16	Pat	724
	18	P L T	255		171	I C	613		16	Pat	589	667	18	P L T	810
532	18	P L T	32	582	16	Pat	405		1937	P W N	895		1937	P W N	835
	166	I C	703		1937	P W N	585		172	I C	193		172	I C	24
	1937	P W N	83		18	P L T	602	628	18	P L T	787	669	16	Pat	484
	16	Pat	196		171	I C	657		16	Pat	557		1937	P W N	736
534	1937	P W N	119	583	167	I C	244		1937	P W N	919		18	P L T	820
	172	I C	237	584	16	Pat	371		172	I C	187		172	I C	387
537	18	P L T	409		1937	P W N	592	633	1937	P W N	771	670	18	P L T	837
	1937	P W N	497		18	P L T	618		18	P L T	783		1937	P W N	862
	172	I C	8		171	I C	728		172	I C	168		172	I C	751
541	171	I C	425	586	172	I C	109	635	1937	P W N	764	671	172	I C	798
542	16	Pat	395	588	171	I C	691		18	P L T	776	672	18	P L T	799
	1937	P W N	606	589	172	I C	516		172	I C	13		172	I C	27
	18	P L T	672	591	18	P L T	441								

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1	1936	PC	332	60	1937	P	185	121	1937	P	138	190	1937	P	481	251	1937	P	242
8	1937	P	369	74	"	"	100	123	"	"	137	196	"	"	532	258	"	PC	69
21	"	"	467	84	"	"	73	127	"	PC	39	202	"	"	113	281	"	P	408
27	"	"	410	92	"	"	4	127*n*	1933	P	210	215	"	"	117	288	"	"	351
34	"	"	214	97	1938	"	55	149	1937	PC	42	230	"	"	546	290	"	"	316
45	"	"	40	105	1937	"	165	159	"	P	65	239	"	"	314	294	1938	"	183
54	"	"	63	116	1938	"	49	184	"	"	237	244	"	"	226	299	"	"	179

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302	1937	P	360	395	1937	P	542	491	1937	P	514	612	1938	P	108	709	1938	P	170
306	"	"	337	405	"	"	582	495	"	"	500	622	1937	"	563	719	"	"	40
316	"	"	321	408	"	"	386	500	"	"	506	632	1938	"	97	724	1937	"	665
323	"	"	257	413	"	"	440	519	"	"	578	643	1937	"	621	729	"	"	647
333	"	"	363	422	"	"	435	527	"	"	572	650	1938	"	99	738	1938	"	228
344	"	PC	127	441	"	"	455	545	"	"	657	660	"	"	136	742	"	"	231
360	"	P	594	453	1938	"	57	557	"	"	628	662	"	"	177	748	"	"	41
371	"	"	584	459	1937	"	486	571	1938	"	83	668	"	"	66	754	"	"	225
377	"	"	417	476	"	"	519	589	1937	"	626	672	1937	"	599	763	"	"	229
382	"	PC	143	484	"	"	669	593	1938	"	52	682	1938	"	174				
389	"	P	388	488	"	"	433	600	1937	"	550	688	"	"	165	766	"	"	22

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PLT		AIR		PLT		AIR		PLT		AIR		PLT		AIR		PLT		AIR	
1	1937	P	185	217	1937	P	151	416	1937	P	497	626	1937	P	245	834	1937	P	654
8	"	"	117	223	"	"	178	421	"	PC	146	628	"	"	317	837	"	"	670
18	"	"	316	227	"	"	110	423	"	"	148	632	"	"	578	839	"	"	665
21	1936	"	622	231	"	"	337	434	"	P	477	637	"	"	382	843	1938	"	76
27	1937	PC	1	239	"	"	314	438	"	"	514	640	"	"	572	848	1937	"	657
32	"	P	532	242	"	"	156	441	"	"	591	652	"	"	391	857	"	"	662
36	1936	"	615	250	"	"	495	443	"	"	562	665	"	"	550	866	1938	"	13
39	"	"	591	252	"	"	360					672	"	"	542	869	"	"	34
41	1937	"	183	255	"	"	531	445	"	PC	163	679	1938	"	57	871	"	"	39
46	1936	"	563	257	"	PC	69	454	"	P	519	683	1937	"	652	873	1937	PC	256
54	1937	PC	42	271	"	P	467	459	"	"	481	686	"	"	82	878	"	"	279
61	"	"	35	275	"	"	367	464	"	"	567	689	"	PC	244	883	"	"	240
62	"	P	3	278	"	"	49	466	"	"	516	700	"	P	506	886	1938	P	1
63	1936	"	602	281	"	PC	21	468	"	"	275	714	"	"	559	896	"	"	41
67	1937	PC	36	286	"	P	358	471	"	PC	201	715	"	"	558	901	1937	PC	242
72	"	P	17	289	"	"	414	477	"	P	458	717	"	"	486	906	"	"	261
79	1936	"	539	294	"	"	363	483	"	"	246	728	"	"	644	911	"	P	454
84	1937	"	180	301	1936	"	572	486	"	"	568	731	"	"	605	913	"	"	525
88	"	"	347	309	1937	"	410	491	"	"	328	734	"	"	500	915	1938	"	12
90	"	"	43	314	"	"	409	495	"	PC	233	737	"	"	620	917	"	"	19
91	"	"	176	315	"	PC	46	506	"	"	105	739	"	PC	251	921	"	"	127
95	"	"	65	321	"	P	349	510	"	"	174	747	"	P	599	925	"	"	35
110	1936	"	619	326	"	"	386	518	"	P	554	753	"	"	621	928	1937	"	278
113	1937	"	124	329	"	"	406	523	"	"	345	758	1938	"	96	932	"	"	523
118	"	"	226	332	"	"	352	527	"	"	455	760	1937	"	603	933	1938	"	33
123	1936	"	570	333	"	"	103	535	"	"	263	763	"	"	530	938	"	"	21
125	"	"	542	335	"	PC	107	553	"	"	643	765	"	"	619	941	"	"	66
127	1937	PC	39	337	"	P	428	554	"	"	417	767	"	PC	152	945	1937	"	374
132	"	"	31	341	"	"	321	559	"	"	224	776	"	P	635	954	1938	"	75
139	"	"	27	345	"	"	387	563	1938	"	183	783	"	"	633	957	1937	PC	299
146	"	P	257	348	"	"	388	566	"	"	179	787	"	"	628	961	1938	P	17
153	"	PC	4	352	"	"	276	569	1937	"	546	796	1938	"	40	964	"	"	60
159	1936	P	546	357	"	"	476	575	"	"	463	799	1937	"	672	977	"	"	22
162	1937	"	237	359	"	PC	127	585	"	"	626	801	1938	"	16	986	"	"	15
166	"	"	219	370	1938	P	55	587	"	"	425	806	"	"	71	989	"	"	92
169	"	"	1	377	1937	PC	101	593	"	"	469	810	1937	"	667	992	"	"	104
176	"	"	44	383	"	P	155	602	"	"	582	812	"	"	639	1001	"	PC	20
182	"	"	242	385	"	"	435	604	"	"	278	814	"	"	642	1007	1937	"	296
187	"	"	408	397	"	"	324	607	"	"	440	817	"	"	651	1014	1938	P	125
193	"	"	311	398	"	"	501	613	"	"	475	820	"	"	669				
197	"	"	430	401	"	PC	143	615	"	PC	260	824	"	"	413	1017	"	"	95
202	"	"	351	407	"	P	433	618	"	P	584	826	"	"	647	1019	"	"	94
210	"	"	191	409	"	"	537	621	"	"	380	833	"	"	615	1021	"	"	124

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2	1936	P	634	47	1937	P	229	79	1937	P	242	133	1937	PC	39	183	1937	P	280
5	"	"	622	51	"	"	232	83	"	"	532	137	"	P	124	202	"	"	314
10	"	"	602	57	"	"	316	87	"	PC	42	142	"	"	343	205	"	"	493
13	1937	"	113	60	"	"	261	95	"	P	311	144	"	"	353	209	"	"	351
22	"	"	117	61	"	"	3	98	"	"	414	150	"	PC	31	210	"	"	408
33	1936	PC	204	62	1936	PC	219	102	"	"	65	161	"	"	27				
36	1937	P	526	69	1937	P	6	119	"	"	534	167	"	P	257	216	"	"	380
39	1936	"	534	71	"	"	289	123	"	PC	1	175	"	"	330	220	"	"	110
41	1937	"	185	78	"	"	347	128	"	P	226	178	"	PC	36	223	"	"	469

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231	1937 PC	24	377	1937 P	501	578	1938 P	71	736	1937 P	639	895	1937 P	626
236	" P	479	382	" PC	46	582	1937 PC	121	742	" "	503	897	1938 "	52
238	" "	430	388	" P	276	585	" P	582	755	" "	413	902	" "	13
243	" "	84	392	" "	486	588	" "	417	756	" "	530	904	" "	41
246	" PC	21	404	" "	435	592	" "	584	759	" "	500	908	" "	34
251	" P	363	416	" "	433	596	" "	440	762	" "	642	910	1937 PC	299
258	" "	358	419	" "	483	602	" "	224	764	" "	635	914	" "	296
261	" "	333	427	" "	475	606	" "	542	771	" "	633	919	" P	628
263	" "	337	429	" "	502	613	" PC	50	775	" "	599	928	" "	454
271	" "	369	434	" PC	143	619	" "	242	780	" "	644	932	" "	525
279	" "	409	441	" "	119	624	1938 P	57	784	" PC	223	934	1938 "	21
281	" "	477	446	" P	463	628	1937 PC	260	793	1938 P	68	937	" "	83
284	" "	495	454	" "	263	631	" "	256	795	1937 PC	251	953	" "	90
286	" "	467	473	" PC	163	636	" P	559	803	" P	621	954	" "	17
290	" PC	69	482	" "	174	638	" PC	244	807	" "	517	957	" "	75
305	" P	324	489	" P	357	649	" P	444	810	1938 "	40	959	1937 "	278
306	" "	382	492	" PC	124	663	" "	560	813	" "	66	962	1938 "	33
309	" "	328	497	" P	537	665	" "	516	816	" "	76	967	" "	94
312	" PC	107	503	" PC	179	667	" "	550	821	" "	69	969	1937 PC	103
314	" "	101	506	" "	189	675	" "	640	823	1937 "	651	978	1938 P	19
320	" P	388	513	" "	4	677	" "	572	826	1938 "	16	982	1937 PC	240
326	" PC	127	519	" P	246	689	" PC	276	830	1937 "	654	985	" "	271
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Nilkantha Narayan Tewari v. Debendra Nath Ray, (1936) 15 Pat 363=17 P L T 39=1936 P W N 92=A I R 1936 Pat 115=161 I C 167	Overruled in A I R 1937 Pat 185 (F B).
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1937
Patna High Court

** A. I. R. 1937 Patna 1

COURTNEY-TERRELL, C. J. AND JAMES, J.

Rajendra Narayan Bhanja Deo — Petitioner.

v.

Commissioner of Income-tax, B. & O.— Opposite Party.

Misc. Judicial Case No. 9 of 1935, Decided on 14th September 1936, from Commissioner of Income-tax, Bihar and Orissa, D/- 20th August 1935.

** **(a) Income-tax—Income being taxable and not coming under any exemption specified in Income-tax Act, but exemption claimed under treaty between assessee's ancestors and East India Company—Income-tax Act by necessary implication repealed provisions of earlier exemptions.**

If there be any earlier legislation or a treaty between the Sovereign power and the subject for special exemption from future taxation, followed by the introduction by the Sovereign power at a later date of legislation which admittedly, but for the claim to the earlier exemption, applies to and includes the person who was originally exempted, it follows that by necessary implication the later statute repeals the earlier statute or other Act under which the exemption is claimed. [P 2 C 1, 2]

Where certain income of a Raja taxable as "other sources" and not coming under any of the exemptions specified in the Act was taxed, but the Raja claimed exemption by virtue of a treaty negotiated between his ancestors and the East India Company, which provided for exemption from all future taxation :

Held : that the Income-tax Act, by imposing the tax on all persons in British India without specified exception, by necessary implication, repealed the provision of earlier exemption and hence the income was taxable : *Kutner* v. *Phillip*, *(1891) 2 Q B 267*, *Rel. on.* [P 2 C 1, 2]

(b) Legislature—Powers of agreement between state and assessee granting exemption from taxation — Subsequent legislation imposing taxation in spite of such exemption is not ultra vires.

The Sovereign legislative authority has inherent power to impose taxes or alter the position of any subject of the State notwithstanding any previous engagement which may have been entered into between the Sovereign power and the subject. Hence if Indian Legislature imposes income-tax upon a person though he had been exempted from taxation by virtue of a prior agreement between him and the State, the legislation is not ultra vires : *A I R 1930 P C 209*, *Rel. on.* [P 2 C 2; P 3 C 1, 2]

K. P. Jayaswal, *G. C. Das* and *Dharamshila Lal*—for Petitioner.

Manohar Lal—for Opposite Party.

Courtney-Terrell, C. J. — The assessee for the year of assessment was a nobleman of this province. His estate is now included in the province of Orissa. He was assessed under the Income-tax Act to pay tax on an income of Rs. 1,35,619. Out of this income the dispute between the assessee and the department is concerned with an aggregate sum of Rs. 21,171 comprised in four items of *sir* income, that is to say income which is derived from his Rajaship over the estate, the four items being : in respect of fisheries Rs. 18,249, market rights Rs. 592, rights of ferry Rs. 1,884 and in respect of income derived from the sale of bones and hides Rs. 445. He claims to hold his estate by virtue of a Treaty Engagement entered into by his ancestor in the year 1803 with the British Government of that day. It was entered into at a time when the British were first engaged in subjugating Orissa. There is some reason to doubt the historical accuracy of the claim made by the assessee and a considerable part of the decision of the Commissioner of Income-tax is occupied with a partial refutation of that claim. To my mind to decide that question of historical accuracy is no part of our duty because for the decision of this case the claim made by the assessee in respect of the alleged treaty rights and privileges acquired by him may be assumed, whether the claim be sound or not. By the Treaty in question the Raja of that day entered into obliga-

tions with the Government of the day by which he assumed certain specified duties towards the East India Company, then the Sovereign power of the country, and amongst other duties he undertook to pay to the Government an annual tribute of 84,840 Kahuns of Corees which was subsequently translated into Government currency at the rate of 20,408 Sicca Rupees per annum. On the part of the East India Company the engagement, it is said, was that

> no further demand, however small, shall be made on the said Raja or received from him as nazar, supplies or otherwise.

The assessment has been made upon the items of income amongst others which I have set forth, under S. 6, Income-tax Act, as income from "other sources." It is conceded and rightly conceded on his behalf that but for the historical claim to exemption made on his behalf, the income in question, if considered with relation to the Income-tax Act alone, is certainly taxable. Furthermore it is conceded and also properly conceded that there is nothing in the Income-tax Act which excludes from taxation the income in question. The argument on behalf of the assessee is confined solely to this very simple point. It is pointed out that in the Income-tax Act there is no express reference to the Raja or to any one of the specific class to which he belongs and there is no repeal of the Treaty relating to him which has statutory force. It is urged therefore that inasmuch as there is no specific repeal of the contractual or, if I may say so, the statutory relationship between himself and the Government, it follows that either the Income-tax Act in its general terms cannot, in the absence of such repeal, be held to apply to him, or on the other hand that the Act in imposing upon him a taxation which it was solemnly agreed should not be imposed upon him is ultra vires.

To deal with these two arguments : it is said that a specific exemption from taxation cannot be abrogated by general terms in a subsequent Act imposing taxation and that there must be a specific repeal of the exemption. Mr. Jayaswal endeavoured to find authority for this proposition of law but was unable to find anything which brought conviction to my mind. If there be any earlier legislation or a treaty between the Sovereign power and the subject for special exemption from future taxation, followed by the introduction by the Sovereign power at a later date of legislation which admittedly, but for the claim to the earlier exemption, applies to and includes the person who was originally exempted, it follows that by necessary implication the later statute repeals the earlier statute or other Act under which the exemption is claimed. Indeed one of the cases to which Mr. Jayaswal on behalf of the assessee referred expressly recognized this principle. In (1891) 2 Q B 267,[1] at p. 271, Smith, L. J., dealing with a somewhat similar argument, although not in a taxation case, said :

> It is admitted on the part of the applicant that there has been no express repeal of this section; but it is argued that, by reason of the legislation which has since taken place, and especially by reason of the provisions of the County Courts Act, 1888 (51 and 52 Vict. c. 43), it has been repealed by implication. Now a repeal by implication is only effected when the provisions of a later enactment are so inconsistent with or repugnant to the provisions of an earlier one, that the two cannot stand together, in which case the maxim, "*Leges posteriores contraries abrogant*" applies, the quotation being from Coke's Institutes.

In this case if we are to assume in the assessee's favour that there was an earlier exemption from taxation, S. 6, Income-tax Act, by imposing the tax on all persons in British India without specified exception, by necessary implication, repeals the provision of the earlier exemption. As to the argument which, however, was not very seriously pressed, that in view of the earlier exemption and contractual relationship between the State and the assessee, the subsequent legislation imposing taxation in so far as it affected him was ultra vires, it cannot be contended that the legislation by the legislative authority in India in any way exceeded the powers under which the right of legislation was granted to the Indian Legislature. In support of the supposed principle, reference was made to the case in 57 I A 228= 5 I T C 1.[2] In that case the assessee was a zamindar of Assam and on his behalf there was advanced an argument somewhat similar to the argument on behalf of the assessee in this case that by reason of the circumstances of the Permanent Settlement in Bengal, the assessee was exempt from taxation upon certain non-agricultural income derived from his estate. It was

1. Kutner v. Phillips, (1891) 2 Q B 267=60 L J Q B 505=64 L T 628=39 W R 526=56 J P 54.
2. Raja Probhat Chandra Barua v. Commissioner of Income-tax, Bengal, A I R 1930 P C 209= 125 I C 871=57 I A 228=5 I T C 1 (P C).

claimed on his behalf that the Government had at the time of the Permanent Settlement entered into a binding engagement with his predecessor in title and with persons in like position that no taxation other than the fixed revenue should be demanded from the holder of his estate.

It was urged by Mr. Jayaswal that their Lordships of the Privy Council, in deciding the case did, it is true, come to the conclusion upon a construction of the Income-tax Act that there was no exemption of the assessee from the operation of the Act, but he said that their Lordships further went on to discuss the claim of fact made on his behalf that a solemn obligation had been entered into by the Government at the time of the Permanent Settlement that further taxation should not be levied and from the fact of this investigation by their Lordships of the Privy Council he suggested that had their Lordships found as a matter of fact that there had been such a prior obligation on behalf of the Government, that then, notwithstanding their Lordships' construction of the Income-tax Act, they would have held that the Act, however effective on other people, was not effective on the assessee in that case; but I am unable, in perusing this judgment, to find any indication of any such opinion on the part of their Lordships. It may be that they discussed this matter with the motive possibly of seeing whether for the benefit of historical accuracy there had been anything in the nature of a breach of faith. I do not find, however, that that part of the decision had any direct bearing in the opinion of their Lordships on the ultimate question which they had to decide. The question of whether or not this income of the assessee is taxable is, to my mind, to be decided on consideration of two points only. Firstly, whether the taxing clauses of the Act did or did not affect income of the kind in question, and it is not denied in this case that they do so affect the income in question, and secondly whether or not the specific income in question comes under the specified exemptions which are set forth in the Act.

It cannot be contended that the income does come under any of those specified exemptions. That the Sovereign legislative authority has inherent power to impose taxes or alter the position of any subject of the State must be beyond question and that notwithstanding any previous engagement which may have been entered into between the Sovereign power and the subject. That this principle is clear has been amply manifested in the case, to take one example only, of the salary paid to His Majesty's Judges. There was certainly a solemn covenant entered into between the Government and His Majesty's Judges that their salary should be at such and such rate. There is equally no doubt that subsequent legislative enactment reduced that salary notwithstanding the covenant that was in fact passed and this enactment was perfectly valid. This was so both in England and in India. No question can therefore be entertained of any breach of covenant, however gross, and in so saying I do not wish to commit myself in any way to the view urged on behalf of the assessee that there was in this case any covenant at all. The question that was formulated for our decision was:

> Whether on the terms of the Kaoolnama, dated 22nd November 1803, the petitioner's incomes from his Kanika Raj are exempt from taxation under the Taxation Act, 1922?

I would answer this question in the negative and the assessee having failed, must pay ten gold mohurs by way of costs in addition to the Rs. 100 which he has deposited.

James, J.—I agree.

P.R./D.S. *Question answered.*

A. I. R. 1937 Patna 3

ROWLAND, J.

J. Ramackers and *another*—Accused—Petitioners.

v.

Emperor—Opposite Party.

Criminal Revn. No. 459 of 1936, Decided on 7th September 1936, from order of Deputy Magistrate, Ranchi, D/- 17th June 1936.

Motor Vehicles Act (1914), S. 16 and Patna Motor Vehicles Rules, R. 20 (5) — Position of reflecting mirror is immaterial — Power to reflect traffic from rear is necessary — If truck not fully loaded, mirror reflecting rear traffic — Unless there is finding that truck was fully loaded there will be no offence.

There is no requirement in the Act or rules that the mirror should be fitted in any particular position. What the rule requires is that it should be capable of reflecting traffic approaching from the rear. [P 4 C 1]

Where the mirror fitted to a truck is capable of reflecting traffic coming from behind provided the truck is not fully loaded, unless there is a finding that the truck was so heavily loaded that the mirror would not reflect approaching traffic, it would not be enough to constitute an offence under the Act and Rule. [P 4 C 1]

K. K. Banerji—for Petitioners.

Order.—This application arises out of a prosecution under S. 16 and R. 20, Cl. (5), Motor Vehicles Act, and Rules thereunder. Cl. (5), R. 20 imposes a penalty both on the owner and on the driver in case a motor vehicle other than a motor cycle is driven in a public place without being fitted with a mirror which will reflect traffic approaching from the rear. Mr. J. Ramackers is the owner and Mobarak Hossain was the driver of a goods truck "B. O. R. 131." A police report was submitted on 16th March 1936 for their prosecution on the allegation that no mirror was fitted in the truck. The case broke down. It was found that the truck was fitted with a central mirror inside the windscreen. The police prosecutor did not however abandon the case but contended that the rule had not been complied with because an outside mirror on the right ought to have been fitted. There is no requirement in the Act or Rules that the mirror should be fitted in any particular position. What the rule requires is that it should be capable of reflecting traffic approaching from the rear. The mirror fitted to this truck is capable of reflecting traffic coming from behind as found by the trying Magistrate provided that the truck is not fully loaded; but it may become ineffective if the lorry is fully loaded. If the evidence in this case had been that the truck was so heavily loaded on the day in question that the mirror would not reflect approaching traffic then that would have been enough to constitute an offence under the Act and the Rule. But the point for decision was whether the mirror was so placed as to reflect traffic approaching from behind at the time when the driver was driving the truck. There is no finding that on that day the mirror did not give an adequate reflection of any traffic that might come from the rear. That being so, the conviction cannot stand and must be set aside. The accused are acquitted and the fines, if paid, are to be refunded.

B.D./R.K. *Sentence set aside.*

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* A. I. R. 1937 Patna 4

ROWLAND, J.

Sakaldeo Singh—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. No. 485 of 1936, Decided on 22nd September 1936, from order of Sessions Judge, Saran, D/- 22nd July 1936.

(a) Sugar-cane Act (15 of 1934), S. 7, Rules (Patna) 9-11 and 15, 20—Prosecution under—Prosecution under R. 15 for breach of Rr. 9-11—Previous sanction of District Magistrate under R. 20 obtained for prosecution—Sessions Judge subsequently finding breach of R. 13 also—Fresh complaint for trial of that breach not necessary.

When the prosecution has been instituted of a kind requiring previous sanction, complaint or order of the particular authority, then once the proceedings are on foot they will take their course. Once the bar to take cognizance is removed, and if it appears that some other offence has been committed, then fresh complaint is not necessary. [P 5 C 2]

The accused was prosecuted under Sugar-cane Act for breach of Rules (Patna) Rr. 9-11 under R. 15 with previous sanction of District Magistrate. Subsequently Sessions Judge found him to have committed breach of R. 13 also:

Held: that for prosecuting the accused for the the breach of R. 13 fresh complaint was not necessary: *A I R 1934 Pat 536, Foll.* [P 5 C 2]

(b) Sugar-cane Act (15 of 1934), S. 7—Rules under—Rr. 11 and 13 making obligatory on purchasing agent to buy in particular manner by weight are not ultra vires.

Power to make rules under S. 7, Sugar-cane Act 15 of 1934, for the regulation of the purchase and sale of sugar-cane by and to licenced purchasing agents is a very wide power. Therefore Rr. 11 and 13 making obligatory on purchasing agents to buy sugar-cane in a particular manner by weight are within the powers conferred by S. 7 of the Act. [P 6 C 1]

(c) Sugar-cane Act (15 of 1934), S. 7, sub-cl. (3)—Local laws (Patna) under—Breach of rules made under is offence for purposes of Ss. 64-67, Penal Code—Court can impose imprisonment in default of fine.

Under S. 7, sub-cl. (3), Sugar-cane Act, Magistrate imposed a fine of Rs. 200 and directed that in default of payment the accused should suffer simple imprisonment for two months. The accused contended that the Act while authorizing the imposition of fine does not authorize imposition of any sentence of imprisonment:

Held: that word "offence" in Ss. 64-67, Penal Code, is used in the meaning given in Cl. 2, S. 40, that is to say "a thing punishable under the Penal Code or under any special or local law as hereinafter defined." Thus offence under the rules made under Sugar-cane Act is offence under Ss. 64-67, for every offence punishable with fine only in which the offender is sentenced to a fine, it shall be competent to the Court to direct by the sentence that in default of payment of fine the offender shall suffer imprisonment. [P 6 C 1]

*** (d) Interpretation of Statutes—Interpretation of rules made under rule-making power is controlled by General Clauses Act—Ss. 63 to 70, Penal Code, apply to all fines imposed under any Act unless there is contrary provision.**

Interpretation of rules under Sugar-cane Act under S. 7 is controlled by the General Clauses Act, 10 of 1897; S. 25 of that Act makes applicable Ss. 63 to 70, Penal Code, to all fines imposed for

the breach of rules made under rule-making power unless there is express provision to the contrary. [P 6 C 2]

Pandey Nawal Kishore Sahay—for Petitioner.

Gopal Prasad—for the Crown.

Order.—The petitioner is a licensed purchasing agent for a sugar-cane factory and has been prosecuted for an offence against the new rules framed by the local Government under the Sugar-cane Act, 1934. The finding of the lower appellate Court expressed in the concluding portion of his judgment is that the appellant purchased sugar-cane both on 19th March 1936 and 20th March 1936 without proper weighment, thereby contravening Rr. 13 and 11 of the Sugar-cane Rules. The learned Sessions Judge accordingly held that he had rightly been convicted under R. 15. Now R. 11 deals with the maintenance of clear and accurate records of all purchases and these records are to show among other particulars the weight of the sugar-cane including the weight of the cart, the weight of the cart itself and the net weight of the sugar-cane purchased. This rule is obviously framed by some one who supposed as a matter of course that weighment would be made on a mechanical weigh-bridge. In fact unless weighment is made in that manner, it is difficult to see how any clear and accurate record of those particulars can possibly be made. R. 13 requires the manager or purchasing agent to comply with conditions among which are these: that all dealings and contracts of purchase are to be made and had according to the standard maund and weighments shall be made to the nearest quarter maund; and the scales or weights used must permit of the easy reading of the recorded weight.

It was first contended for the petitioner that the rules nowhere provided that weighment must be made on a mechanical weigh-bridge. I think that R. 13 contains requirements which a mechanical weigh-bridge satisfies and that no other method of weighing has been suggested which would equally satisfy those requirements. R. 13 is therefore broken unless weighment is made either by a weigh-bridge or by some other method which equally satisfies the requirements of the Rule and no other practicable method has in fact been suggested; nor has any other practicable method been suggested of fulfilling the requirements of R. 11. I am of opinion that the accused on the facts found by the learned Sessions Judge did not obey Rr. 11 and 13. It has, however, been contended that the proceedings are defective, because under R. 20 no prosecution is to be instituted under these Rules except by order of or under authority from the District Magistrate. The District Magistrate did in fact direct the prosecution of the petitioner in the following terms: "Prosecute the two men under R. 15 for infringement of Cane Rr. 9-11." The Sessions Judge has found that the petitioner committed a breach of R. 13; and it is said that a breach of this Rule was not within the cognizance of the Court before which a prosecution was instituted for breach of Rr. 9-11. I do not find much substance in this argument. It has been held in several cases that when a prosecution has been instituted of a kind requiring the previous complaint, sanction or order of a particular authority, then once the proceedings are on foot they will take their course in respect of any offence which the facts disclose. There is ample authority for this. It is sufficient at present to refer to 15 P L T 694[1]—once the bar to the Court taking cognizance of the case is removed, then if it appears that some other offence also has been committed, it is not necessary to have a fresh complaint.

Another point taken is that if the meaning of the Rules is as understood by the Courts below and the Rules make it obligatory on the purchasing agent to buy in a particular manner by weight, then the Rules go beyond the scope of the Act and are ultra vires. For this contention reference is made to the provisions of the Act itself and the powers conferred on the Local Government by it. S. 3 (2) empowers the Local Government to fix a minimum price for the purchase of sugar-cane in a controlled area; and S. 3 (3) authorises the Local Government to prohibit in controlled area the purchase of sugar-cane for a factory otherwise than from the grower or a licensed purchasing agent. Then there is power in S. 7 to make rules for the purpose of carrying into effect the objects of the Act and in particular to provide for (c) the issue of licenses to purchasing agents, the fees for such licenses, and the

1. Jamuna Singh v. Laldhari Singh, A I R 1934 Pat 536=1934 Cr C 1191=152 I C 228=36 Cr L J 26=15 P L T 694.

regulation of the purchase and sale of sugar-cane by and to such agents; (f) the records, registers and accounts to be maintained for ensuring compliance with the provisions of this Act. Sub-cl. (3) authorises the Local Government to provide that a breach of sub-cl. (2) (c) or (f) may be punished with fine not exceeding two thousand rupees. The power to make rules for the regulation of the purchase and sale of sugar-cane by and to licensed purchasing agents, seems to me to be a very wide power indeed; and I have no doubt at all that Rr. 11 and 13 are within the powers conferred by S. 7 of the Act.

These are all the points taken for the petitioner as against the conviction. One further point is raised with regard to the sentence imposed. The Magistrate imposed a fine of Rs. 200 and directed that in default of payment the accused should suffer simple imprisonment for two months. It is said for the petitioner that the Act while authorising the imposition of a fine does not authorise the imposition of any sentence of imprisonment. The answer to this is in Ss. 64 to 67, I. P. C., read with Ss. 40 to 42. In Ss. 64-67 the word 'offence' is used in the meaning given in Cl. 2, S. 40, that is to say, "a thing punishable under the Penal Code, or under any special or local law as hereinafter defined." The definitions are in Ss. 41 and 42, a 'special law' being a law applicable to a particular subject and a 'local law' being a law applicable only to a particular part of British India. Thus an offence under a local or special law is an offence for the purpose of Ss. 64 to 67. Under S. 64 in every case of an offence punishable with fine only in which the offender is sentenced to a fine, it shall be competent to the Court to direct by the sentence that, in default of payment of the fine, the offender shall suffer imprisonment; and under S. 67 the amount of imprisonment is defined and limited. There is thus a power to impose a sentence of imprisonment in default of payment when an offender is convicted of an offence punishable under a special or local law although such law makes no specific provision for imprisoment in default. But it has been argued that though this principle may be applicable when an offence is created by any section of a special or local law, it does not apply when the offence is created by a rule made in exercise of a rule-making power. For this proposition reliance is placed on 6 Rang 791,[2] a case in which a single Judge of the Rangoon High Court held that the provisions of the Penal Code relating to abetment did not apply to an abetment of a breach of the bye-laws framed by a District Council under the authority of the Burma Rural Self-Government Act.

The terms of that Act and of the rules and of the bye-laws are not before me; nor the provisions of the General Clauses Act, if any, in the light of which Acts of the Burma legislature are to be interpreted. But what we are dealing here is an act made punishable by rules framed under the authority of an Act of the Governor-General in Council, the interpretation of which is controlled by the General Clauses Act, Act 10 of 1897. S. 25 of that Act makes applicable Ss. 63 to 70 of the Penal Code to all fines imposed under any Act,Regulation, rule or bye-law, unless the Act, Regulation, rule or bye-law contains an express provision to the contrary. I have no doubt therefore that the provisions of Ss. 64 and 67, I. P. C., are applicable to the fines imposed under rules framed under the Sugar-cane Act, and there is no want of power to impose a sentence of imprisonment in default of payment of the fine. In the result the application fails and the rule is discharged.

M.D./D.S. *Rule discharged.*

2. Ma Khwet Kyi v. Emperor, A I R 1929 Rang 75=115 I C 664=30 Cr L J 509=6 Rang 791.

A. I. R. 1937 Patna 6

ROWLAND, J.

Sakhichand Kandu — Accused— Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. No. 491 of 1936, Decided on 23rd September 1936, from order of Addl. Sess. Judge, Saran, D/- 3rd August 1936.

Penal Code (1860), S. 182 — Prosecution must show that circumstances were such that only inference is that person giving information knew or believed it to be false— Prosecution must show that the complainant knew that his information was false.

To constitute an offence under S. 182, the prosecution must show that the person giving the information knew or believed it to be false or that the circumstances in which the information was given were such that the only reasonable inference is that the person giving information knew or believed it to be false. Where prosecution could

not produce any evidence that the person giving information knew or believed that the information was false :

Held : that the complainant could not be convicted under S. 182 : *26 Mad 640, Foll.* [P 8 C 2]

G. P. Singh—for Petitioner.

Gopal Prasad—for the Crown.

Order.—The petitioner has been convicted under S. 182, I. P. C., and sentenced to two months' rigorous imprisonment and a fine of Rs. 50. It is alleged that he gave the Sub-Inspector of Police an information which he knew or believed to be false intending the Sub-Inspector to make an investigation and so on. The substance of the petitioner's information was that during the preceding night his house had been broken into and a sendh cut in the wall connecting his main room with a small outer room, that access having been obtained in this manner to his main room his safe had been opened and some properties had been stolen. He said that he found the sendh and some clothes left behind; also that he suspected certain persons in connexion with the alleged crime. The Sub-Inspector made an investigation. He formed the opinion that the information had been false and he complained to a Magistrate of the offence under S. 182, as having been committed by the present petitioner. The Magistrate convicted the latter, and on appeal he was only able to obtain some modification of the sentence. In the grounds of the application to this Court some objections are taken to the regularity of the proceedings, but I find no substance in them. There is only one substantial point that arises in the case and that is what was the duty of the prosecution to prove in order to establish the ingredients necessary for conviction under S. 182 and has the prosecution been able to produce evidence on which a Court is entitled to act in founding a conviction ? The ingredients of the offence punishable under S. 182 are stated in the section itself. They are not the same as the ingredients of the offence under S. 193 of giving false evidence or the ingredients of the offence under S. 211 of making a false charge. Under S. 211 the accused person must institute a proceeding against a person knowing that there is no just or lawful ground for such proceeding. Under S. 193 the accused must have made a statement which is false and which he either knows or believes to be false or does not believe to be true. Under S. 182 the accused must have given to a public servant information which he knows or believes to be false. It has been explained in 26 Mad 640[1] :

> To constitute an offence under that section (S. 182), it must be shown that the person giving the information knew or believed it to be false or that the circumstances in which the information was given were such that the only reasonable inference is that the person giving the information knew or believed it to be false. The fact that the information is shown to be false does not cast upon the party who is charged with an offence under this section, the burden of showing that when he made it he believed it to be true. The prosecution must make out that the circumstances were such that the only reasonable inference was that he must have known or believed it to be false.

Now as to the falsity of the information given, the prosecution has not adduced any direct evidence. There is no witness to depose that on the morning of 24th April 1936, the petitioner Sakhichand did not find a sendh cut in the wall of his room. There is no evidence that he did not find that the small outer room had been opened ; there is no evidence that he did not find the clothes scattered on the floor ; and there is no evidence that he did not miss money which had been in his safe. On the defence side the accused naturally could not produce any witness who had seen the sendh being cut or theft being committed or had seen any of the thieves ; but he examined his own brother to prove that on getting up in the morning the petitioner told him and showed him what he had found. The Magistrate has regarded the testimony of this defence witness as worthless because he is accused's brother ; but there is no evidence on which it can be said that this part of the witness's testimony is not true. The conviction has been based by the Courts below on their view that the story told by Sakhichand was so improbable that they could not believe it to be true. A number of reasons are given for holding it to be improbable. The one which has weighed most with the Courts below appears to be the size of the sendh. The Sub-Inspector who saw it was of opinion that no man could go through so small a hole. Now that is a matter of opinion. There is evidence that some experiments were made ; but they all appear to have been made by adults, and the failure of an adult to go through the hole does not show that a boy could not do so

1. Rayan Hutti v. Emperor, (1903) 26 Mad 640= 1 Weir 190.

Again the failure of two or three of the accused's neighbours, presumably respectable persons, to go through the hole does not show that an expert criminal could not have the skill to push his body through a smaller aperture than a mere amateur. Those who have attended circus performances are familiar with a trick shown by performers of putting the whole body through the opening of a surprisingly small ring. Therefore, the opinion of the Sub-Inspector that it was unlikely that any one should be able to get through this hole is an inconclusive matter.

Another point taken was that it was improbable that a thief should be able to find and use the key of the safe. In this connexion the Magistrate and the Sessions Judge hardly appear to have noticed that Sakhichand had told the Sub-Inspector that he had seen Paltan Gonr at his place a day or two before and there was a possibility that Paltan Gonr had used that opportunity to reconnoitre the position. There is no evidence that Paltan Gonr did not visit the house of Sakhichand during the two or three days before the alleged burglary. Paltan Gonr was called as a prosecution witness but no questions were put to him. He has not denied that he visited the house of Sakhichand. He has not even denied that he committed a burglary there. Next it is said to be improbable that the thieves should go away leaving some valuable clothes behind. This is pure speculation. The thieves might have left in haste in consequence of some fancied alarm. Fourthly, it is said that the sendh was made in an improbable position. Apart from the fact that this is also purely speculative reasoning, it does not seem to me to be at all improbable that the place referred to should be selected by thieves for the making of a sendh. The main room is an east-facing room and a smaller room adjoins it on the west with a door to the north. The thieves were able to enter that smaller room by opening the door. Once inside it was easy for them to remain unobserved while making the hole in the wall of the larger room. This security from observation could not have been obtained by them while making a sendh from the lane on the south or from any of the external walls of the complainant's house ; so that this point, if examined, really tells in favour of the probability of Sakhichand's information being true rather than against it.

The next point is that the Courts have found it difficult to believe that the accused who was sleeping outside only a few yards away would not wake up hearing the noise of a burglary. That is a matter of probability. Some people, as is well known, sleep more heavily than others. Some burglars, as is also well known, can do their operation very quietly and making very little noise. There is no breaking of locks and boxes in this case such as must have been noisy. Finally reference is made to the motive. There is some enmity between Sakhichand and Sheonandan and other persons whom he named as suspects. This motive is not denied, but as usual it is capable of cutting both ways. It could be a motive for the commission of a burglary as well as a motive for the formulation of a false case. But in the absence of any direct evidence that any one of the statements made by Sakhichand to the Sub-Inspector was false, the Courts had not before them, in my opinion, material on which they could properly convict. The fact is, it seems to me, that the burden of proof has in substance been placed on the accused instead of on the prosecution. I find myself unable to support the conviction. The application will be allowed, the conviction set aside, the petitioner acquitted and the fine, if paid, is to be refunded.

M.D./D.S. *Conviction set aside.*

A. I. R. 1937 Patna 8

ROWLAND, J.

Molhu Rai and *another*—Petitioners.

v.

Emperor—Opposite Party.

Criminal Misc. No. 43 of 1936, Decided on 10th September 1936, against order of Deputy Magistrate, Gopalganj, D/- 3rd August 1936.

Criminal Trial—Stay of criminal case—Civil suit based on handnote—Defendant alleging that handnote was outcome of fraud on him—Complaint by defendant against plaintiff—Plaintiff applying for stay of criminal proceedings till decision of civil suit—Stay held should be granted.

A person instituted a suit against another on a handnote alleged to be executed by him. The defendant after the service of summons of the civil suit against him filed a criminal complaint against the plaintiff alleging that the plaintiff had cheated the complainant by getting his thumb impression on a blank paper and later on by refusing to hand over that paper on which the alleged handnote was written. The plaintiff as an accused in the complaint asked the criminal Court to stay proceedings till the disposal of his civil suit. The trying Court refused the application for stay hold-

ing that sufficient grounds for stay were not made out:

Held: that ordinarily the High Court will not interfere with the discretion exercised by the Court of first instance regarding balance of convenience. But as in this case, the Magistrate did not consider the balance of convenience and the balance of convenience being in favour of the civil suit being first determined and the criminal proceeding being decided afterwards, the criminal proceedings should have been stayed: *A I R 1925 Pat 193, Rel. on.* [P 9 C 2]

G. P. Das—for Petitioners.

Raj Kishore Prasad and *Jaleshwar Prasad*—for the Crown.

Order.—This is an application to stay proceedings pending before a Magistrate against the petitioners. These proceedings began with the presentation of a complaint on 5th May 1936 by the opposite party Sobran Koeri. It was alleged in that complaint that the petitioners had forcibly taken the thumb impression of Sobran Koeri on a blank paper on a date rather less than two months before the date of the complaint. The actual date is said to be 10th April 1936. The petitioners suggest that this prosecution is merely directed against them as a counterblast to a civil suit instituted by them on 18th April 1936 in the Court of the Munsif claiming a sum of Rs. 255 from Sobran Koeri. The suit, it is said, is based on a handnote dated 5th March 1935 and the summons was served on the defendant on 27th April 1936, that is to say, eight days before the presentation of the complaint. If it is a fact that the criminal prosecution of the petitioners was instituted as a counterblast to the civil claim of the latter, then the case would be closely analogous to that in 6 P L T 348[1] in which Adami, J. granted stay of criminal proceedings pending the decision of a civil suit. In that case the civil suit was brought on a handnote and after its institution the complainant presented a complaint to the effect that he had gone to the petitioner (plaintiff of the suit) but the petitioner had failed to return to him the pronote and therefore he had been cheated. In that case the criminal proceedings were stayed by the order of this Court in order that the civil Court should first decide on the genuineness of the plea of payment and refusal to return the handnote. The reply on behalf of the opposite party is that the story of the extorted thumb impression did not take its origin on the 5th May, that is after the service of summons in the plaintiff's suit but at a much earlier date, namely 11th April 1936, when Sobran went to the police station and made a report which was entered in the station diary to the effect that Molhu Rai on the previous day had taken his left thumb impression on a blank paper saying that there was something due from him. In that saneha, which by the way has not yet been proved in the criminal Court, it may be noticed that there is no mention of Chatardhari Rai, and it is not stated that the thumb impression was taken by force.

The High Courts have invariably refused to lay down any fixed rule in dealing with cases of this nature. It is regarded as ordinarily a question of convenience whether the proceeding of one party or of the other party should be heard first. In dealing with this question of convenience the Court of first instance has a discretion and the High Court ordinarily will be by no means eager to interfere with the exercise of that discretion if it is judicially exercised. In the present case had the question of convenience been before me as a Court of first instance, I have no doubt that I should have been of opinion that the balance of convenience was in favour of the money suit in the Munsif's Court being first determined and the criminal proceeding being decided afterwards. The Magistrate has not given reasons for refusing to stay the trial before him but merely says that he does not see sufficient ground to postpone the criminal proceedings. I do not feel sure that the Magistrate has really considered the balance of convenience. In the circumstances of this particular case I shall follow the example of Adami, J. in 6 P L T 348[1] and direct that the criminal proceedings be stayed pending the disposal of the civil suit which I hope the Munsif will do his utmost to expedite.

B.D./R.K. *Order accordingly.*

1. Banambar Chhotra v. Nata Behera, A I R 1925 Pat 193=84 I C 350=26 Cr L J 286=6 P L T 348.

A. I. R. 1937 Patna 9

JAMES AND ROWLAND, JJ.

Mt. Balkesia and *others*—Appellants.

v.

Mahant Bhagwan Gir and *others*—Respondents.

Appeal No. 1186 of 1933, Decided on 12th August 1936.

(a) Evidence Act (1872), S. 114, Illus. (i)—Mortgage suit—Mortgage bond in possession of mortgagor—Court believing mortgagee's

evidence that debt has not been satisfied—There is no room for application for presumption under Illus. (i) of S. 114.

Where, in a suit on a mortgage the Court believes the mortgagee's evidence that the debt has not been satisfied and that he was unable to recover the mortgage money from the mortgagor, there is no room for the application of the presumption under S. 114, illus. (i), that the bond is satisfied because it is in possession of the mortgagor. [P 10 C 2]

(b) Civil P. C. (1908), O. 9, R. 4 — Application by plaintiff for restoration dismissed—He is still entitled to bring fresh suit.

The alternative provisions of O. 9, R. 4, are not mutually exclusive and a plaintiff whose application for restoration has been dismissed is not precluded from bringing a fresh suit. [P 11 C 2]

Per *Rowland, J.*—In absence of some such provisions as that with which O. 9, R. 9 commences, a dismissal under O. 9, R. 3 would not operate to preclude the plaintiff from suing again even if O. 9, R. 4 did not expressly save the right of suit. O. 9, R. 4 in effect, does not create but declares the right of bringing a fresh suit while at the same time permitting the plaintiff in the alternative to proceed with the original suit: *63 I C 239*; *A I R 1926 All 678* and *A I R 1929 All 131*, *Rel. on.* [P 11 C 2]

(c) Equity—Application of—No equity arises from mere delay to enforce demand unless other circumstances create it.

No equity arises from mere delay to enforce a demand; and unless other circumstances create an equity, the only question which can arise from the delay is whether the legal demand is barred by the law of limitation or not: *In re Maddever*, *(1884) 29 Ch D 523*, *Ref.* [P 11 C 1]

Khurshaid Husnain and *S. N. Bose*—for Appellants.

B. N. Mitter and *B. Mukharji* for *B. K. Sinha*—for Respondents.

James, J.—This is a second appeal from the decision of the District Judge of Patna decreeing the plaintiff's suit which was based on a mortgage-bond of 13th December 1915. The facts as found by the learned District Judge are as follows: On 13th December 1915 Ramdhin Singh mortgaged certain property to Mahant Bhagwan Gir, the plaintiff of this suit, for Rs. 500. Ramdhin Singh subsequently took two more loans from the mahant, who, in order to obtain the money for the second loan, borrowed Rs. 400 from Ramdas Sahu, depositing with him the mortgage-bond as some kind of security for repayment. The mahant had already paid Rs. 200 to Ramdas Sahu, when, on 6th April 1919, he went to pay him the balance. He was then told that one Sheoprasad, who had apparently represented himself as the agent of the mahant, had paid to Ramdas Sahu the balance due to him and had taken the mortgage-deed. He subsequently discovered that the mortgage-deed which had an endorsement of payment signed by Sheoprasad was in possession of Bengala Singh, who had purchased from Ramdhin Singh a portion of the mortgaged property. Thereupon the mahant instituted a suit on his mortgage-bond, but owing to his failure to appear at an early stage of the suit it was dismissed under O. 9, R. 3, Civil P. C., on 10th May 1920. The mahant applied for restoration of the suit under O. 9, R. 4, but the application was dismissed after hearing. On 9th December 1930 he instituted the present suit, which was in due course decreed by the District Judge of Patna on the findings of fact which have been stated above.

The appellants are three defendants of the suit who on 12th October 1923 purchased a portion of the mortgaged property from Ramdhin Singh, defendant 1. Mr. Khurshaid Husnain on behalf of the appellants argues, in the first place, that in dealing with the question of whether the mahant's mortgage-debt has been satisfied, the learned District Judge has not applied the presumption which he is permitted to apply by illus. (i) of S. 114, Evidence Act. The learned District Judge has believed the mahant's evidence that the debt has not been satisfied, and that he was unable to recover the mortgage-bond from Ramdas Sahu; and since the learned District Judge has believed that evidence, there is no room for the application of a presumption that the bond has been satisfied because it is in possession of the mortgagor. Mr. Khurshaid Husnain argues, in the second place, that the present suit should be regarded as barred by reason of the provisions of O. 9, R. 4. O. 9, R. 4, provides that where a suit is dismissed under R. 2, or R. 3, the plaintiff may bring a fresh suit, or he may apply for an order to set the dismissal aside. Mr. Khurshaid Husnain argues that these two provisions are mutually exclusive, so that if the plaintiff elects to avail himself of his right to apply to have the order of dismissal set aside, he is thereby precluded from availing himself of the right to institute a fresh suit. The only decisions in point which have been brought to our notice by Mr. Khurshaid Husnain are adverse to this argument: 63 I C 239[1] of Stuart, J., A I R 1926 All 678[2] of Daniels, J., and

1. Bhudeo v. Baikunthi, (1921) 63 I C 239.
2. Tulshi Singh v. Sheosaran Rai, A I R 1926 All 678=96 I C 187.

50 All 837[3] of Weir, J., all of the Allahabad High Court. In all these cases it has been held that the alternative provisions of R. 4 are not mutually exclusive, and that a plaintiff whose application for a restoration of his suit has been dismissed, is not precluded from instituting a fresh suit. I do not consider that any ground has been made out which justifies us in differing from the view expressed by the learned Judges whom I have named. It appears to us that a reasonable reading of the rule provides that the plaintiff may bring a fresh suit or he may apply for setting aside the dismissal. If he satisfies the Court and obtains an order setting aside the dismissal, he proceeds with his original suit. If having applied for an order to set aside the order of dismissal, he fails to satisfy the Court and his application is dismissed, he is left to his alternative remedy which is that he may, subject to the law of limitation, bring a fresh suit.

Mr. Khurshaid Husnain suggests, in the third place, that the present appellants should be regarded as bona fide transferees for value without notice, and that some kind of equitable right has accrued to them from the delay of the plaintiff in instituting the present suit. He instituted his suit on the mortgage bond; and it has not been proved that the plaintiff by any express words or action led these defendants to believe that his debt had been satisfied before they purchased the property. But it is suggested that the plaintiff in some way or other led them to that belief by holding aloof when he should at once have instituted a fresh suit after the failure of his application under O. 9, R. 4. This argument has been based on certain English equitable rules, but the law is clear that no equity arises from mere delay to enforce a legal demand, and unless other circumstances create an equity, the only question which can arise from the delay is whether the legal demand is barred by the law of limitation or not : 27 Ch D 523.[4] Nothing in the conduct of the plaintiff can be held to have conferred any kind of equitable right upon the appellants to resist the enforcement of the mortgage bond, and in my judgment this appeal should be dismissed with costs.

3. Govind Prasad v. Har Kishan, A I R 1929 All 131=115 I C 118=50 All 837=26 A L J 776.
4. *In re* Maddever, (1884) 27 Ch D 523=53 L J Ch 998=52 L T 35=33 W R 286.

Rowland, J.—I agree. With reference to the argument that the dismissal of a suit under O. 9, R. 3, Civil P. C., may, coupled with the dismissal of an application for rehearing, operate to preclude the plaintiff from suing again on the same cause of action, I would like to add a few words. It seems to me that S. 9, Civil P. C., is fatal to the appellants' argument. This section declares that the Courts shall have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred. That is subject to such provisions as those of S. 11 which bars suits on matters already judicially decided between the parties or of O. 9, R. 9, which precludes a plaintiff from suing again on the same cause of action where his suit has been dismissed under R. 8, that is to say on appearance of the defendant and in the absence of the plaintiff. In the absence of some such provision as that with which O. 9, R. 9 commences, a dismissal under O. 9, R. 3 would still, in my opinion, not operate to preclude the plaintiff from suing again even if O. 9, R. 4 did not expressly save his right of suit. R. 4 in effect does not create but declares the right of bringing a fresh suit while at the same time permitting the plaintiff in the alternative to proceed with his original suit. The former option the plaintiff has as of right; the other option is available to him only if he can satisfy the Court that he had sufficient cause for the non-appearance or other default which led to the dismissal of the suit. On the other points I have nothing to add.

R.M./R.K. *Appeal dismissed.*

A. I. R. 1937 Patna 11

COURTNEY-TERRELL, C. J. AND SAUNDERS, J.

Gokulananda Harichandan — Defendant—Appellant.

v.

Iswar Chhotrai — Plaintiff — Respondent.

First Appeal No. 6 of 1934, Decided on 12th December 1935.

(a) Compromise—Recording of—Court must be satisfied that suit has been adjusted wholly or in part in lawful manner—Onus of establishing that state of mind in Court lies on person setting up compromise.

In order to record a compromise, it is necessary for the Court before whom the compromise is brought for recording, to be satisfied that the suit

has been adjusted wholly or in part in any lawful manner and the onus of establishing that state of mind in the Court lies on the person who brings the compromise forward. Where the Court is not satisfied from the materials before it that the suit has been really compromised, it should refuse to record it. [P 12 C 2]

(b) Civil P. C. (1908), O. 41, R. 20—Suit by reversioner for declaration that defendant is not adopted son of last male holder decreed —Defendant filing appeal — More distant reversioners are entitled to be added as parties.

Where the suit by a person claiming to be the nearest reversioner of the last male holder of an estate, for a declaration that the defendant is not the adopted son of the last male holder, is decreed and the defendant files an appeal from it, persons claiming to be more distant reversioners than the plaintiff in the suit are entitled to be added as respondents in the appeal as their position and interests will be adversely affected if the decision of the lower Court is reversed. [P 12 C 2; P 13 C 1]

B. K. Ray and *P. Mahanty* — for Appellant.

B. N. Das and *B. Mahapatra* — for Respondent.

Courtney-Terrell, C. J. — These two applications arise out of a suit by one Iswar who claims to be the nearest reversioner to the last male holder of a certain estate and his suit was for a declaration that the defendant Gokulananda was not, as he purported to be, the adopted son of that last male holder. There was a further claim to set aside an alienation by Gokulananda of a portion of the estate. The Subordinate Judge decreed the suit finding that Gokulananda was not the adopted son of the last male holder and he declared that the alienation did not bind the reversioner. The defendant Gokulananda has lodged a first appeal and comes before us with a petition to record a compromise of the appeal and, according to which proposed compromise the decree of the Subordinate Judge is to be set aside in consideration of certain money to be paid to the respondent, the plaintiff in the suit. At the same time we have before us an application by certain persons who claim to be more distant reversioners than the plaintiff Iswar. They say that by the proposed compromise the effect of the judgment of the Judge declaring that Gokulananda was not the adopted son would be set aside and that their status accordingly would be affected as reversioners inasmuch as a judgment upholding an alleged adoption or holding that the adoption did not take place is a judgment in rem, and these persons ask that notwithstanding the proposed disappearance of the repsondent Iswar from the appeal, they may be allowed to take up the respondent's position in the appeal and defend the judgment of the Subordinate Judge. This application is resisted by the appellant who seeks to record the compromise.

There are various allegations contained in affidavits by the distant reversioners to the effect that the compromise was obtained from Iswar by fraud or unfair means and that he is a person of weak mind who has been induced to give away not only his own position but the status of the distant reversioners by consenting to the reversal of the judgment of the Subordinate Judge. Into the merits of those allegations it is not right that we should enter beyond saying that in order to record a compromise it is necessary for the Court, before whom the compromise is brought for recording, to be satisfied that the suit has been adjusted wholly or in part in any lawful manner and the onus of establishing that state of mind in the Court lies upon the person who brings the compromise forward. Without discussing the merits of the allegations by the distant reversioners, I would merely state that speaking for myself I am far from satisfied on the materials before us that the suit has really been compromised and would refuse therefore to record the compromise, at any rate, at this stage of the proceedings. As regards the application for the addition of the distant reversioners as parties to the appeal, in my opinion that is a right and proper application. Their interests are manifestly affected by the decision of the Subordinate Judge, and if his decision is reversed their position will be adversely affected. It is contended on behalf of the appellant who seeks to record the compromise, that the remedy of the distant reversioners is to bring a separate suit saying, as they would have a right to say, that their interests were not affected by the compromise. But this offer of a statement that the distant reversioners' interests are not affected is gratuitous and has no serious value, for the statement that the distant reversioners' interests were not affected might be denied by other litigants in the future and the Court would have to decide as a matter of law whether the decision in rem on the subject of adoption affected the rights of the distant reversioners. The offer therefore to limit the effect of the compromise merely to the particular plaintiff's interest is illusory.

I would allow therefore the application of these persons, Pravakar Chhotrai and Banshidar Narendra, to be added as respondents to the appeal, with permission to contest the appeal. This is of course subject to any objection which may be taken at the hearing of the appeal by the appellant that these new respondents or anyone or more of them have not the required status to prosecute the appeal. As to the matter of costs, the costs of both of these applications will be costs in the appeal.

Saunders, J.—I agree.

R.M./R.K. *Order accordingly.*

A. I. R. 1937 Patna 13

COURTNEY-TERRELL, C. J. AND SAUNDERS, J.

Narayan Prasad Panda—Plaintiff—Appellant.

v.

Sreemati Adarmani Dasi and *others*—Defendants—Respondents.

Appeal No. 87 of 1930, Decided on 11th December 1935, from appellate decree of Addl. Dist. Judge, Cuttack, D/- 31st March 1930.

Adverse Possession — Suit on mortgage—Stranger purchasing mortgaged property during pendency of suit—Mortgagee obtaining decree and purchasing property in execution thereof—Legal possession delivered to mortgagee but stranger continuing in actual possession of mortgaged property—Suit by mortgagee against stranger in possession — Suit within 12 years from date of possession to mortgagee in his mortgage suit — Suit held within time and not barred by adverse possession.

Mortgagee brought a suit on his mortgage and while the suit was pending another person purchased a share of the mortgaged property. Mortgagee obtained decree in his suit, and in a sale held thereon purchased the property. When Court delivered possession of property to the mortgagee the purchaser continued in possession ; later on, the purchaser was also recorded as a proprietor of the property. So, the mortgagee was driven to civil suit against the purchaser, which was filed within 12 years from the date of delivery of possession but not within 12 years from the date of judgment and decree. The purchaser contended that the suit is barred because of his adverse possession to the plaintiff for more than 12 years from the date of judgment on which date he could have obtained possession. Question was as to when the time began to run adversely :

Held : that on the date when plaintiff was put in possession and the purchaser continued in possession, from that date only time began to run adversely, and as the suit was within 12 years from the date of possession the suit was within time : *A I R 1932 Pat 145, Foll. ; 21 All 269, Dissent.* [P 13 C 2; P 14 C 1]

L. K. Das Gupta—for Appellant.

S. C. Chatterji and *A. S. Khan* — for Respondents.

Courtney-Terrell, C. J. — This second appeal arises out of a suit which was instituted on 29th January 1927, by the plaintiff to recover from defendant 1 two pies share of Taluk Panpur, tauzi No. 891, in the Balasore Collectorate. The suit was also for 12 karants odd share from defendant 2. The trial Court decreed the suit as against both defendants. Defendant 1 alone appealed to the District Judge, and it is with her case alone that we are concerned. The lower appellate Court held that the suit against defendant 1 was barred by limitation.

The facts are simple. The property originally belonged to one Kailash Chandra Kar, and in 1897 he mortgaged it to the plaintiff. In 1903 the plaintiff sued for a decree for sale on the mortgage, and in 1904, while the suit was pending, defendant 1 purchased the two pies share from the mortgagor Kailash Chandra Kar who was the owner of the equity of redemption. The purchaser, therefore, was bound by the doctrine of lis pendens. In 1909 there was a preliminary decree in the mortgage suit, and in 1910 there was a final decree for the sale of the mortgaged property. On 16th December 1911, the auction sale took place and the plaintiff purchased in the execution and on 18th January 1912 the sale was made absolute. On 29th January 1915 the plaintiff got delivery of possession. The suit was begun on 29th January 1927, exactly 12 years after the delivery of possession. The dispute between the parties came to a head by reason of the application of the plaintiff to register his name in the Land Registration Department. He was registered as proprietor in 1920-21, and on 23rd June 1922, defendant 1 applied to be registered as the proprietor of the two pies share which she had purchased in 1904. The result of that proceeding was that she was so registered in accordance with her petition, and the plaintiff's name was expunged from the register of proprietors and accordingly he has been driven to the civil Court.

It is contended on behalf of defendant 1 and it was held by the lower appellate Court that the possession of defendant 1 became adverse to the plaintiff from the date of the confirmation of the sale on 18th January 1912, on ground that the

plaintiff might have applied for immediate possession and did not do so and that the suit is, therefore, brought more than 12 years after the date when the plaintiff was entitled to possession. On the other hand, it is contended on behalf of the plaintiff that he did not get delivery from the Court until 29th January 1915 and that his suit being brought within 12 years is in time. The matter of when the adverse possession begins in circumstances of this kind has already been decided by a Bench of this Court in 11 Pat 165.[1] The judgment of Noor, J. in that case is very clear, and dealing with a purchaser lis pendens he observed as follows :

> His position is no better than that of the mortgagor ; he obtained the right, title and interest of the mortgagor subsequent to the passing of the mortgage-decree and, therefore, he was bound by the decree, the sale and the delivery of possession.
>
> Now when once the Court put the plaintiff's predecessor in interest in possession of the property and the defendant continued in possession of it in spite of this delivery of possession, it is then and then only that the possession of the defendant becomes adverse.

I would venture respectfully to agree entirely with the reasoning of the decision, and in the course of this case the authority which was cited by the lower appellate Court was considered. The learned Judge of the lower appellate Court felt himself bound by a decision of the Allahabad High Court in 21 All 269.[2] The Bench of this Court, which decided the case reported in 11 Pat 165,[1] considered and disagreed with the judgment of the Allahabad High Court. We are bound by the decision of our own Court especially having regard to the fact that, speaking for myself, I think, the judgment of the learned Judges who decided the Patna case was correct. On this ground it is clear that the suit is not barred by limitation. The judgment of the lower appellate Court must be set aside and the judgment and the decree of the trial Court restored with costs throughout against defendant 1.

Saunders, J.—I agree.

B.D./R.K. *Appeal allowed.*

1. Ram Prasad Ojha v. Bindeshwari Prasad Sinha, A I R 1932 Pat 145=142 I C 246=11 Pat 165=13 P L T 121.
2. Narain Das v. Lalta Prasad, (1899) 21 All 269 =1899 A W N 56.

A. I. R. 1937 Patna 14

ROWLAND, J.

Ramadhikari Singh & others—Accused —Petitioners.

v.

Emperor—Opposite Party.

Criminal Revn. No. 442 and Ref. No. 50 of 1936, Decided on 8th September 1936, from order of Magistrate, First Class, Samastipur, D/- 1st June 1936, and from reference of Addl. Sess. Judge, Darbhanga, D/- 28th July 1936, respectively.

(a) Bengal Embankment Act (2 of 1882), Ss. 6, 76 (b) and 80—Publication of notification under S. 6, relating to provisions of S. 76 (b)—Crown can rely on presumption under Cls. (e) and (f), S. 114, Evidence Act.

Apart from the difficulty of getting direct proof of local publication of notification under S. 6, Bengal Embankment Act, relating to the provisions of S. 76 (b) of the Act, after an interval of time exceeding 25 years, the Crown can be permitted to rely on the presumption under S. 114, Cls. (e) and (f), Evidence Act, namely that judicial and official acts have been regularly performed and that the common course of business has been followed in particular cases. [P 15 C 1, 2]

(b) Bengal Embankment Act (2 of 1882), S. 80—Publication is directory and not mandatory.

The publication under S. 80 is directory and not mandatory: *A I R 1933 Pat 40, Rel. on.* [P 15 C 2]

(c) Bengal Embankment Act (2 of 1882), Ss. 76 (b), 79—It is hazardous to interfere with system of embankment in any way without advice of competent engineer and full inquiry—Provisions are designed for maintenance of status quo.

The system of embankments in North Bihar is very complex and it is extremely hazardous to interfere with them in any way without the advice of a competent engineer and full inquiry. The Bengal Embankment Act is largely composed of provisions designed for the maintenance of the status quo and to prevent interference therewith except by competent persons or under competent advice or sanction. [P 15 C 2]

Where therefore certain persons erecting a new embankment are convicted under S. 76 (b), the proper order to be passed under S. 79 is one directing them to demolish so much of the embankment as is new embankment and to remove so much of the new earth as is addition to the existing embankment, thus restoring the locality as nearly as possible to its status quo ante: *A I R 1936 Pat 413, Rel. on.* [P 15 C 2; P 16 C 1]

Manohar Lal and *G. P. Singh*—for Petitioners.

K. K. Banerji—Against reference.

Order. — The petitioners in Criminal Revision No. 442 of 1936 apply against their conviction and sentences of Rs. 50 each under S. 76 (b), Bengal Embankment Act (Bengal Act 2 of 1882). Criminal Reference No. 50 of 1936 is made by the

Additional Sessions Judge of Darbhanga recommending revision of a consequential order under S. 79 of the same Act made by the same Magistrate in connexion with the above conviction. Now so far as the convictions of the petitioners are concerned, the facts are concluded by the findings of the trial Court against which no appeal lay on the facts. The findings were that people of village Mahthi led by the petitioners who themselves were present at and supervised the work, were making an embankment west of the river Gandak with a view to preventing that river from overflowing into the fields of village Mahthi.

The defence of the petitioners, apart from their denial that they took part in this work, was that no new embankment was being made but an old embankment was being repaired. The finding is that there had been an old embankment; at some places traces of it remained, at others there was no trace and the embankment which was being made must be considered new. A point of law is raised, it being contended that the prosecution had not proved that S. 76 (b) had been lawfully brought into force in the area. I find no substance in this. The section is to be brought into force by publishing a notification under S. 6 in the Provincial Gazette. S. 6 enacts that the provisions of Cl. (b), S. 76, shall take effect one month after the publication of such notification. It is not disputed that there was a Gazette notification made in July 1911. S. 6 further directs that

> As soon as possible after the said publication, the Collector shall cause a translation of the notification in the vernacular to be published in the manner prescribed in S. 80.

Section 80 gives the manner of local publication affixing a copy in the Collectorate, Subdivisional and Munsif's offices, at every police station and by affixing copies in hats, bazars, towns, villages, etc., and by beat of drum at certain public places. The Collector has forwarded with his explanation on this ground the Gazette notification under S. 6 and a letter from the Secretary to Government with instructions as to publication and with an endorsement comprising the Collector's orders for giving effect to those instructions in the several localities. Apart from the difficulty of getting direct proof of local publication after this interval of time exceeding 25 years, the Crown can, I think, be permitted to rely on the presumption under S. 114, Cls. (e) and (f), Evidence Act, namely, that judicial and official acts have been regularly performed and that the common course of business has been followed in particular cases; and even if publication could be neither proved nor presumed, it has been held in 13 P L T 652[1] that the publication under S. 80 is directory and not mandatory. This point failing, Mr. Manohar Lal throws his clients on the mercy of the Court and asks for some reduction of sentence. They were liable each of them to pay a fine of Rs. 500, and I do not consider that the fines of Rs. 50 each which have been imposed are excessive. Criminal Revision No. 442 is accordingly dismissed.

Turning now to the reference, the learned Additional Sessions Judge thinks that the order is unwarranted by the evidence. As it stands, it appears to be a direction to demolish the entire embankment, whereas on the Magistrate's own findings parts of the embankment were already existing before the work of adding to it began. The learned Sessions Judge suggests that the order be set aside. But that would clearly not be a correct order, as it would allow the retention of a bandh which makes serious change in the status quo with regard to the levels and to the flow of water. As pointed out in 17 P L T 412[2]:

> The system of embankments in North Bihar is very complex, and it is indeed as the Commissioner pointed out 'extremely hazardous to interfere with them in any way without the advice of a competent engineer and full inquiry.'

The Bengal Embankment Act is largely composed of provisions designed for the maintenance of the status quo and to prevent interference therewith except by competent persons or under competent advice and sanction. Therefore simply to set aside the learned Magistrate's order and allow the embankment and additions to embankment to remain would cause the very evil which the learned Additional Sessions Judge seeks to avoid. The proper order will be, in my opinion, to modify that passed by the Magistrate under S. 79 by directing that the petitioners are to de-

1. Damodar Narayan v. Emperor, A I R 1933 Pat 40=1933 Cr C 56=142 I C 35=34 Cr L J 275=13 P L T 652.
2. Kameshwar Singh Bahadur v. Emperor, A I R 1936 Pat 413=1936 Cr C 660=163 I C 965=37 Cr L J 875=17 P L T 412.

molish so much of the embankment as is new embankment and to remove so much of the new earth as is addition to existing embankment, thus restoring the locality as nearly as possible to its status quo ante. If such an embankment as the petitioners and others wish to erect can be erected without damage to neighbouring village, their proper course is not to take the law into their own hands but to move the Collector under the Embankment Act to give them permission after holding an inquiry and giving such directions as may be necessary to secure the rights of their neighbours. The order under S. 79 is modified accordingly.

R.M./R.K. *Order accordingly.*

A. I. R. 1937 Patna 16

MOHAMMAD NOOR AND VARMA, JJ.

Shazad Khan and *others*—Plaintiffs—Petitioners.

v.

Darbar Babu Kuchhi—Defendant—Opposite Party.

Civil Revn. No. 94 of 1936, Decided on 15th September 1936, from order of Sub-Judge, Dhanbad, D/- 21st January 1936.

Partnership Act (1932), Ss. 69 and 74 (b)—Suit by unregistered firm for recovery of money on basis of hand-note—Right to realize money accruing before passing of Act—S. 74 (b) only saves pending suits—Suit held barred under S. 69.

The plaintiffs sued the defendants in the name of an unregistered firm on the basis of a hand-note and the right to realize money had accrued before the Act came into force. Small Cause Court dismissed the suit on the ground that as the firm was unregistered their suit as such was not maintainable:

Held: in revision, S. 74 (b) of the Act only saves pending suits and the suit was therefore barred by S. 69 of the Act: *A I R 1934 Cal 754* and *163 I C 703*, *Rel. on*; *A I R 1935 All 898* and *A I R 1935 Lah 893*, *Ref.* [P 16 C 2]

S. C. Mazumdar—for Petitioners.

R. S. Chattarji—for Opposite Party.

Mohammad Noor, J.—This application in revision is directed against a decree of the Small Cause Court Judge of Dhanbad, dismissing the plaintiffs' suit as barred under S. 69, Partnership Act. The plaintiffs sued the defendant in the name of a firm on the basis of a hand-note. The execution of the hand-note and the passing of consideration were not disputed, but the defendant set up a plea of payment which was not believed by the learned Small Cause Court Judge. He, however, held that as the plaintiff-firm was not registered, their suit as such was not maintainable, and on this ground he dismissed the suit. The plaintiffs have filed this application for revision. It was contended by the learned Advocate for the petitioners that under S. 74 (b), S. 69 does not bar suits by unregistered firms if the claim is based upon a cause of action which accrued before the passing of the Partnership Act. At first sight this contention may appear to be sound; but as has been pointed out in two of the decisions of the Calcutta High Court, 39 C W N 67[1] and 39 C W N 1080,[2] S. 74 (b) only saves pending suits. S. 1 (3) of the Act was referred to in those cases to show that S. 69 had not come into force before 1st October 1933. The learned Judges were of the view that this was intended to give time to unregistered firms to get themselves registered, in order to enable them to bring suits, and we respectfully agree with them. The same view seems to have been taken in A I R 1935 All 898[3] and A I R 1935 Lah 893.[4] There is therefore no merit in this application.

The learned Small Cause Court Judge has, however, dismissed the suit with costs. We do not think it is a case in which the defendant ought to be allowed costs. The claim of the plaintiffs was just. We would therefore set aside the order of payment of costs passed by the learned Judge in the Court below, and with this modification reject the application.

P.R./A.L. *Application rejected.*

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1. Surendra Nath De v. Manohar De, A I R 1934 Cal 754=153 I C 671=39 C W N 67=62 Cal 213.
2. Basanta Kumar Pal v. Durgadas Akrur Chandra Banik, (1935) 163 I C 703=39 C W N 1080.
3. Ram Prasad Thakur Prasad v. Kamta Prasad Sita Ram, A I R 1935 All 898=157 I C 154=1935 A L J 1243.
4. Krishen Lal Ram Lal v. Abdul Ghafur Khan, A I R 1935 Lah 893=160 I C 513.

A. I. R. 1937 Patna 17

MOHAMAD NOOR AND MADAN, JJ.

Kedar Nath Singh—Appellant.

v.

Kesri Mull and *others*—Respondents.

Appeal No. 281 of 1935, Decided on 24th August 1936, from order of Sub-Judge, Gaya, D/- 27th June 1935.

(a) Civil P. C. (1908), O. 9, R. 13—Ex parte decree—Non-appearance of defendant during trial of suit—Recital in decree that defendant was present—Still decree must be taken to be ex parte and application to set it aside is maintainable.

The question whether a particular decree is or is not ex parte is a mixed question of law and fact. The Court must examine the records of the case and examine the circumstances under which the decree was passed, and if it is found that a particular defendant was not present at the time of the hearing of suit, the decree must be taken to be ex parte against him, in spite of the fact that decree as drawn up mentions his presence. The recital in the records is not conclusive. [P 18 C 2]

Thus where the guardian ad litem of the defendant was absent during the trial of the suit and decree drawn up mentioned his presence :

Held : that non-appearance of the guardian during trial made the decree ex parte and the application to set it aside was maintainable : *20 I C 67, Rel. on.* [P 18 C 2]

(b) Civil P. C. (1908), O. 5, R. 12—Summons against defendant served upon his guardian—Guardian refused to take summons — It cannot be taken to have been served properly upon defendant.

The service of summons against a major defendant upon a person who is described to be his guardian cannot be said to be a proper service on the defendant though the supposed guardian may be his brother. [P 19 C 2]

(c) Limitation Act (1908), Art. 164—Specific knowledge of the particular decree is necessary.

The knowledge of the decree mentioned in Art. 164 is knowledge of the particular decree and not a knowledge of a decree. A vague information about there being a decree is not sufficient for the period of limitation to run against the applicant. The question whether the knowledge which an applicant had on a particular date can be said to be a knowledge of the decree, is practically a question of fact, and in a case where applicant filed an application for time in the execution proceedings, from the fact that he knew that a decree was under execution, it cannot be inferred that he had complete information about the decree : *1923 Bom 193, Foll.* [P 19 C 2; P 20 C 1]

(d) Hindu Law—Manager—Service of summons on karta of family is not service on other members of family who are impleaded in suit.

A service of summons on the karta is not a service on other members of the family who are impleaded in the suit as they may have their own defence to make : *A I R 1929 Pat 741, Disting.* [P 20 C 1]

(e) Mortgage decree—Mortgage debt being indivisible, decree cannot be set aside in part.

Mortgage debt being indivisible, mortgage decree cannot be set aside in part because complications will arise at the time of execution and anomalous results may follow. [P 20 C 2]

Sultan Ahmad, S. M. Mullick, Rajkishore Prasad and *H. R. Kazimi*—for Appellant.

P. R. Das and *Sarjoo Prasad*—for Respondents.

Mohamad Noor, J.—This is an appeal against an order of a Subordinate Judge of Gaya refusing to set aside under O. 9, R. 13 a mortgage decree which according to the appellant was ex parte against him but has been held by the learned Subordinate Judge not to be so. The suit in which the decree sought to be set aside was passed was to enforce a simple mortgage for Rs. 2,250 executed by Basudev Narayan Singh, defendant 1 of the suit, as karta of the family on 7th September 1917, and was among others against his two brothers Lal Narayan Singh and the appellant Kedar Nath Singh, who were defendants 2 and 3 in the suit. Defendant 4 was the minor son of defendant 2 and the other defendants as usual were impleaded as being interested in the mortgaged properties. By the time the suit was instituted the mortgage debt had swelled to a large amount, but only Rs. 17,000 was claimed, as the entire amount due could not be realized from the mortgaged properties. Defendant 1 did not enter appearance. Defendant 2 filed a written statement and appeared off and on, but as it appears from the order sheet was not present nor was he represented at least for some time during the trial of the suit which seems to have been mainly contested by defendants 13 to 15 who were subsequent transferees of the mortgaged properties or of some of them. Defendant 3, who is the appellant before us and seeks to have the decree set aside, was impleaded as a minor under the guardianship of defendant 1, his elder brother. As defendant 1 did not appear, a guardian ad litem was appointed for this defendant who filed a written statement. Thereafter it is not clear what steps this guardian ad litem took on behalf of defendant 3, but in the heading of the judgment his name appears as appearing for defendant 3. However, the suit proceeded to trial and a preliminary decree was pased on 30th January 1932.

The decree drawn up recites that it is inter partes against defendant 3 also. Final

decree was passed on 17th February 1933. Execution was taken out on 5th December 1933 (Execution Case No. 403 of 1933). Notices were issued perhaps under O. 21, R. 66, and one such notice was probably served upon defendant 3. Be that as it may, it appears that on 15th January 1934, he appeared in the execution case and applied for time. Thereafter, on 25th January 1934, he applied for inspection of the records of the suit, and on 24th February 1934, filed the present application for setting aside the decree which having been rejected the present appeal has been preferred. The learned Subordinate Judge found (1) that when the suit was instituted defendant 3 was a major and not a minor as described in the plaint, and though the fact of majority of defendant 3 was known or ought to have been known to the plaintiffs they described him as a minor not intentionally but perhaps inadvertently; (2) that notices were properly served upon defendants 1 and 2 and so was the notice on the guardian of defendant 3 nominated by the plaintiffs, namely defendant 1; (3) that defendant 3 must be presumed to have knowledge of the suit though not of the decree; and (4) that the application was not barred by limitation.

He has however refused to set aside the decree on the ground that it was not ex parte in form against the appellant, and therefore O. 9, R. 13 had no application. He declined to exercise his inherent power under S. 151, Civil P. C., on the ground that there was no equity in favour of the applicant as he all along had full knowledge of the suit. He has referred to certain decisions which are to the effect that if a man, who is really a major, is sued as a minor, and he stands by and takes no steps, the decree passed in the suit is binding upon him. We are however not concerned with the question whether the decree is binding upon the appellant but whether he is entitled to have it set aside under O. 9, R. 13. An ex parte decree though liable to be set aside is nevertheless binding as long as it is not set aside and cannot be collaterally questioned. The binding character of the decree necessitates steps for setting it aside. None of the cases relied upon by the learned Subordinate Judge lays down that the decree passed under such circumstances cannot, if a proper case be made out, be set aside.

The first question to be considered is whether the decree is really an ex parte one. No doubt, the decree as drawn up appears to be inter partes as against the appellant, as he has been shown therein to have appeared through his guardian ad litem. But in my opinion the decree in essence is really an ex parte decree. The suit was taken up on 18th January 1932. The order-sheet of that date shows that the plaintiff and defendants 13 to 15 were present. The order-sheet of subsequent dates does not show that from that date up till the date of disposal of the suit the guardian ad litem was present representing defendant 3 on any one of the dates when the case was heard. The guardian ad litem has been examined in this case on behalf of the plaintiffs to prove that he did file a written statement on behalf of the minor defendant 3 perhaps on the instructions of his natural guardian.

The guardian does not claim to have, as it was not possible for him to have, any independent recollection of the facts of the case. He was not asked on behalf of the plaintiff-respondents (the omission was either intentional or otherwise) any question to show that he was present in Court representing defendant 3 at the time when the suit was being tried. The question whether a particular decree is or is not ex parte is a mixed question of law and fact. The Court must examine the records of the case and examine the circumstances under which the decree was passed and if it is found that a particular defendant was not present at the time of the hearing of the suit, the decree must be taken to be ex parte against him in spite of the fact that the decree as drawn up mentions his presence. The recital in the records is not conclusive. If any authority is needed for this simple proposition, I may refer to the decision of the Calcutta High Court in 20 I C 67.[1] In this case some of the defendants after filing written statements absented themselves at the time of the hearing of the suit. In spite of this the judgment and the decree were drawn up as if those defendants were present. Their Lordships held that the decree must be taken to be in essence ex parte against these defendants and the application to set it aside was maintainable. Assuming that in spite of defendant 3 being a major his appearance through a guardian ad litem was sufficient appearance in the suit, the

1. Sham Lal Sahu v. Ram Kumar Lal Bhagat, (1912) 20 I C 67.

fact that the guardian does not appear to have been present during the trial of the suit makes the decree an ex parte decree. It has not been disputed before us, as it cannot be disputed, that if a defendant enters appearance and then absents himself altogether at the time of the hearing of the suit, the decree passed against him is ex parte. The decision of the Calcutta High Court above referred to is an authority for the proposition. In this view of the matter it is not necessary to decide whether the appearance of a guardian ad litem of a defendant who is in fact a major is proper appearance as in this case there was no appearance at all at the time of the hearing of the suit. Much reliance cannot be placed upon the heading of the judgment which is generally filled up by the office after consulting the record. The order-sheet which is written from day to day is more authentic as it is a contemporaneous record of the proceedings of the Court. In my opinion, the learned Subordinate Judge was wrong in holding that the decree was not an ex parte one.

The next question is whether the summons was properly served upon defendant 3. As I have mentioned, the learned Subordinate Judge has found that at the time of the institution of the suit he was a major. This finding of fact has not been and cannot be seriously challenged. It seems that long before the institution of the suit in 1930 defendant 3 entered into transactions as a major and there is absolutely no reason to think that at that time he had any motive in putting himself forward as a major had he in fact been a minor. Now the summons against defendant 3 was served upon defendant 1 who was described as his guardian. The serving peon's report is that he first went to the defendant at his house in the town of Gaya. Defendants 1 and 2 were present but they refused to take summonses and asked the peon to go to their village home Rowna which is said to be about six miles from Gaya. The peon went there, and there also he found defendants 1 and 2, but they again refused to take the summonses and the notice of the guardianship of defendant 3.

There was therefore substituted service by posting the processes on their house. The report of the peon does not show that defendant 3 was present either at Gaya or Rowna at the time of service of the summonses or of the notice. The service of summons against a major defendant upon a person who is described to be his guardian cannot be said to be a proper service on the defendant though the supposed guardian may be this brother. The learned advocate for the respondents drew our attention to certain passages in the evidence of their witness 2, Devaki Singh, to the effect that defendant 3 was present at Rowna when the summonses and the notice were served upon defendants 1 and 2. This evidence however, is in conflict with the statement of the peon in the report and is obviously untrustworthy. Therefore, the decree being ex parte against the appellants and there not being a proper service of summons on him, he in my opinion is entitled to have it set aside, provided that his application was within time. The learned Subordinate Judge, as I have already said, has held that the application was not barred by limitation. That finding has been questioned before us on behalf of the respondents. The argument advanced by Mr. Das is that we must presume that defendant 3 had knowledge of the suit.

Therefore when on 15th January 1934 he filed the application for time in the execution proceedings, he must be presumed to have known at least on that date that the decree under execution was the one of which the suit had already been instituted. We must therefore attribute to him the knowledge of the decree on 15th January 1934, and the application having been filed on 24th February 1934 was out of time. First of all there is no evidence that the appellant knew of the suit. The utmost which can be said is that it is likely that he knew of it. But the knowledge of suit is one thing and the knowledge of decree is another. It has been held and I may refer among others to the decision in 47 Bom 485[2] that the knowledge of the decree mentioned in Art. 164, Lim. Act, is the knowledge of the particular decree and not a knowledge of a decree. A vague information about there being a decree is not sufficient for the period of limitation to run against the applicant. In my opinion the question whether the knowledge which an applicant had on a particular date can be said to be

2. Bapurao Sakharam v. Sadhu Bhivba, A I R 1923 Bom 193=72 I C 130=47 Bom 485=25 Bom L R 74.

a knowledge of the decree is practically a question of fact.

In this case we find that on 15th January 1935, (it may be noted that this was the date on which the great earthquake occurred in this province) he filed an application for time in the execution proceedings. From the fact that he knew that a decree was under execution it cannot be inferred that he had complete information about the decree. A knowledge of a decree which was on the face of it inter partes, even if he saw it on that day, cannot be said to be the knowledge of the decree passed under the circumstances stated above. In fact, we find that within ten days of that date he actually applied for an inspection of the record of the suit. An indefinite knowledge which he had on 15th January 1934, of a decree against him being under execution in my opinion is not the knowledge contemplated in Art. 164, Lim. Act. Then the steps taken by the appellant were prompt as he applied for the inspection of the record within ten days. The little delay must be ignored as it is a matter of common knowledge that for several days after the earthquake the work of the Courts was somewhat dislocated. I am of opinion that the learned Subordinate Judge has rightly held that the application was not barred by limitation.

The learned advocate for the respondents argued that assuming that there was no appearance on behalf of defendant 3, even then the decree cannot be set aside as this defendant was properly represented through defendant 1, the karta of the family, and his natural brother. First of all the decree is admittedly ex parte against defendant 1 also. He did not appear in the suit. The only thing which can be said is that the karta was served with summons. But a service of summons on the karta is not a service on other members of the family who are impleaded in the suit. They may have their own defence to make. Then we are not concerned, as I have said, with the effect of the decree as it stands against defendant 3. The simple question before us is whether the decree against him is ex parte and whether the summons was served upon him.

If these two questions be answered in his favour, he as I have said is entitled to get the decree set aside in spite of the fact that the karta was a defendant in the suit. The learned advocate relied upon a decision of this Court in 8 Pat 788.[3] But it appears that the question in that case was whether the decree, which was obtained after the names of some of the defendants were expunged from the record was still binding upon them. Their Lordships held that the karta was there and thus those defendants in spite of their absence from the record were bound by the decree. Neither this decision nor the decision of the Privy Council in *Sheoshankar Ram* v. *Juddo Kunwar*,[4] on which it is based, is an authority for the proposition that a junior member of a Hindu family who is made a defendant in a suit and against whom an ex parte decree is passed, is not entitled to have it set aside if summons was not served upon him, and that is the issue before us and not the binding character of the decree.

The next point urged was that if the decree be set aside it should be set aside only so far as it affects the appellant. Now it is a mortgage decree and the mortgage debt is indivisible. If the decree be set aside in part, complications will arise at the time of the execution and anomalous results may follow : I would therefore allow this appeal with costs, grant the application of the appellant and set aside the entire decree, both preliminary and final, passed in the suit. The suit will be restored to its original number and tried as expeditiously as possible. The learned lower Court will pay particular attention to it.

Madan, J.—I agree.

P.R./V.V. *Appeal allowed.*

3. Lalchand Thakur v. Seogobind Thakur, A I R 1929 Pat 741=121 I C 330=8 Pat 788.
4. Reported in A I R 1914 P C 136=24 I C 504=41 I A 216=36 All 383 (P C).

A. I. R. 1937 Patna 20

SAUNDERS, J.

Nand Kishore Singh and *others* — Appellants.

v.

Nagendra Bala Debi and *others*—Respondents.

Misc. Appeal No. 340 of 1935, Decided on 6th February 1936, from decision of Addl. Sub-Judge, Monghyr, D/- 26th July 1935.

Execution—Sale—Legality of—Holding of sale fixed for first day of monthly sale on following day in its due order is not illegal—Nor is it material irregularity.

The holding of a sale, fixed for the first day of the monthly sales, on the following day in its due

75665.

order because it could not be held earlier, is not illegal. It does not amount even to a material irregularity : *39 Cal 26 (P C), Rel. on ; A I R 1934 Pat 659 ; A I R 1925 Cal 201* and *A I R 1924 Mad 431, Disting.* [P 21 C 1, 2]

D. C. Verma—for Appellants.

S. M. Mullick and *M. K. Mukherjee*—for Respondents.

Judgment.—This appeal by the judgment-debtor, so far as it purports to be against the order of the lower appellate Court dismissing his appeal from an order under O. 21, R. 90, Civil P. C., is incompetent as no second appeal lies. The application, however, was not only under O. 21, R. 90, but also under S. 47 of the Code, and it is contended that the sale was a nullity because it was held on a day subsequent to the date for which it was advertised. The latter date was 5th February 1934. The sale was actually held on the following day presumably because there were other sales to be held on the previous day as it was the first day of the monthly sales. The learned advocate for the appellant relied on a decision of this Court in A I R 1934 Pat 659[1] in which it was held that where a sale was being kept "under hammer" it must be deemed to have been started and, therefore, a sale held on a subsequent date to which it was not postponed was set aside. That, however, was an appeal from a decision under O. 21, R. 90 and it was not held that the postponement of the sale in those circumstances had the effect of making the sale a nullity. The case in A I R 1925 Cal 201,[2] also referred to by the learned advocate, was a case of a sale on a date that had never been fixed for it and of which the judgment-debtor could not have had notice. Another case that he cited, 47 Mad 288,[3] was held by a Full Bench of the Madras High Court to have been void because there had been no notice under O. 21, R. 22. None of these cases, therefore, is authority for the proposition that the holding of a sale fixed for the first day of the monthly sales on the following day in its due order because it could not be held earlier is illegal. In 39 Cal 26,[4] it was held by the Privy Council that it was not even a material irregularity. There is, therefore, no ground for interference with the decision of the learned Subordinate Judge and the appeal is dismissed with costs. Leave to appeal under the Letters Patent is refused.

R.M./R.K. *Appeal dismissed.*

1. Jagdish Bahadur v. Ramji Ram, A I R 1934 Pat 659=152 I C 1017=15 P L T 743.
2. Motahar Hossain v. Mohammad Yakub, A I R 1925 Cal 201=84 I C 700=40 C L J 311.
3. Rajagopala Ayyar v. Ramanujachariar, A I R 1924 Mad 431=80 I C 92=47 Mad 288=46 M L J 104.
4. Rang Lal Singh v. Ravaneshwar Persad Singh, (1912) 39 Cal 26=12 I C 174=38 I A 200 (P C).

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* A. I. R. 1937 Patna 21

VARMA, J.

Mt. Bibi Uma Salama—Petitioner.

v.

Syed Hasan Imam—Opposite Party.

Civil Revn. No. 239 of 1936, Decided on 4th September 1936, from order of Sub-Judge, Ranchi, D/- 4th May 1936.

*** Commission—Application of pardanashin lady living beyond the jurisdiction of the Court, for her examination on commission at *K* (her place of residence) as she was ill—Court insisting on her examination at *R* (place of suit)—Order rejecting application amounts to irregular exercise of jurisdiction, as defeating provisions as to commission—Order is subject to revision.**

Where on an application filed by the defendant pardanashin lady who was living beyond the jurisdiction of the Court, for her examination on commission at *K* (her place of residence), as she was ill, the Court insisting on her examination on commission at *R* (place of suit), rejected her application ; on revision against this order:

Held : in the case of a pardanashin lady a commission usually issues for her examination especially when she is residing beyond the jurisdiction of the Court. The whole object of the issue of commission fails if the witness has to go to the commissioner at a place where the Court is sitting and the commissioner does not go to the witness. Once the principle is recognized that a commission should issue for the examination of the lady, the power of the Court to issue commission is not limited to her examination at *R* only. The order therefore rejecting her application for her examination at *K* and insisting upon her examination at *R* was certainly an irregular exercise of jurisdiction and could be set aside in revision: *A I R 1924 Mad 541, Rel. on.* [P 22 C 1, 2]

Y. Yunus and *Ramswarup Singh*—for Petitioner.

Syed Hasan and *Azizullah*—for Opposite Party.

Order.—This is an application on behalf of the defendant who is the wife of the plaintiff in a suit for restitution of conjugal rights filed at Ranchi. The prayer is that the commission which has been issued by the Court below for her examination at Ranchi should be converted into a commission for her examination at Khagoul where she is at present residing. The plaintiff is a resident of Dehri, police

station Poonpoon, district Patna, and the defendant, as I have said, is residing at Khagoul although she is a resident of Mauza Kopa, police station Bikram, district Patna. She filed a petition on 26th February 1936, praying for a commission to examine her at Khagoul. The Court below on the objection of the plaintiff ordered that she should go to Ranchi for her examination. After various orders having been passed in the case, another petition was filed by the defendant on the 26th of March to be examined on commission on the ground of illness of one of her sons. There were one or two more petitions till we come to the last date, 4th May 1936, when on that date she put in a petition supported by affidavit and a medical certificate saying that she was ill and praying for time and the Court again insisted that she should be examined in the town of Ranchi on commission.

In dealing with this petition, it must however be remembered that she is a pardanashin lady and she is residing beyond the jurisdiction of the Court that is trying the case. Mr. Azizullah appearing on behalf of the plaintiff urges that this is not a case in which this Court should interfere inasmuch as no question of jurisdiction arises and the order of the Court below that the lady should be examined on commission at Ranchi is not without jurisdiction and should not be interfered with, especially when the lady has not, according to Mr. Azizullah, raised any objection to her being examined at Ranchi. In the case of a pardanashin lady a commission usually issues for her examination, especially when she is residing beyond the jurisdiction of the Court. The Court itself realised that it was necessary to issue a commission and therefore on the prayer of the lady the Court did issue a commission; but the trouble is that the Court insisted upon the commission being executed at Ranchi. Perhaps the lower Court did not realize that the whole object of the issue of a commission fails if the witness has to go to the Commissioner at a place where the Court is sitting and the Commissioner does not go to the witness. Once the principle is recognised that a commission should issue for the examination of this witness, I do not see by what process of reasoning the order is limited to the examination of the lady in Ranchi town. This is certainly an irregular exercise of jurisdiction by the Court below and I am supported in this view by several reported decisions; but I would content myself by referring to the case in 46 M L J 131.[1] It has been said that she never objected to go to Ranchi. The more important point to see is whether she ever agreed to go to Ranchi. In her very first petition of the 26th of February, she prayed that she should be examined at Khagoul and in the petition before this Court she makes the same prayer. There is nothing in between these two dates from which one can infer that she was ever agreeable to be examined at Ranchi. In the result I would order that a commission do issue to examine this lady at Khagoul as requested by her in the very beginning and the order of the Court below for the issue of a commission for her examination at Ranchi be modified to that extent. It is for the Court below to fix a reasonable amount of cost that has to be realised from the defendant for her examination on commission. The application is allowed. Hearing fee one gold mohur.

P.R./A.L. *Application allowed.*

1. Visvanathan Chetty v. Somasundaram Chetty, A I R 1924 Mad 541=78 I C 407=46 M L J 131.

A. I. R. 1937 Patna 22

MOHAMAD NOOR AND MADAN, JJ.

Raja Kirtyanand Singh Bahadur and *others*—Appellants.

v.

Saileswar Sen—Respondent.

Appeal No. 97 of 1936, Decided on 8th September 1936, from appellate order of Sub-Judge, Bhagalpore, D/- 3rd March 1936.

Provident Funds Act (1925), S. 53—Compulsory deposits in Provident Fund maintained by private college—College subsequently adopting Government rules as to Provident Fund—Fund, since the date of adoption of Government Rules, becoming Fund constituted under authority of Government—Ex-principal obtaining decree for fund—Whole fund becoming one constituted under authority of Government — College authorities seeking attachment of the decree for Provident Fund —Decree for Fund not liable to attachment.

An ex-principal of a private college obtained a decree for Provident Fund, deposited by him in the Provident Fund maintained by the college. The authorities instituted a suit against the ex-principal for damages for his malfeasance during the period of his office, praying at the same time attachment of the Provident Fund decree obtained by him :

Held : that S. 3, Provident Funds Act, and S. 60 (k), Civil P. C., make it clear that compulsory deposits in Government and Railway Provident Funds are not liable to attachment as long as they are in the Fund. The college was an aided college and adopted the rules framed by Government for Provident Fund in aided colleges. The Provident Fund therefore became a fund constituted under Government since the date of the adoption of the rules by the college authorities. The decree obtained by the ex-principal was for the Provident Fund to his credit. When the fund was, therefore, constituted, under the authority of Government, the entire amount of the Fund became consolidated into one fund. The decree for fund was not therefore liable to attachment, as in effect it would amount to attach the Fund before it has reached the hands of the depositor : *Case law discussed.* [P 23 C 2; P 24 C 2; P 25 C 1]

Manohar Lal, C. P. Sinha, Gopal Prosad and *N. C. Roy*—for Appellants.

K. P. Jayaswal and *S. C. Mazumdar*—for Respondent.

Mohamad Noor, J.—This is an appeal against an order of the Subordinate Judge of Bhagalpore passed in a simple money suit refusing attachment before judgment of a decree obtained by the defendant of the suit against the plaintiffs. The facts are that one Mr. S. Sen was for some time the principal of the T. N. J. College at Bhagalpore. For some reason or other his services were dispensed with. Under the rules of the College he was to make compulsory deposits in the Provident Fund maintained by the College. After his services were dispensed with, Mr. Sen instituted a suit in the Original Side of the Calcutta High Court for realisation from the College authorities of the Provident Fund amount due to him. Thereafter the Governing Body of the College (who are the appellants before us) instituted in the Court of the Subordinate Judge at Bhagalpore a suit claiming about Rs. 15,000 from Mr. S. Sen for his malfeasance or misfeasance during his incumbency as the Principal of the College. The Calcutta High Court issued an injunction against the defendants of the suit before it, i. e. the appellants, directing them not to proceed with the Bhagalpore suit till the disposal of the suit in Calcutta. Therefore the trial of the Bhagalpore suit was held up. It now appears that the Calcutta suit has been decreed for Rs. 5,700 on account of the principal Provident Fund and for Rs 6,000 as costs (we are informed, but there is no material before us to verify it that this Rs. 6,000 as costs is subject to the lien of the attorneys of Mr. Sen for the sum advanced by them towards the prosecution of the suit). Be that as it may, the plaintiffs of the Bhagalpore suit applied to the Subordinate Judge under O. 38, Civil P. C., for calling upon the defendants to furnish security and failing which for an order of attachment of the decree for Provident Fund which Mr. Sen had obtained against them at Calcutta. The learned Subordinate Judge refused this application and the plaintiffs have preferred this appeal.

The learned Subordinate Judge refused the prayer of the plaintiffs mainly on the ground that the decree really represented the Provident Fund money which is still in the hands of the employers who are the managers of the Fund and is not attachable under the provisions of the Provident Fund Act, 1925, read with S. 60 (k), Civil P. C. Mr. Manohar Lal who has appeared on behalf of the appellants has contended, first, that the exemption from attachment is confined to Government Provident Funds and the fund in question is not such a fund. Now S. 3 of Act 19 of 1925, which with certain modifications subsequently made is the Provident Fund Act now in force, enacts that:

> A compulsory deposit in any Government or Railway Provident Fund shall not in any way be capable of being assigned or charged and shall not be liable to attachment under any decree or order of any Civil, Revenue or Criminal Court in respect of any debt or liability incurred by the subscriber or depositer, and neither the Official Assignee nor any receiver appointed under the Provincial Insolvency Act, 1920, shall be entitled to, or have any claim on, any such compulsory debt.

S. 60, Civil P.C., enumerating the various properties not liable to attachment, mentions in clause (k) :

> All compulsory deposits and other sums in or derived from any fund to which the Provident Funds Act 1897 for the time being applies in so far as they are declared by the said Act not to be liable to attachment.

It may be noted that the Act of 1897 referred to in this sub-clause was repealed by Act 19 of 1925, clause 3 of which I have already quoted above. Now, it is obvious that these two provisions, one in the Provident Fund Act and another in the Civil Procedure Code, make it clear that compulsory deposits in Government and Railway Provident Funds are not liable to attachment at any rate as long as they are in the Fund. Government Provident Fund has been defined in the Provident Fund Act as follows :

> Government Provident Fund means a Provident Fund, other than a Railway Provident Fund,

constituted by the authority of the Government for any class or classes of its employees or of persons employed in educational institutions or employed by bodies existing solely for educational purposes.

The words "of persons. . . . purposes" have been substituted in the definition for the words "for teachers in educational institutions" by the Provident Fund Amending Act of 1927. It is therefore obvious that the Provident Fund maintained by the college authorities in this case is a Government Provident Fund provided it has been constituted by the authority of Government. If so, it is immune from attachment as I have said at least as long as the money remains in the Fund. Now, there has been much controversy before us whether or not the Provident Fund with which we are dealing was constituted under the authority of the Government. It appears that in 1925 the Local Government took up the question of the introduction of the Provident Fund in the aided Colleges of Bihar. The first notification in this respect was issued on 30th June 1925 (No. 308 E. R. published at p. 784 of the Bihar and Orissa Gazette supplement, dated 8th July 1925). In that notification it is mentioned that the Provident Fund was already constituted in the T. N. J. College, Patna, for which a sum of money was provided by the Government. The T. N. J. College is specifically mentioned there, but as there was a Provident Fund already constituted in that College the Resolution mentions that the authorities of that College were called upon to express their views whether they were willing to adopt the rules framed by the Government. Thereafter we find a second notification No. 110 E, dated 5th January 1927, published in the Bihar and Orissa Gazette (Supplement) dated 12th January 1927, which shows that the T. N. J. College expressed a desire for the amendment of certain rules which were amended and thereafter the authorities of the College adopted the rules framed by the Government.

Mr. Manohar Lal has contended that the adoption of the rules by the College authorities does not mean that the Provident Fund was constituted under the authority of the Government. I think there is a good deal of force in the view which was adopted by the learned Subordinate Judge that though there was a Fund in the College from before the Government rules were enforced and the adoption of the rules of Government must be taken to mean that at least since that date the Fund was constituted under the authority of the Government. Therefore, I agree with the view taken by the learned Subordinate Judge that the Fund in question is a Fund constituted under the authority of the Government from the date of the Notification of January 1927. Mr. Manohar Lal has however contended that the defendant Mr. Sen was in service since 1922 and any compulsory deposits made by him prior to January 1927 cannot be immune from attachment. First of all, no data has been supplied to us to show how much of the amount of the decree against the authorities of the College represents the contribution of the defendant prior to January 1927 and how much represents the amount contributed subsequently; apart from this, when the Fund was constituted under the authority of Government, the entire amount of the Fund becomes consolidated into one Fund.

Mr. Manohar Lal next contended that the immunity from attachment lasts only as long as the money is in the Fund, but when it reaches the depositor, i. e. the employee, the immunity comes to an end and the amount is liable to be attached just as any other property of a debtor. On this point unfortunately there is no clear decision of any High Court. Mr. Jayaswal appearing on behalf of the respondent referred us to the case in 44 Bom 673,[1] which goes to the length of laying down that even if the money has reached the hands of the employee it cannot be taken by the receiver in an insolvency proceeding. This decision, however, seems to have been dissented from in a single Judge decision of the Madras High Court in 55 M L J 38.[2] There are, however, observations in some decisions of the Calcutta High Court which may support both the views. For instance in 46 Cal 962[3] there are observations of Rankin, C. J. which lend support to the view that the immunity lasts only as long as the money is in the hands of the institution, but at another place it is observed that it was a deliberate act of the Legislature

1. Nagindas Bhukhandas v. Ghelabhai Gulabdas, A I R 1920 Bom 58=56 I C 449=44 Bom 673 =22 Bom L R 322.
2. Official Assignee of Madras v. Ranganayaki Ammal, A I R 1928 Mad 784=112 I C 235= 55 M L J 38.
3. Hindlay v. Joy Narain, A I R 1920 Cal 305= 54 I C 439=46 Cal 962=24 C W N 288.

to give protection to the Provident Fund money for the benefit of the employees so that when they retire they may have something to live upon and in the event of death they have something to leave. However, I think we are not called upon to decide this question of law as, in my opinion, it does not in fact arise. Up till now the money is still in the Fund. A decree has been passed but the money has not left the Fund. What we are asked in this case is that we should order attachment of the decree thereby depriving the defendant of his right to receive the money, that is, indirectly attaching the money while it is still in the Fund. Mr. Manohar Lal contended that the plaintiff will have no objection if the defendant be injuncted against transferring the decree. In my opinion such an order will be absolutely useless and infructuous because the defendant will still be entitled to execute the decree and realise the amount. The only order which can be of any benefit to the plaintiffs will be an order to attach the money as soon as it is realised. Practically that order will amount to an order attaching the Provident Fund money before it has reached its destination. Therefore, independent of the consideration whether or not the money is attachable after it reaches the hands of the depositor, I think in this case we are in effect being asked to attach it before it has reached the hands of the defendant.

On the whole I think that the view taken by the learned Subordinate Judge is correct. I would, however, ask the learned Subordinate Judge to expedite the disposal of the suit so that if the plaintiffs get any decree they may execute the same against any property of the defendant which may be available. The defendant has given a list of other properties which he claims to possess. It will be open to the plaintiffs to make inquiries and choose some one of them and ask the learned Subordinate Judge to call upon the defendant to furnish security, failing which to make out a case for attachment of those properties before judgment. With these remarks I would dismiss this appeal with costs.

Madan, J.—I agree.

P.R./A.L. *Appeal dismissed.*

A. I. R. 1937 Patna 25

VARMA, J.

Chairman of the Commissioners of Chakradharpur Municipality—Petitioners.

v.

Murlidhar Marwary—Opposite Party.

Civil Revn. No. 197 of 1936, Decided on 7th October 1936, from order of Special Sub-Judge, Chaibassa, D/- 10th January 1936.

(a) Provincial Small Cause Courts Act (1887), Sch. 2, Art. 19—Declaratory suit—What is.

Where the suit was for a declaration that the assessment in respect of assessee's holding in excess of Rs. 18 per quarter was ultra vires and not made according to the provisions of the Municipal Act and that the Municipality was not entitled to demand and recover for the holding at more than Rs. 18 per quarter and further prayed for decree for Rs. 54 which was realized in excess of that amount:

Held: that the suit was of a declaratory nature and being covered by Art. 19, appeal could lie: *20 Bom 675* and *A I R 1918 Cal 528*, *Ref.* [P 27 C 1]

(b) Revision—Lower appellate Court decreeing permanent reduction in assessment contrary to provisions of Municipal Act—Error of law—High Court will not interfere in revision.

Where the lower appellate Court decreed permanent reduction in assessment though according to the provisions of Municipal Act there could not be any permanent reduction in the assessment once the assessment has been made:

Held: that at best it was a point of law and High Court would not be justified in interfering in revision. [P 27 C 1]

G. C. Mukherji—for Petitioners.

S. De—for Opposite Party.

Order.—This is a petition against the decision of the lower appellate Court setting aside the judgment of the Munsif of Jamshedpur at Chaibassa dismissing the suit of the plaintiff for a declaration that the assessment in respect of his holding No. B/118 within the Chakradharpur Municipality in excess of Rs. 18-9-0 per quarter was ultra vires and for the recovery of Rs. 54 which had been realized from him by the said Municipality in Certificate Case No. 295 of 1933-34. The trial Court held that the suit was barred by the provisions of S. 119, Municipal Act, inasmuch as it was not proved that their action was ultra vires. The lower appellate Court went into the facts of the case and came to the conclusion that the action of the Municipality was ultra vires and decreed the suit of the plaintiff for a sum of Rs. 45-12-0.

In order to understand the nature of the suit it is necessary to give some facts.

The plaintiff has a house which comprises holding No. B/118 within the Municipality of Chakradharpur. The original tax of the holding was Rs. 11-4-0. Then it appears it was raised to Rs. 12-6-0 in the year 1929-30, on account of the increase of the latrine tax. Thereafter there was a general revision which was completed on 26th January 1930, and by that revision the tax was fixed at Rs. 41-4-0 from 1st April 1930. On appeal by the plaintiff, the Municipality reduced the tax to Rs. 30-15-0 per quarter on 29th March 1930. Then there was further reduction and the plaintiff was to pay at the rate of Rs. 12-6-0 up to December 1930. It appears that from January 1931 to March 1932, the tax was realized at the rate of Rs. 16-8-0. There was again a fresh assessment by the end of 1931-32 and the tax was raised to Rs. 41-4-0 from 1st April 1932. In the year 1933 on an application (Ex. F) made by the plaintiff it was settled that the tax would be charged at Rs. 33 from 1st July 1933. Then again there was some change and the tax from 1st January 1934 was fixed at Rs. 25. The demand made by the Municipality was for the first and second quarters of 1933-34, that is, at the rate of Rs. 41-4-0 for the first quarter and Rs. 33 for the second quarter. As there was no payment a certificate case was started and the Municipality realized the amount. The plaintiff was compelled to deposit Rupees 91-2-0 which exceeds by Rs. 54 the legitimate demands for the two quarters which would come to Rs. 37-2-0. The plaintiff it appears had left a copy of the notice on 2nd June 1934 at the Municipal office before filing this suit and another was delivered through registered post on 5th June 1934.

The Munsif who tried the suit has held that from an entry in the peon book (Ex. C) it must be presumed that notice of enhancement must have been sent by the Municipality on 19th January 1932 before increasing the assessment to Rs. 41-4-0. He further held that the reduction of Rs. 90-12-0 was by way of remission only for that year and not a permanent reduction of the tax to Rs. 18-9-0 per quarter. The lower appellate Court refers to some very significant facts by which it comes to the conclusion that the action of the Municipality was ultra vires. First of all it refers to Ex. 3 (k) dated 20th March 1933 from which it appears that the rate of the tax was Rs. 18-9-0 and the same amount was paid but a reduction from the higher tax imposed earlier seems to have been made only eleven days after, that is, on 31st March 1933. The lower appellate Court further refers to the fact that the assessment register had not been produced nor any order of the Chairman enhancing the tax to Rs. 41-4-0; further it could not be understood why a substantial amount of Rs. 90-12-0 was remitted at the close of the year 1932-33. The lower appellate Court has also held that the provisions of S. 107, sub-s. (2) have not been complied with because it did not feel satisfied that the entry in Ex. C proves that any notice was received by the plaintiff and upon this finding it has held that the action of the Municipality was ultra vires and therefore decreed the suit.

Mr. G. C. Mukherji appearing on behalf of the petitioner Municipality has urged that the suit was of the nature of a Small Cause Court suit, that the decree as passed cannot be sustained and the findings are vitiated. He refers to certain pieces of evidence which according to him have been wrongly admitted. Firstly he has urged that the suit is of the nature of a Small Cause Court suit and should not have been tried in the general way and, therefore, there could not be any appeal to the lower appellate Court. He urges that the appeal was incompetent and, therefore, the appellate Court judgment should be set aside. He has referred to various authorities some of them being the cases in 9 P L T 499,[1] 11 Pat 690[2] and A I R 1934 Rang 312.[3] He has referred to some earlier cases also, for example, the cases in 25 Bom 417,[4] 40 Cal 537[5] and 33 Mad 323.[6]

Mr. Saileswar De on the other hand has drawn my attention to Sch. 2, Art. 19, Provincial Small Cause Courts Act, for the purpose of showing that the suit was of a

1. Somar Sao v. Balchand, A I R 1928 Pat 451=109 I C 46=9 P L T 499.
2. Jaduni Pande v. Sheonandan Pande, A I R 1933 Pat 31=141 I C 130=14 P L T 269=11 Pat 690.
3. Ko Sit Yar v. Ma Shwe Taing, A I R 1934 Rang 312=152 I C 144.
4. Shankarbhai v. Somabhai, (1901) 25 Bom 417 =3 Bom L R 129.
5. Indra Chandra Mukherjee v. Srish Chandra Banerjee, (1913) 40 Cal 537=21 I C 120.
6. Kollipara Seetapathy v. Kankipati Subbayya, (1910) 33 Mad 323=1 I C 543=20 M L J 718 (F B).

declaratory character and, therefore, not of the nature of a Small Cause Court suit. A suit of a declaratory nature is excepted from the operation of the Provincial Small Cause Courts Act. It can be gathered from the nature of the plaint and the reliefs sought that the plaintiff's suit was for a declaration that the assessment in respect of his holding, B/118, in excess of Rs. 18-9-0 per quarter, was ultra vires and not made according to the provisions of the Municipal Act and that the defendants were not entitled to demand and recover for the holding at more than Rs. 18-9-0 per quarter, and he further prays for a decree for Rs. 54 which was realized in excess of that amount in Certificate Case No. 295 of 1933-34. From this it is clear that the case is covered by Art. 19, Sch. 2, Provincial Small Cause Courts Act, and this point must fail. Moreover it does not appear that this point was taken by the defendants anywhere in the lower Courts. Mr. De has drawn my attention to the case in 20 Bom 675,[7] where it was held that the shape in which the suit was originally instituted is the test of jurisdiction, and to the case in 41 I C 627.[8]

Mr. G. C. Mukherji next took me to the various provisions of the Bihar and Orissa Municipal Act to show that there could not be any permanent reduction in the assessment once the assessment has been made. I do not think that is a point which entitles me to interfere with the judgment of the lower appellate Court in revision. There are sections which talk of remissions and evidently the Municipality was relying upon these sections. I am of opinion that the points raised by Mr. Mukherji at best are points of law and this Court would not be justified in interfering with that order in its revisional jurisdiction. I would therefore reject the application. Hearing fee one gold mohur.

D.S./A.L. *Application rejected.*

7. Motabhai Motilal v. Surat City Municipality, (1896) 20 Bom 675.
8. Nogendra Nath Roy v. Ashutosh Roy Chowdhury, A I R 1918 Cal 528=41 I C 627.

A. I. R. 1937 Patna 27

DHAVLE, J.

Parmeshwar Panday—Appellant.

v.

Ramdhari and *others*—Respondents.

Appeal No. 886 of 1933, Decided on 4th May 1936, from appellate decree of Sub-Judge, Arrah, D/- 8th June 1933.

(a) Estoppel — Shikmi tenant already in possession under original tenancy acknowledging tenancy to new patta-holder—There is no estoppel between him and new patta-holder—For adverse possession against new patta-holder he need not give up possession to him.

A shikmi tenant was already in possession of land under the original tenancy. The land subsequently was settled with a new patta-holder and the shikmi tenant acknowledged tenancy to the new patta-holder. The patta-holder sold the land to a third person who sued the shikmi tenant for rent. The shikmi tenant denied the title of the patta-holder through whom the vendee was claiming and also set up his own title by adverse possession :

Held : that there was no estoppel between the patta-holder and his vendee on one side and the shikmidar on the other. For setting up adverse possession against the new patta-holder it was not necessary for him to give up possession to the new patta-holder : *37 All 557, Disting.*

[P 28 C 2; P 29 C 1]

(b) Res judicata — Co-defendants — Ejectment and rent suits by proprietor against *A* and shikmi tenant under him *B* alleging expiry of patta—*A* contesting claim by alleging himself to be occupancy holder — *B* contending himself to be shikmi tenant independent of *A*—Trial Court negativing *A's* occupancy tenancy but dismissing suit on ground of *B's* independent tenancy — Subsequent suit for rent by *A's* assignee against *B*—Former suit though dismissed, decision in it negativing *A's* occupancy tenancy held operated as res judicata in subsequent suit.

A proprietor of land brought a suit for ejectment and also another suit for rent against the patta-holder *A* and the shikmi tenant under him *B*, alleging that the patta granted to *A* had expired. *A* contested the claim on the ground that though he had been given a patta, what he really had taken was the right of occupancy. *B* on the other hand contended that the land was his guzashta ancestral holding, and that he was not a shikmi tenant of *A* and therefore was not liable to ejectment on the expiry of *A's* lease. The trial Judge held patta to be a colourable one and negatived *A's* right of occupancy but dismissed the suit on the ground that *B* was the independent shikmi tenant on his own account and not under *A*. Subsequently *A's* assignee brought a suit for rent against *B* claiming that *B* was the shikmi tenant under the occupancy tenant *A* :

Held : that there was conflict of interest and titles between the co-defendants *A* and *B* in the former suits and it was necessary to decide that conflict in order to give the plaintiff in those suits appropriate relief. Though the suit was dismissed, yet *A's* right of occupancy-tenancy and consequently his right to demand rent from *B* was definitely negatived and *A* could have appealed against that decision on the ground that notwithstanding the dismissal of the suit, he was adversely affected by the pronouncement in favour of the co-defendant. He having not done so, the decision in the former suit negativing his right of occupancy tenancy operated as res judicata in subsequent suit between his assignee and *B* : *A I R 1932 P C 161, Rel. on; 9 C W N 584* and *A I R 1917 Pat 350, Ref.; 10 C W N 820, Disting.*

[P 30 C 1, 2; P 31 C 1]

B. P. Sinha—for Appellant.

D. N. Varma—for Respondents.

Judgment.—This is an appeal by the plaintiff who in 1927 purchased four acres out of an area of 4·05 acres recorded in the survey and settlement as the occupancy holding of Harbans, defendant 3. Bikram Rai, father of defendants 1 and 2, had been recorded as the shikmi tenant of the holding, and the suit was brought for an apportionment of the rent payable by the shikmi tenants between the plaintiff as purchaser and defendant 3 as vendor, and for recovery of back rents due to the plaintiff from defendants 1 and 2 by reason of his purchase. The trial Court found that defendants 1 and 2 had a title to the holding independent of defendant 3; that defendant 3 had conveyed nothing to the plaintiff; and that the plaintiff's claim of title through defendant 3 was barred by res judicata and limitation or adverse possession. The suit was accordingly dismissed and an appeal which was heard by a Subordinate Judge failed. It has been urged before me on behalf of the appellant that the decision of the lower Courts is wrong for more than one reason. It is said that in the first place there was an admission by Bikram Rai that he held the land shikmi under defendant 3, which now estops defendants 1 and 2. It is next urged that the Record of Rights, which was finally published in January 1912, supports the claim of the plaintiff, and that the lower Courts have erred in their view of res judicata as regards the ejectment suit of 1915 and the rent suit of 1918. It is also urged that there could be no adverse possession for defendants 1 and 2 to assert until they gave up their possession as shikmidars to defendant 3 as the person who had put their father in possession as shikmi tenant. On the other hand it has been urged on behalf of the respondents that even apart from the question of res judicata, the matter is really concluded by the findings of fact of the Courts below.

The plaintiff's case was that the holding of 4·05 acres originally belonged to his ancestors but was put up to sale in execution of a rent decree and purchased by the landlord, the proprietor of the Dumraon estate, who in 1907 settled it with defendant 3 for seven years under a registered patta (Ex. 5), and that it was defendant 3 who brought Bikram Rai, father of defendants 1 and 2, on the land as a shikmi tenant. The story that the land originally belonged to the ancestors of the plaintiff was disbelieved by the trial Court, which pointed out that the rent receipts produced in support of the story were not shown to refer to the land now in dispute, especially on account of the difference in the jama. The Record of Rights showed Bikram Rai as a shikmi tenant in possession for 20 years, and as this was in 1912, it is clear that it clashes with the plaintiff's story that Bikram Rai was brought upon the land by defendant 3 after the patta of 1907. In 1910, while the settlement proceedings were going on, Bikram Rai made a complaint to the Magistrate against defendant 3 and others, in which it was stated that there had been a dispute between the parties regarding a field as to which he had received a parcha. In his examination on that complaint Bikram Rai stated that he was the shikmi tenant of Harbans (defendant 3). Referring to this document, on which much stress has been laid before me, the learned Munsif said that he was not inclined to believe the story of defendant 1, that the Bikram Rai referred to in the plaint "must have been somebody else and not his father." But he observed that it was very difficult to connect the land now in dispute with the field which was the subject matter of the dispute on that occasion, and that further, even supposing that the lands were identical, the admission was not conclusive proof.

The learned Subordinate Judge who heard the appeal refers to the petition of complaint and Bikram Rai's examination on it, but does not give his own findings, nor does he express his dissent in any way from the views of the trial Court. Even if the story of shikmi in the petition of complaint or the examination upon it were to be taken to refer to the shikmi found in the Record of Rights, it is clear as regards the shikmi set up by the plaintiff, namely, a shikmi under defendant 3 after the patta of 1907 from the Dumroan proprietor, that if Bikram Rai's shikmi interest dates from before Harbans's patta, as is shown by the Record of Rights, there can obviously be no estoppel between him or his sons, defendants 1 and 2, and Harbans or his purchaser, the plaintiff, and the contention on behalf of the appellant that the shikmidar could not set up the plea of adverse possession against

Harbans or his purchaser until he gave up his possession as shikmidar, which was rested, before me, on 37 All 557,[1] would be unfounded. Bikram would on that footing have been inducted upon the land not by Harbans, but by the original tenants who were sold out by the landlord before 1907 ; and it would not be necessary for him to give up possession to the new raiyat of 1907, Harbans, before setting up adverse possession against him.

I will now turn to the litigation on which the plea of res judicata has been raised and found in favour of the defence by the lower Courts. In 1915 the Dumraon proprietor brought a suit for ejectment against Harbans and Bikram on the ground that the land was his khas land, but had been given to Harbans under a seven years' lease and that this term had expired. Harbans contested the claim on the ground that though in accordance with the prevailing custom in the plaintiff's estate he had been given a seven years' patta, what he had taken under it was the right of occupancy. Bikram, on the other hand, contended that the land was his guzashta, ancestral holding, and that he was not a shikmi tenant of Harbans and was not liable to ejectment on the expiry of Harbans's lease. The trial Court found that the land had not been shown to be the khas land of the plaintiff, that the settlement with Harbans, then defendant 1, by means of the patta was a "pen and paper transaction," that defendant 1 had never taken actual possession of the land under the patta nor ever paid rent for it, and that defendant 2, Bikram Rai, was in actual possession on his own account and would have had to be treated as a trespasser but for the fact that in the survey and settlement he was recorded as a a shikmi tenant. On these findings the ejectment suit was dismissed. There was an appeal by the plaintiff landlord, and the Subordinate Judge who heard the appeal agreed with the trial Court in disbelieving the plaintiff's story of khas possession before the alleged seven years settlement with defendant, apparently regarded the patta as a colourable transaction, and found in accordance with the Record of Rights that defendant 2 had been in possession as a tenant for more than 20 years. The appeal was therefore dismissed.

The learned Munsif, who tried the suit out of which the appeal before me has arisen, carefully considered the question of res judicata apart from the question of title (that is to say, title irrespective of res judicata) and came to the conclusion that the decision in the ejectment suit that Harbans had taken nothing under the patta operated as res judicata between the co-defendants Harbans and Bikram Rai. The lower appellate Court has taken the same view. That there was a conflict of interest between these co-defendants in that suit is obvious and is not disputed. The learned Munsif also held that it was necessary in that suit to decide the conflict between the co-defendants in order to give the plaintiff appropriate relief. This has been contested by the learned Government Pleader who appears for the appellant and who has urged that the landlord's ejectment suit would have failed in one of three contingencies: (1) it would have failed if defendant 1 had succeeded in establishing his occupancy right; (2) it would have failed if Bikram Rai, defendant 2, had succeeded in showing that he had been rightfully inducted on the land by some person other than defendant 1, and (3) it would also have failed if Bikram had a permanent title under Harbans, and Harbans a permanent title under the plaintiff.

But before considering why exactly the suit failed and assessing the effect of the failure, it is desirable to appreciate the nature of the suit and the possibility of giving any relief to the plaintiff in order to make it clear what it was that the Court was called upon to decide on that occasion. The plaintiff could only succeed on proof of his story, namely that the right of Harbans had come to an end by reason of the expiry of the seven years' lease which alone gave him his title and that Bikram Rai was only a shikmidar under Harbans and was therefore not entitled to be on the land after the expiry of Harbans's right. These matters were both disputed and were actually put in issue. They were also actually decided; and it is to be noted that they involved a conflict of interest between the defendants, Bikram claiming an independent right of occupancy, while Harbans deposed (Ex. C) that Bikram had merely dispossessed him by force. It is true that the suit was dis-

1. Bilas Kunwar v. Desraj Ranjit Singh, A I R 1915 P C 96=30 I C 299=42 I A 202=37 All 557 (P C).

missed; but as was pointed out in 10 Rang 322,[2] there is no principle or authority on which it can be said that the doctrine of res judicata does not apply as between co-defendants in a previous suit if no relief has been granted to the plaintiff in that suit. The decision definitely negatived the occupancy right set up by Harbans; and it has to be remembered that according to the plaintiff in the present case it is in subordination to this occupancy right of Harbans that Bikram or his sons, defendants 1 and 2, have their shikmi right. The dismissal of the suit was, it is true, directly based not on the finding against Harbans's right of occupancy but on the finding in favour of the independent shikmi tenancy of Bikram, the second of the three contingencies formulated by the learned Government Pleader. This latter finding, however, was also destructive of Harbans's claim; and there is authority for the view that in such circumstances Harbans could have appealed against the decision on the ground that notwithstanding the dismissal of the suit, he was adversely affected by the pronouncement in favour of the co-defendant. As a matter of fact, the lower Courts have also dealt with the matter on the footing that the decision in the ejectment suit was only a piece of evidence; the learned Subordinate Judge calls it a strong piece of evidence in the present case instead of operating by way of res judicata. Even if the decision is regarded in that light, the result in their opinion was apparently the same.

In 1918 the Dumraon proprietor brought a suit for rent against Harbans and Bikram Rai's sons. Harbans did not appear in spite of a summons. Bikram Rai's sons contended that Harbans was never a tenant of the holding; that the settlement by patta with him alleged by the landlord was a collusive transaction not binding upon them, as (they said) had been decided in the previous suit for ejectment; that they were the tenants of the land and were liable to pay a much smaller rent than that shown in the record of rights according to Harbans's patta. The first point framed for determination in that rent suit was whether defendant 1, (Harbans Singh) had any concern with the land in suit, and this was answered by the Court in the negative on the ground of res judicata, having regard to the original and the appellate judgments in the ejectment suit.

The learned Munsif who tried the present suit was of opinion that this decision in the rent suit was also res judicata as between Harbans and the other defendants 1 and 2. As to this, the learned Subordinate Judge began by observing that in a rent suit no question of title in its entirety can be decided, and that therefore if any finding on title is recorded in such a suit, it would not bind as res judicata. In support of this observation he cited a ruling 10 C W N 820,[3] which does not seem to have any application to the facts of the present case. That was a ruling in which a distinction was made between cases in which the defendant sets up a title in himself as against the plaintiff landlord and cases in which he denies the relationship of landlord and tenant by setting up the title of a third person or claiming that he is not in occupation of the land or a tenure which existed but has expired. In the latter class of cases no question of title can properly be said to be decided in the rent suit. In the former however, a question of title is directly raised between the plaintiff and the defendant, and, if decided, will obviously give rise to res judicata. In the rent suit with which we are dealing, the question that arose was of a different kind. The record of rights showed defendant 1, as the occupancy raiyat, while the plaintiff's case was that Harbans was only entitled to cultivate the lands for seven years under the patta of 1907 and that the term of that patta had expired. The Record of Rights also showed Bikram as the shikmi raiyat (for 20 years). That, of course, was no reason for impleading Bikram's sons as defendants 2 and 3 in that rent suit. It is obvious that the landlord impleaded them on that occasion because it had been held by the Courts in the ejectment suit and appeal that the settlement with Harbans by means of the patta was collusive and that the person really in possession was Bikram. In the rent suit, therefore, it became obviously necessary for the Court to pronounce between the conflicting titles of Harbans and Bikram, and the Court did pronounce in favour of Bikram. That

2. Maung Sein Done v. Ma Pan Nyun, A I R 1932 P C 161=137 I C 328=59 I A 247=10 Rang 322.

3. Sahadeb Dhali v. Ram Rudra Halder, (1906) 10 C W N 820.

Harbans took no part in the suit does not affect the application of the doctrine of res judicata. His title as the person entitled to receive rent from Bikram or his sons in respect of the holding was clearly in issue and was definitely negatived.

It is true that the suit was dismissed as against Harbans, but it is obvious that in spite of this dismissal Harbans could have appealed on the ground that his title *vis-a-vis* Bikram or his sons had been negatived: see 9 C W N 584[4] and 40 I C 771.[5] It seems to me, therefore, that the learned Subordinate Judge fell into an error if he really meant to hold (for he seems to have qualified, later on, what he had said on the case from 10 C W N 820[3]) that no res judicata could be founded on the decision of the rent suit of 1919. But this only adds to the strength of the findings of fact of the lower appellate Court against the appellant. The trial Court referred to the absence of any evidence that Harbans had ever paid rent to the landlord in respect of this holding and to the fact that defendants had produced rent receipts since 1928. The appellant's story of the landlord's settlement with Harbans and the shikmi settlement by Harbans with Bikram who is now represented by his sons rests substantially on the documents produced by the parties in the case. His oral evidence has been discussed by the Munsif and characterised as quite worthless. As to the documents the principal ones have been noticed so often that there is really nothing more to say about them, especially as the lower Courts took care to consider the matter even on the footing that the decisions in the ejectment suit and the rent suit did not form res judicata but were merely evidence to be explained away by the plaintiff in the present suit. It seems to me impossible, therefore, to interfere with the decision of the lower Courts that Harbans had no title to convey to the plaintiff by the kobala of 1927.

The only other point that has been raised before me is the question of adverse possession, with which I have already dealt in part. If the appellant had succeeded in showing that Bikram came into possession of the holding under Harbans, it would undoubtedly not have been open to Bikram or his sons to set up adverse possession before surrendering the land to the person who had inducted them. But the record of rights, as I have already said, is inconsistent with a shikmi settlement by Harbans who had had nothing to do with the land before 1907; and in his deposition in the ejectment suit Harbans spoke of Bikram forcibly taking possession of the land in or after 1317. The adverse possession, moreover, claimed on behalf of Bikram or his sons is not now set up for the first time. It was, as we have seen, asserted in the ejectment and the rent suit, and further accepted by the Courts on that occasion, and the present suit was brought more than 12 years after the appellate decision in the ejectment suit. The points urged before me on behalf of the appellant all fail. The finding of fact that Harbans had no title to convey to the plaintiff in 1927, so far as it is a finding of fact, is binding on me; and, so far as it is a question of law based on inference from documents and the decisions of the Courts, is not vitiated by any error of law especially as the lower Courts have also dealt with the matter on the footing that there was no res judicata but that the earlier decisions only furnished strong evidence which it was necessary for the plaintiff-appellant to meet. The appeal fails and is dismissed with costs.

D.S./A.L. *Appeal dismissed.*

4. Krishna Chandra Goldar v. Mohesh Chandra Saha, (1905) 9 C W N 584.
5. Raghunath Kurmi v. Deo Narain Rai, A I R 1917 Pat 350=40 I C 771.

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* A. I. R. 1937 Patna 31

ROWLAND, J.

Bajrang Marwari and *others*—Appellants.

v.

Durga Prasad Sao—Respondent.

Criminal Appeal No. 3 of 1936, Decided on 7th September 1936, from order of Dist. Judge, Manbhum-Singhbhum, Purulia, D/- 15th May 1936.

(a) Criminal Trial—Sanction to prosecute—Process server, under Patna High Court rules and orders (Civil) (Old) prior to amendment, was not subordinate to Court issuing process — Process server obstructed while attaching property—Application by decree-holder for prosecution of obstructor under S. 183, Penal Code—Application held not entertainable—No appeal held lay to Dist. Judge, from order on such application even if entertained—Proper remedy is revision to High Court.

Prior to the amendment of Patna High Court General Rules and Orders (Civil) R. 24, Vol. 1, P. 16, the process serving staff was not subordinate to individual Courts issuing process for service by them. A process server attaching property on

behalf of a decree-holder was obstructed and the Court was moved by the decree-holder to proceed against the obstructor under S. 183, I. P. C. :

Held : that as the application for prosecution was not proper under S. 195 (a), Criminal P. C., being by decree-holder and not by process server, the Court had no jurisdiction to entertain it. [P 32 C 2 ; P 33 C 1]

Held further : that, even if the Court had wrongly entertained it, District Judge had no jurisdiction to hear an appeal from such order under S. 476-B. But proper remedy against such wrong order was by revision to High Court : *A I R 1936 Pat 74, Rel. on.* [P 33 C 1]

*** (b) Criminal Trial—Sanction to prosecute —Rules of guidance to Courts making complaints laid down.**

In considering whether a prosecution is to be ordered or not, it is desirable for a Court making a complaint to have regard to the interests of public justice rather than to the gratification of private spite. Regard may also be had to the question whether the prayer for prosecution is a manoeuvre to obtain an undue advantage by embarrassing the defence in a pending civil proceeding. Another point which might well be considered is whether there is evidence of any criminal act, against each individual person against whom it is proposed to take proceedings; and if there is a prima facie case at all it may be whether the person offended against was in fact following a lawful procedure. [P 33 C 1, 2]

S. N. Basu and *S. Mustafi*—for Appellants.

K. K. Banerji—for Respondent.

Judgment.—The facts out of which this appeal arises are that a rent suit was instituted by Durga Prasad Sao, on 6th November 1935, claiming house rent of a shop from Nathmal, one of the petitioners, and another person and applied to the Munsif on 8th November 1935, for attachment before judgment of moveables in the shop of the defendants. The Munsif ordered notice to issue to the defendants, and it was returned by the peon as having been served on them. Subsequently, however, the Munsif has come to a finding that this process was suppressed. The Munsif accepting the return of service at its face value, ordered the issue of an ad interim attachment before judgment in pursuance of which on 13th November 1935, the plaintiff and a civil Court peon went to the shop of the defendants in Jharia and began removing goods of the defendants. The peon wanted to take the goods away and bring them to the Court at Dhanbad.

The accused persons, according to the peon's report, abused him and the identifier and snatched away the goods saying "we will not allow you to take away the goods." The peon submitted his return of service on the following morning before the nazir. The plaintiff Durga applied to the Munsif requesting him to order the prosecution of the persons named in the peon's report under S. 183, I. P. C. Meanwhile Nathmal, defendant, appeared on the 14th November, and showed a cause against the order for attachment before judgment. On 7th December 1935, the Munsif discharged the interim order of attachment holding that the plaintiff's allegation that the defendants were about to close their shop and abscond was utterly unfounded and malicious. The Munsif after considering the cause shown by Nathmal and others against their prosecution under S. 183, declined to order any proceedings to be taken. Durga Prasad thereupon presented to the District Judge a petition described as an appeal under S. 476-B, Criminal P. C., and entertained by the District Judge as such. I have to point out that no such appeal lay to the District Judge. The section gives an appeal against the refusal of a Subordinate Court to make a complaint under S. 476. S. 476 is the section giving a Court power to make a complaint of an offence referred to in S. 195 (1), Cl. (b) or (c). These are clauses which require the complaint of a Court for the institution of proceedings for offences under certain sections of the Penal Code, when committed in relation to a proceeding in a Court. But the alleged offence which we are now considering is an offence under S. 183, I. P. C., which is not referred to in S. 476, Criminal P. C. The requisite for a prosecution under S. 183 is laid down in S. 195, Cl. (a), Criminal P. C., and is that there should be a complaint in writing of the public servant concerned or of some other public servant to whom he is subordinate, that is to say, the peon was under the Code competent to file a complaint, failing which it could have been filed by a public servant to whom the peon is subordinate.

So the first question that arises is whether the peon was subordinate to the Munsif. Such a question was considered in 16 P L T 808.[1] Macpherson, J., held that the process-serving staff were not under the rules then in force subordinate to the individual Courts issuing process for service by them. I may mention that the position has since been altered by an

1. Thakur Prasad v. Emperor, A I R 1936 Pat 74=1936 Cr C 103 = 159 I C 503=37 Cr L J 104=16 P L T 808.

amendment of R. 24, at p. 16, Vol. I of the High Court's General Rules and Circular Orders (Civil), but at the time of the proceedings that we are dealing with, this amendment had not been made and the state of the law was, as pointed out by Macpherson, J. in the decision cited. Therefore, in the first place, the application to the Munsif was one that he had no jurisdiction to entertain. In the second place, the appeal to the District Judge was one that he had no jurisdiction to entertain from there. An appeal has been presented to this Court purporting to be an appeal under S. 476-B, and I feel doubt whether any appeal lies to this Court under that section. There is, however, sufficient revisional jurisdiction to empower this Court to set aside an order passed without jurisdiction in cases in which such interference is called for; and I do so. It is urged for the Crown and as against the interference of this Court that the District Judge being a public servant to whom the peon is subordinate had an independent power of his own under S. 195 (1) (a) of the Code to make a complaint, and that if a District Judge makes a complaint under that provision the order is an administrative one. That may be; but the District Judge in the present case purports to act as a Court. He says:

> This Court will make a complaint under S. 476-B, Criminal P. C., which the subordinate Court might have made under S. 476.

That order, as it stands is an order which the District Judge as a Court had no jurisdiction to pass, and I am not prepared to say that he did in fact pass it in any other capacity, that is to say, in the capacity of a public servant to whom the peon was subordinate. The merits have been placed before me, and I may point out, in the event of the District Judge being disposed to take up the matter afresh in his administrative and non-judicial capacity, some points which he would do well to consider before taking action. The first is that in considering whether a prosecution is to be ordered or not, it is desirable to have regard to the interests of public justice rather than to the gratification of private spite. Regard may also be had to the question whether the prayer for prosecution is a manœuvre to obtain an undue advantage by embarrassing the defence in a pending civil proceeding. Under this head the learned District Judge will no doubt remember the Munsif's finding that the application for attachment before judgment was mala fide as well as the finding that the plaintiff had managed to get an interim order through the Court by fraudulent suppression of the preliminary notice so that on the day the petitioners who are still only defendants and not judgment-debtors were taken by surprise.

Another point which might well be considered is whether there is evidence of any criminal act against each individual person against whom it is proposed to take proceedings; and with reference to the general question whether there is a prima facie case at all, it may be examined whether the peon was in fact following a lawful procedure. It seems to have been taken for granted in the Courts below that the ordinary procedure for a Court's officer who is deputed to make an attachment of moveable property is to remove the property from the place where he finds it and to bring it to the Court from which the warrant has issued. That is not the direction in the warrant. The warrant dated 13th November 1935, directed the peon:

> to attach the following properties of the said defendants and keep the same under safe and secure custody until the further order of the Court . . . . and to return the warrant on or before 3rd December 1935.

There is no order in the warrant to bring the goods to the Court. The procedure to be followed by a Court's officer executing a warrant is in Rr. 43 and 43-A, O. 21 as framed by the Patna High Court under its rule-making powers. (The rules may be found in Mulla's Code of Civil Procedure, Edn. 10, Appx. 8, at p. 1513.) R. 43 provides that moveable property other than agricultural produce is to be attached by actual seizure and the attaching officer shall be responsible for the due custody thereof. The rule does not say that he is to keep it anywhere else but where he finds it. R. 43-A directs the attaching officer in suitable cases to keep the attached property in the village or locality. He may keep it in his own custody in any suitable place provided by the judgment-debtor, or in his absence by any adult member of his family who is present on his own premises or elsewhere. For instance, if the judgment-debtor has an almirah, goods may be put in the almirah, the peon sealing or locking it. Failing this the attached property may be kept in the custody of a respectable surety. It is only when, in the opinion of the attaching

officer, the attached property could not be kept in the village or locality through lack of suitable place or satisfactory surety etc., that the attaching officer is to remove the property to the Court at the decree-holder's expense. If the decree-holder fails to provide the necessary funds, the attachment will be withdrawn. These rules are supplemented by R. 7, at p. 31, Vol. I, of the High Court's General Rules and Circular Orders and the rules regarding process fees, etc., at p. 120 and following of the same volume. In the table annexed to R. 1, in Art. 3 (b) at p. 121 provision is made in the case of issue of process of attachment of property by actual seizure for a daily fee for each man necessary to ensure the safe custody of property attached when such a man is actually in possession. What this contemplates is that the Court's bailiff enters on the premises where the attached property is to be found and remains there holding the property against any unlawful removal; for each day that he is to be detained so holding the property, a fee is payable. In this connexion the District Judge may refer to Note 2 at p. 122. Ordinarily the party taking out an attachment is expected to deposit not less than 15 days' fee of the officer who is to be in possession of the property.

Now turning back to R. 7, at p. 31 (as amended in 1933), it is to be noticed that the officer is to be furnished with a certificate stating the period for which the fee has been paid and is to give notice thereof to the judgment-debtor or other person at whose instance he remains in possession at the place of attachment. It is not until that period has expired that the officer is to remove the property from the premises; and even so the judgment-debtor has the option of depositing before the expiry of that period the further fee as required by para. 2, Note 1 to R. 1, at p. 122, in which case the property will continue to remain at the place where it is. Therefore should the District Judge feel at all disposed still to pursue the matter, it will be for him to consider whether the peon was acting within his lawful authority in seeking to remove the property without giving the defendants any option of having it kept in the peon's custody at the place where was.

B.D./V.V. *Order accordingly.*

A. I. R. 1937 Patna 34

ROWLAND, J.

Deodhari Koeri and *others*—Petitioners.

v.

Emperor—Opposite Party.

Criminal Revn. No. 470 of 1936, Decided on 18th September 1936, from order of Sess. Judge, Saran, D/- 8th August 1936.

(a) Evidence Act (1872), S. 154—Prosecutor taking permission of Court to declare prosecution witnesses hostile and to cross-examine them, though not sufficient reason for doing so, discretion of Court in allowing prosecutor to cross-examine prosecution witnesses is not fettered.

Section 154, Evidence Act, in no way fetters the discretion of the Court to permit leading questions to be put by a party to his own witnesses. [P 35 C 1]

Where prosecutor took permission of the Court to declare prosecution witnesses hostile and to cross-examine them and it was suggested that there were not sufficient reasons for doing so:

Held: the discretion of the Court in allowing the prosecutor to cross-examine prosecution witnesses was not fettered. [P 35 C 1]

(b) Witness—Hostile witness—Value of his evidence—Value is same as other ordinary witness.

The evidence of hostile witness is evidence in the same manner and to the same extent as that of any other witness, whether called by prosecution or defence: *A I R 1930 Pat 247* and *A I R 1931 Cal 401*, *Rel. on.* [P 35 C 1]

(c) Rioting—Merely coming to spot with lathi or weapon in response to cry of accused that he was being killed is not sufficient to make such persons guilty of rioting.

Where at an early stage of the quarrel accused shouted out: "Help, I am being killed;" and on his cry some people came to the spot with lathis and other weapons:

Held: merely coming to the spot with lathis or other weapon in response to the cry that accused was being killed was insufficient to make such persons guilty of rioting. [P 35 C 2]

Hareshwar Prasad Sinha—for Petitioners.

Asst. Govt. Advocate—for the Crown.

Order.— There are eight petitioners before me. They have been convicted of rioting and four of them have been convicted of causing hurt. The origin of the occurrence, it appears, was a family dispute between petitioner 1 Deodhari and Tilesar, a relative of his; their houses are adjacent to one another and on 18th March 1936, they came to blows over the use of a cattle trough and pegs just outside the house of Deodhari. The shouting is said to have brought the rest of the petitioners to the spot and there was a fight. The petitioners were sentenced each to three

months' rigorous imprisonment and fine of Rs. 25 which sentences were affirmed on appeal. In revision it is contended that the cases of individuals have not been properly considered by the Sessions Judge, that the counter-complaints by two of the accused persons, which were admitted in evidence, were not admissible either against the persons who presented them, or still more so against the other accused, that oral evidence should not have been admitted to explain away the compromise which had been arrived at a year before and that a wrong procedure was followed in allowing some of the prosecution witnesses to be cross-examined by the Public Prosecutor without taking the permission of the Court and declaring them hostile. Some of these points are unsubstantial or immaterial. I find no defect in the charge. As regards the compromise decree, its existence was common ground to both parties, and as to the terms agreed on there is no serious conflict of evidence. As regards the complaints of two of the accused, technically perhaps it was incorrect to consider these in evidence as against the rest of the petitioners; but the accused led evidence and the substance of the evidence was the same as the case sought to be made out in the complaints ; so it is impossible to say that any prejudice was caused.

Then as regards the objection to the procedure in the matter of declaring witnesses hostile, it appears from the order sheet of 18th April 1936 that in fact the prosecutor did take the permission of the Court to declare these witnesses hostile and to cross-examine them. It is suggested that there was not sufficient reason for doing so. But S. 154, Evidence Act, in no way fetters the discretion of the Court to permit leading questions to be put by a party to his own witness, and I think it is not at all desirable that the discretion of the Court in this matter should be fettered. As regards the use of evidence of witnesses who have been so declared hostile, the law is in no doubtful state. The evidence of such witnesses is evidence in the case in the same manner and to the same extent as that of any other witnesses whether called by the prosecution or by the defence. This was established in this Court in 9 Pat 474[1] and a much more exhaustive survey of the position in the Full Bench case of the Calcutta High Court in 58 Cal 1404[2] leads to the same result. Now as to the contention that the cases of the individuals have not been considered, I am unable to say that there was a failure to come on the evidence to a definite finding as to the presence of each and every one of the petitioners. But the circumstances regarding individuals may perhaps require a little further consideration. A point which does not appear to have attracted the attention of the Sessions Judge is that at an early stage of the dispute, when apparently only Deodhari was quarrelling with the complainant, the prosecution evidence is that Deodhari shouted out : "Help, I am being killed"; and on his cry the remainder of the petitioners assembled. Four of them, as I have said, have been convicted of causing hurt, but against Thakur Singh, Jagarnath Singh and Mukhlal Pande, no particular act of violence appears to be established, and it is not in evidence that they inflicted hurt on any person. I think that merely coming to the spot even with lathi or other weapon in response to a cry by Deodhari that he was being killed, can hardly be considered sufficient to make them guilty of rioting. I would therefore set aside the conviction of these three petitioners and acquit them. The fines imposed on them, if paid, should be refunded.

As regards the remainder, I do not think that there is any error in their conviction, but it was not perhaps necessary to sentence each of them to three months' rigorous imprisonment, particularly when it appeared at the trial that the differences between the parties had been composed. Accordingly I reduce the sentence on each of these remaining petitioners to the period of imprisonment already undergone while maintaining the fines and the sentences of imprisonment in default.

P.R./D.S. *Order accordingly.*

1. Sohrai Sao v. Emperor, A I R 1930 Pat 247=124 I C 836=31 Cr L J 721=9 Pat 474=11 P L T 148.

2. Praphulla Kumar Sarkar v. Emperor, A I R 1931 Cal 401=1931 Cr C 497=131 I C 575=32 Cr L J 768=58 Cal 1404=35 C W N 731 (F B).

* A. I. R. 1937 Patna 36

COURTNEY-TERRELL, C. J. AND JAMES, J.

John Gurney Wakefield—Defendant—Appellant.

v.

Kumar Rani Sayeeda Khatoon—Plaintiff—Respondent.

Appeal No. 56 of 1933, Decided on 10th September 1936, from original decree of Sub-Judge, Gaya, D/- 23rd December 1932.

(a) Transfer of Property Act (1882), Section 53-A— Part-performance — Provisions—Contract for farming lease on unregistered document made in 1923—Acceptance of rent by landlord—Contract is valid and tenant cannot be treated as a trespasser (*Obiter*).

Obiter.—The effect of S. 63 of Act 20 of 1929 is only to remove from operation of the new S. 53-A, those irregular part-performed contracts which on 1st April 1930 already formed the subject of pending litigation. [P 37 C 1]

Where contract for farming lease on unregistered document was made in 1923 and afterwards rent was accepted by the landlord :

Held : that provisions of S. 53-A, T. P. Act, enacted by Act 20 of 1929 would govern the contract and tenant could not be treated as a trespasser. [P 37 C 1]

*** (b) Transfer of Property Act (1882), Section 53-A—S. 53-A is not retrospective with respect to suits filed before Amending Act of 1929—Still transferee can enforce rights on contract prior to 1st April 1930 in suit filed after that date.**

The question of the retrospective nature of S. 53-A does not arise with respect to the contract made before 1st April 1930, but in respect to the enforcement of right against the transferee. The only question of retrospection which can be considered to arise is with regard to the suit in which rights are in controversy. Act is not retrospective with regard to suits begun prior to the Act. Nor is it a question of there being any retrospective effect with regard to contracts made before the passing of the Act because the operative part of the section is " debarred from enforcing " and does not refer to the date of contract. [P 38 C 1]

(c) Registration Act (1908), S. 49 — Non-registration—Effect.

Rights under a contract arise immediately after the execution and do not arise in consequence of registration. The effect of non-registration is to prevent the enforcement of those rights in a Court of law inasmuch as the contract cannot be received in evidence unless registered : *A I R 1936 Lah 5, Rel. on* ; *A I R 1932 Mad 734* and *A I R 1934 All 701, Dissent*. [P 38 C 1, 2]

K. N. Moitra—for Appellant.

Manohar Lal, S. A. Khan and *G. P. Shahi*—for Respondent.

James, J.—The defendant in 1923 obtained a farming lease from the Maharaj Kumar of Tikari of seven villages for a term of 20 years. On 7th March 1925, the Maharaj Kumar executed a mukarrari deed, which made the lease permanent in respect of four villages, and granted certain other villages to the defendant. At the same time he executed a deed of gift whereby the proprietary right in the other three villages of the lease of 1923 was transferred to the plaintiff. The plaintiff in 1930 demanded rent from the defendant on account of the farming lease of the three villages at the rate of Rupees 773-3-6 a year, which was duly paid though the plaintiff's claim for interest was not satisfied. In 1931 the plaintiff instituted the suit out of which this appeal arises, describing the defendant as a trespasser, and claiming compensation by way of mesne profits or in the alternative rent at the rate of Rs. 912 a year. The defendant contested the suit denying that he was a trespasser and claiming that he held as a tenant under the lease of 1923 which had been recognized by the plaintiff.

At the trial of the suit the question arose of whether the performance by the defendant of his part of the contract of 1923 had the effect of putting him into the position which he would have enjoyed if he had obtained a regular lease. The Subordinate Judge, considering himself bound by the decision of the Judicial Committee of the Privy Council in 58 I A 91,[1] found that the defendant could base no claim to be a lessee on the strength of the unregistered document of 1923. He did not consider the question of whether the provisions of S. 53-A, T. P. Act, enacted by Act 20 of 1929 would govern this contract; nor did he consider the effect of the acceptance of rent by the plaintiff in recognition of the contract. He found that the defendant was a trespasser and he assessed compensation by way of mesne profits at Rupees 1,500 a year. The defendant has appealed from that decision.

In the trial Court the defendant had taken the objection that he was entitled to complete suspension of rent, owing to the fact that he had been forcibly ejected from his tenure by the plaintiff, but the point was not pressed before the Subordinate Judge, and although it is mentioned in the memorandum of appeal, it must be

1. Ariff v. Jadunath Majumdar, A I R 1931 P C 79=131 I C 762=58 I A 91=58 Cal 1235 (P C).

treated for practical purposes as abandoned by the appellant, who by his memorandum of appeal admits liability for three years of arrears of rent at the rate of Rs. 773 odd. Arguments have been addressed from both parties to this Court at some length, on the question of whether the provisions of S. 53-A, T. P. Act, would apply to the agreement of 4th August 1923. On the whole, I think that the provisions of this section would apply to this contract, and that the effect of S. 63 of Act 20 of 1929 is only to remove from the operation of the new S. 53-A those irregular part-performed contracts which on 1st April 1930 already formed the subject of pending litigation; but in the form which this appeal has ultimately taken, this question, strictly speaking, does not arise. It is manifest, in the first place, that the occupation of the defendant-appellant during the years in suit cannot be treated as that of a trespasser liable to pay damages or mesne profits. Rent had been demanded from him up to the end of 1335 Fs. which was duly paid. A demand was made for rent for the years 1336 and 1337 which was not satisfied. It is clear that he was a tenant, but it is not necessary for the purposes of this appeal to decide what may have been the terms of his tenancy.

Mr. Manohar Lal suggested that the rent payable by the defendant ought to be ascertained by deducting the rent assigned for the other villages of the farming lease when the permanent tenure was created in 1925 which would leave a balance of Rs. 912 payable annually, but this argument would involve the admissibility in evidence of the unregistered contract of 1923; and this document would only be admissible in evidence under Act 21 of 1929 if the provisions of S. 53-A, T. P. Act, applied to it. Mr. Manohar Lal has completely taken the wind out of the sails of the defendant by abandoning his claim to rent at Rs. 912, and by asking for rent only at the rate which the defendant admits to be due. The decree of the learned Subordinate Judge cannot be defended. The defendant is not a trespasser; and there is an end of that question. And if the argument of the learned Advocate for the appellant should prevail, he would by consequence be liable for arrears of rent at a higher rate than he has admitted, because if the unregistered lease of 1923 is to be treated as a valid contract, the annual rent payable for the farming lease of these three villages is clearly Rs. 912. On that question also there is no doubt. We are thus in the anomalous position that if the appellant should be successful he would have to pay more; and if he should fail he would have to pay less. The decree of the Subordinate Judge must be set aside. The plaintiff is entitled to a decree for rent at the rate of Rs. 773-3-6 a year for the years 1336 to 1338 Fs. with interest at 12½ per cent from the end of the agricultural year in which the rent fell due up to the date of the decree. She is entitled in addition to interest at 12½ per cent. for one year on the sum of Rupees 2,029-11-6. This is the interest which accrued during 1335 Fs., to which must be added simple interest at the same rate up to the 7th Bhado 1336, when payment of the principal was made. This interest is a fixed sum which does not accumulate. It is the interest due on 28th August 1929, which itself bears no interest up to the date of the decree. The decretal amount will bear interest at six per cent. from the date of the decree. The appellant is entitled to his costs in this Court proportionate to his success. The plaint was framed in such a manner as to make it difficult for the defendant to satisfy the claim; he was compelled to defend the suit; and the plaintiff will be held entitled to no costs of the suit.

Courtney-Terrell, C. J.—I entirely agree with the judgment of my brother James just delivered. Although by reason of the course which the case has taken the question of the retrospective nature of S. 53-A, T. P. Act, is no longer of importance in this particular case, I think it necessary by reason of its general importance to explain the reason for my concurrence with the view expressed by my brother James that in circumstances such as those which are found in this case, the section is applicable. Properly speaking, the question of the retrospective nature of S. 53-A arises not with respect to the contract which is in question but in respect to the enforcement of the right against the transferee. In this case the contract in question was undoubtedly long before the suit and long before the passing of the Amending Act; but the suit was begun after the Amending Act had come into force and had added S. 53-A, T. P. Act. Its effect may be stated broadly as the

establishment in favour of the transferee of the doctrine of part performance, and in effect the section states that from and after the passing of this Act, if the contract in question was in writing and signed, and if its terms can be ascertained with reasonable certainty, and if the contract, though required to be registered, has not been registered, then the transferor is to be debarred from enforcing against the transferee, by any means, any right in respect of the property which the transferee has taken or continued in possession other than a right expressly provided by the terms of the contract. In other words, according to my construction of the section, no question of retrospection arises with regard to the contract in question. The only question of retrospection which can be considered to arise is with regard to the suit in which the rights are in controversy. If the suit has been instituted after the passing of the Act, then it is clear, in my opinion, that the Act applies to that suit. If, on the other hand, the suit was instituted before the passing of the Act, then under the provisions of the Act, which have been mentioned, the suit is to proceed as though the Act had not been passed.

In other words, the Act is not retrospective with regard to suits begun prior to the Act. Nor is it a question of there being any retrospective effect with regard to contracts made before the passing of the Act because the operative part of the section refers to the words "debarred from enforcing" and not to the date of the contract. It was argued that the opening words of the section "Where any person contracts to transfer" indicate that the section can apply only to contracts made after the passing of the Act. If the words were to be construed in that grammatical sense, then it would be necessary to alter the wording of the remainder of the Act, for example, in para. 2 the words should in that case read "and the transferee shall have in part performance of the contract, taken possession." Similarly para. 3 should be "and the transferee shall have performed" instead of the words as they at present appear in the Act. The rights under a contract arise immediately after the execution and do not arise in consequence of registration. The effect of non-registration is to prevent the enforcement of those rights in a Court of law inasmuch as the contract cannot be received in evidence unless registered. The rights do not arise upon registration. Therefore, in my opinion the opening words of the section apply to contracts made whether before or after the passing of the Act and no question of retrospection arises with respect to the date of the contract. For this reason I respectfully disagree with the decision in A I R 1932 Mad 734[2] and in those cases which have followed it, for example, A I R 1934 All 701;[3] and I agree with the view of the learned Judge who decided the case in A I R 1936 Lah 5.[4]

P.R./V.V. *Order accordingly.*

2. Kanji and Moolji Bros. v. T. Shunmugam Pillai, A I R 1932 Mad 734=139 I C 870=63 M L J 587.
3. Gauri Shankar v. Gopal Das, A I R 1934 All 701=151 I C 388.
4. Benarsi Das v. Ali Muhamad, A I R 1936 Lah 5=157 I C 839=37 P L R 658.

A. I. R. 1937 Patna 38

WORT, J.

Jagdish Narayan Singh—Petitioner.

v.

Alakhdeo Narain Singh and *others*—Plaintiffs and *another* — Defendant — Opposite Parties.

Civil Revn. No. 270 of 1936, Decided on 9th October 1936, from order of Munsif, Second Court, Gaya, D/- 29th February 1936.

Revision—Discretion—Judge in exercise of his discretion rejecting application to be added as intervener of person depositing landlord's fee under S. 26 (o), Bihar Tenancy Act—High Court in revision will not interfere.

A Judge in the exercise of his discretion rejected the application of a person to be added as an intervener of a person who deposited the landlord's fee under S. 26 (o), Bihar Tenancy Act, 1934, in January of 1936, the suit having been compromised on 21st December 1935:

Held: that the Act gave the Court a discretion and when once the Judge had exercised it, the High Court would not interfere in revision: *10 P L T 442* and *A I R 1935 P C 185, Explained.*

[P 38 C 2; P 39 C 1]

Raj Kishore Prasad—for Petitioner.

A. B. Mukharji and *B. B. Mukharji*—for Opposite Parties.

Order.—There is no substance whatever in this application and the rule must be discharged. The Judge in the exercise of his discretion has rejected the application to be added as an intervener of a person who deposited the landlord's fee under S. 26 (o), Bihar Tenancy Act, in January of 1936, the rent suit having been com-

promised on 21st December 1935. His tenancy dates therefore from January 1936 and not before. It is a matter of utter indifference that he may have engaged with the tenant for transfer prior to that date. But I do not decide this case on the question of its merits, but I decide it on the question of jurisdiction. If I were to hold in this case that the petitioner had made out his case and the Judge was bound to join him as an intervener, I should be guilty of legislating. The Act gives the Court a discretion. If I order the petitioner to be added as an intervener, I should be disposing of that discretion which undoubtedly is in the Judge.

Amongst the authorities relied upon is the decision in 10 P L T 442.[1] That was a decision of Das, J., as he then was, to the effect that the Judge was bound to dispose of the application, and in no way indicated which way the Court was to decide it; and it is quite clear that it would have been impossible for the learned Judge to have come to a conclusion to that effect. It is merely, as I have said and repeat, a decision that the application should be heard and determined according to law. Nor is the decision of their Lordships of the Judicial Committee of the Privy Council in 17 P L T 93[2] of any help to the petitioner. That was a case in which one of the applicants had not had a proper hearing before the Subordinate Judge, and in supporting the judgment of the High Court given under S. 115, Civil P. C., their Lordships of the Judicial Committee of the Privy Council indicated that the Judge of the trial Court had acted with material irregularity in not giving a proper hearing to the application, and it is on that footing that the decision proceeded. It is impossible to say in this case that the Judge has not exercised his discretion. The tenancy, as I have said, came into existence by reason of the deposit after the suit had been disposed of; and in my judgment the learned Judge in the Court below, in those circumstances, was entitled to exercise his discretion one way or the other. The rule is discharged with costs, hearing fee two gold mohurs.

K.B./D.S. *Rule discharged.*

1. Nilambar Jha v. Chandradhari Singh, (1929) 10 P L T 442.
2. Atma Ram v. Beni Prasad, A I R 1935 P C 185=157 I C 894=62 I A 257==57 All 678= 17 P L T 93 (P C).

A. I. R. 1937 Patna 39

MOHAMAD NOOR AND SAUNDERS, JJ.

Sukhdeo Missir and *others*—Appellants.

v.

Kamleshwari Prasad Singh — Plaintiff —Respondent.

Appeal No. 100 of 1934, Decided on 17th July 1935, from order of Sub-Judge, Monghyr, D/- 5th January 1934.

Compromise— Suit on mortgage — Defendant alleging compromise by which plaintiff agreed to take sale of half of mortgaged property in satisfaction of whole mortgage debt —Defendant is entitled to have enquiry made of compromise.

It is not true that a contract cannot be a contract unless it is performed. If there is a lawful agreement between the parties to adjust the suit in a particular way, a party is entitled to have an enquiry whether there was such an agreement under O. 23, R. 3, Civil P. C. A promise by one party to execute a sale deed of half the mortgaged property is a good consideration for the other party's promise to have the suit decided in a particular way and as long as the former party is willing to perform its part of promise, namely to execute sale deed, that party can hold the other party bound to its promise. [P 39 C 2; P 40 C 1]

Kapildeo Narain Lal—for Appellants.

Ganesh Sharma—for Respondent.

Mohamad Noor, J. — This appeal is against an order of a Subordinate Judge of Monghyr, refusing to record a compromise under O. 23, R. 3, Civil P. C. The suit was for recovery of Rs. 8,299 odd on the basis of a registered mortgage bond said to have been executed by defendants 1 to 7, defendants 8 to 12 being the minor sons of defendants 3 and 4. Defendants 1 to 4 filed a petition, alleging that the suit was adjusted out of Court, the plaintiff having agreed to take a sale of half of the mortgaged properties in satisfaction of the entire mortgage debt. They prayed for the recording of the compromise. The plaintiff denied this agreement. The learned Subordinate Judge without holding any enquiry as to the truth or otherwise of the defendants' allegation has rejected their petition. He seems to be of opinion that as no sale deed was executed by the defendants, there was no adjustment of the suit and no enquiry was necessary. In my opinion, the learned Subordinate Judge is obviously in error. His view will lead to the proposition that a contract is not a contract unless it is performed. If it is true that there was a lawful agreement between the parties to adjust the suit in a particular way, namely that the defendants would execute a sale

deed in favour of the plaintiff in respect of half the mortgaged properties and that the plaintiff would accept it in satisfaction of his debt, the suit was adjusted and the defendants were entitled to have an inquiry whether there was such an agreement. A promise to do a certain thing is a good consideration for a promise by the other party to do certain other things. A promise by the defendants to execute a sale deed was therefore a good consideration for the plaintiff's promise to have the suit decided in a particular way, and as long as the defendants were ready and willing to perform their part of the promise, namely to execute a sale deed, they can hold the plaintiff bound to his own promise.

The order of the learned Subordinate Judge is set aside. The case is remanded to him. He will hold an enquiry as contemplated by O. 23, R. 3, Civil P. C., and then dispose of the case according to law. Costs of this appeal will abide the result.

Saunders, J.—I agree.

K.B./D.S. *Case remanded.*

A. I. R. 1937 Patna 40

MOHAMAD NOOR AND MADAN, JJ.

Darogi Rai and *another*—Defendants—Appellants.

v.

Basdeo Mahto and *others*—Plaintiffs—Respondents.

Appeals Nos. 1110 and 1136 of 1933, Decided on 30th September 1936, from decision of Addl. Dist. Judge, Muzaffarpur D/- 9th February 1933.

(a) Hindu Law—Debts—Debt incurred by daughters for sradh of their father when widow was alive—Such debt is for practical purposes debt by widow—Alienations to pay such debt are binding on reversioners.

A widow is under obligation to perform sradh of her husband. The fact that daughters incurred debt for sradh, performed by a widow when she was alive, should be considered for all practical purposes, to be a debt incurred by a widow. Daughters are bound to pay such debt when they succeed to the estate. The alienations made by the daughters to pay off such debt are binding on reversioners. [P 41 C 2]

(b) Hindu Law—Alienation—Widow—Legal necessity—Legal necessity does not mean enforceable necessity—Alienation by limited female owner for payment of barred debt incurred by her for legal necessity—Such alienation is binding on reversioners.

Under Hindu Law a widow can alienate her husband's property to pay up her barred debt. In deciding what are legal necessities under Hindu law all those necessities which the Hindu lawgivers have recognized as legal, justifying alienation of property by a limited owner, should be included. Payment of an antecedent debt legally incurred is a legal necessity. This necessity does not cease to be legal under Hindu law when debt has become time barred under the statute law. If Hindu Law authorizes a limited female owner to incur debt for certain purposes and also authorizes her to alienate properties for payment of that debt, the authority cannot be said to have come to an end simply because the enforcement of payment of that debt has become barred. Hindu law does not recognize limitation. Legal necessity does not mean enforceable necessity. Hindu law is very strict about payment of debts and under it there is no such thing as barred debt: *6 M I A 393 (P C), Expl.; A I R 1932 All 555, Dissent.* [P 41 C 2 ; P 42 C 1, 2]

(c) Limitation Act (1908 as amended in 1927), S. 19—Acknowledgment by widow is binding on reversioners.

Under the Amending Act of 1927 a widow can by acknowledgment save a debt from limitation and this acknowledgment is binding upon reversioners. [P 42 C 2]

(d) Appeal—Power of appellate Court—Court will interfere with decree not appealed against when inseparably connected with decree appealed against, but would not interfere when there are two independent transactions, though questions of law and fact involved in both are to some extent same.

Though the power of the appellate Court is wide, the cases in which it should interfere with decree which has not been appealed against are those in which the portion of the decree appealed against is so inseparably connected with the decree not appealed that justice cannot be done unless the portion against which no appeal has been preferred is also interfered with. Appellate Court however would not interfere where are two independent transactions, though the questions of law and fact involved in both of them to some extent are the same : *A I R 1925 Pat 285* and *A I R 1934 Pat 134, Ref.* [P 43 C 1]

M. N. Pal and *Navadwipa Chandra Ghose*—for Appellants.

Dhyan Chandra and *R. J. Bahadur*—for Respondents.

Mohamad Noor, J.—These two appeals arise out of the same suit instituted by the plaintiffs for a declaration that two deeds, one a sudhbharna dated 3rd December 1928 for Rs. 1,000, in favour of Halaku Rai (appellant in S. A. 1136 of 1933), and the other a sale for Rs. 1,100 dated 6th December 1926 in favour of Darogi Rai (appellant in S. A. 1110 of 1933), executed by Mt. Murni and her sister Mt. Sahodri, daughters of one Rampat, were without legal necessity and therefore not binding upon the plaintiffs who are the reversioners of Rampat. Rampat died leaving three daughters, Mt. Murni, Mt.Sahodri and Mt. Jhapsi. The plaintiffs are the sons of his fourth daughter who predeceased him. Rampat was succeeded by his widow Jaimangal who died a

few months later and then the three daughters succeeded him as limited owners. Two of them, namely Murni and Sahodri, executed the two deeds mentioned above. The learned Subordinate Judge who tried the suit held the documents to be valid in part, that is to say, the sudhbharna to the extent of Rs. 850 and the sales to the extent of Rs. 700 and invalid for the rest of the consideration. One of the defendants of the suit, Darogi Rai, who held the sale deed, preferred an appeal. Halaku, the other defendant, the holder of the sudhbharna, accepted the decree and preferred no appeal. The plaintiffs also remained satisfied with the decree and did not prefer any appeal, but in Darogi's appeal he filed a cross-objection not only against that portion of the decree which was in favour of Darogi, but also against that portion of it which was in favour of Halaku. The learned District Judge has held that the deeds were not valid to any extent whatsover and while dismissing the appeal of Darogi, decreed the suit in its entirety not only against Darogi but against Halaku also. Darogi and Halaku have therefore preferred these two second appeals.

The two deeds which are Exs. A. (sudhbharna) and B (the sale deed) were executed for consideration, a very large part of which, as mentioned therein, was utilized for payments of debts which are said to have been incurred for meeting the sradh expenses of Rampat and his widow. The learned trial Court held that the payment of these debts constituted legal necessities under the Hindu law for which the properties could be alienated. The learned District Judge on appeal, though he has not found that in fact no money was borrowed for the sradh expenses or that the debts were not paid out of consideration money of the deeds in question, has held the alienations to be illegal on two grounds: first, that it was no business of the daughters when their mother was alive to incur debt for the sradh of their father Rampat: and secondly, that when the two deeds were executed, the debts incurred for the sradhs had become barred and therefore it was illegal to alienate properties to pay off those debts. Both these grounds of the learned District Judge have been assailed before us in these second appeals. Regarding the first proposition the learned District Judge's objection is about the daughters borrowing for the sradh of their father Rampat when his widow was alive. The amount borrowed for his sradh was Rs. 800 out of which Rs. 400 with interest thereon was paid by the sale and Rs. 400 which interest thereon by the sudhbharna. It seems that the widow of Rampat must have been very much advanced in age and naturally the daughters who were prospective heirs of their father must have been looking after the property. It is not disputed that it was the duty of the widow to perform the sradh of her husband. It is also not denied that the sradh was performed out of the money borrowed. This being the case, it is in my opinion of no importance that the loan was actually taken by the daughters who must have been acting on behalf of their mother. The debt was there and for all practical purposes it was a debt incurred by the widow for the sradh of her husband. It was therefore incumbent upon the daughters when they succeeded to the estate to pay off that debt.

It is not denied, as it cannot be denied, that had the widow herself borrowed the money for the sradh of her husband, the daughters could have legitimately alienated the property for the payment of that debt and the fact that they incurred the debt for the sradh performed by the widow makes no difference whatsoever. The next ground of the learned District Judge for dismissing the suit, namely that the daughters could not alienate property for payment of debts incurred for legal necessities which had become barred, requires serious consideration. It is settled law that a widow can alienate her husband's property to pay up his barred debts. The recent decision in this connection is of the Calcutta High Court in 57 Cal 904.[1] Now the question is whether a female limited owner can legitimately alienate any portion of the estate to pay a debt legally incurred by her when the debt has become barred. The learned District Judge has relied upon a decision of the Allahabad High Court in A I R 1932 All 555=137 I C 193.[2] It was held in this case that a widow is not entitled to alienate property of her husband for the payment of her own barred debt though the debt itself was of such a nature

1. Ashutosh Sikdar v. Chidam Mandal, A I R 1930 Cal 351=126 I C 263=57 Cal 904=34 C W N 153.
2. Makkhanlal v. Sardar Kunwar, A I R 1932 All 555=137 I C 193.

that alienation of property would have been justified at the time the debt was incurred. With my profoundest respect to the learned Judges who decided this case, I beg to differ from the view taken by them as in my opinion it introduces into the Hindu Law considerations which are foreign to it, namely, the principles of the statute law of limitation.

In deciding what are legal necessities under the Hindu law we must include all those "necessities" which the Hindu law-givers have recognised as legal, jusifying alienation of properties by a limited owner. Payment of an antecedant debt legally incurred is a legal necessity. Does this necessity cease to be "legal" under the Hindu law when the debt has become barred under the statute law? If the Hindu law authorizes a limited female owner to incur debt for certain purposes and also authorises her to alienate properties for the payment of that debt, the authority cannot be said to have come to an end simply because the enforcement of payment of that debt has become barred. Hindu law does not recognize limitation. Mayne in his invaluable Treatise on Hindu Law, while dealing with this topic after referring to some earlier cases in which it was held that a Hindu widow was not entitled to alienate property to pay up her husband's barred debt, says :

> This seems sensible enough as a matter of mundane equity, though it may be doubted whether a plea of the statute would be accepted in the Court of the Hindu Rhadamanthus. In more recent cases it has been repeatedly held that a widow's obligation to pay her husband's debts, and her right to alienate property, descended from him for that purpose, is not affected by the statute of limitation, or any similar contrivance for getting rid of his obligations.

Then he refers to the decision of the Judicial Committee in 40 I A 74=35 All 227,[3] where it was held that a widow by acknowledgment cannot keep alive the debt of her husband and save it from limitation against the husband, and says :

> It is respectfully submitted that the validity of the acknowledgment might have been adequately and properly tested by those principles by which her dealings with her husband's property are ordinarily judged. If the widow can contract a debt when a case of necessity arises, so as to bind the reversioners, she must obviously have a discretion in determining the mode and time of payment. Cases can be easily imagined when it may be more prudent to defer payment and to hold that even in such a case the widow could not prolong the period of limitation by her acknowledgment seems to introduce a rule fraught with serious risk to the estate.

The decision of the Judicial Committee was based on the construction of S. 19, Lim. Act. Since then on the recommendation of the Civil Justice Committee the law has been changed by the Limitation (Amending) Act of 1927. Now a widow can by acknowledgment save a debt from limitation and this acknowledgment is binding upon the reversioners (see Explanation to S. 21, Lim. Act). It was open to the daughters in this case to keep the debts alive by renewing them and they would have been binding upon the plaintiffs as they were incurred for legal necessity. I see no reason why they should not be allowed to pay up the debts which they could have kept alive. No other decision except the one of the Allahabad High Court referred to above has been placed before us. Their Lordships have relied upon the decision of the Privy Council in 6 M I A 393[4] for the definition of "legal necessity." That was a case of alienation by the guardian of an infant and the question was whether it was for the benefit of the estate. Their Lordships of the Judicial Committee in dealing with the power of the manager of an infant heir observed:

> The actual pressure on the estate, the danger to be averted, or the benefit to be conferred upon it, in the particular instance, is the thing to be regarded.

Their Lordships were considering "benefit to the estate" and not "legal necessity." The two partly overlap but do not always coincide. As was pointed out in the Calcutta decision above referred to, 57 Cal 904,[1] pressure upon the estate is not the only ground upon which a limited owner can alienate the property. For instance pilgrimage to Gaya or sradh justifies alienation though it cannot be said that they benefit the estate in its material sense or that they are pressure upon the estate which is to be averted. Legal necessity does not mean enforceable necessity. Hindu law is very strict about the payment of debts. It makes a man's three generations liable for his debts though the descendants may have received no property from his ancestors. Under it there is no such thing as a barred debt. Even under the statute law of India a barred debt is a good consideration. The debt does not become extinct; only the remedy is barred. It is true

3. Lala Soni Ram v. Kanhaiya Lal, (1913) 35 All 227=19 I C 291=40 I A 74 (P C).

4. Hunoomanpersaud Panday v. Mt. Babooee Munraj Koonwaree, (1854) 6 M I A 393=18 W R 81=2 Suther 29=1 Sar 552 (P C).

that a karta of a joint family as such cannot revive a barred debt though he can save it from becoming barred. But there is a difference between the powers of a karta and a female limited owner. The former acts under an implied authority of the coparceners which authority does not extend to his paying a barred debt, but the latter within certain limits is an owner and there is no reason to debar her from paying up a debt which she has legally incurred.

In view of my findings it is not necessary to consider how far the learned District Judge was justified in reversing the decree in favour of Halaku in an appeal by Darogi when the former had not appealed. The circumstances under which a Court of appeal is justified in interfering with that portion of the decree against which there is no appeal have been laid down in this Court in 4 Pat 37[5] and in 13 Pat 200.[6] Those circumstances were not present in this case in which though in form there was one decree but in effect there were two distinct decrees against two different persons on two separate causes of action. There were two documents executed no doubt by the same parties but in favour of two different persons. Though the power of the appellate Court is wide, the cases in which it should interfere with the decree which has not been appealed against are those in which the portion of the decree appealed against is so inseparably connected with the decree not appealed against that justice cannot be done, unless the portion against which no appeal has been preferred is also interfered with. Here there were two independent transactions, though the questions of law and fact involved in both of them were to some extent the same. As, however, the decision of the learned District Judge is wrong on the main ground, this question need not be pursued further. I would therefore allow these two appeals, set aside the decree of the District Judge and restore that of the trial Court. Parties will bear their own costs in this Court and in the Court of appeal below. The order for costs by the trial Court will stand.

Madan, J.—I agree.

P.R./D.S. *Appeals allowed.*

5. Kesho Prasad v. Narayan Dayal, A I R 1925 Pat 285=82 I C 984=4 Pat 37.

6. Mt. Chandra Bibi v. Mohanram Sahu, A I R 1934 Pat 134=153 I C 412=15 P L T 42=13 Pat 200.

A. I. R. 1937 Patna 43

MOHAMAD NOOR AND MADAN, JJ.

Saukhi Singh and *others* — Appellants.

v.

Thakur Prasad Sinha and *another*— Respondents.

Appeal No. 88 of 1936, Decided on 2nd October 1936, from appellate order of Dist. Judge, Monghyr, D/- 14th December 1935.

(a) Civil P. C. (1908), S. 48—Applicability—S. 48 applies only to fresh application for execution and not to applications for revival of previous execution—Application for re-sale of property not found to be incapable of being sold is only one for revival of execution and not fresh application.

On an application for execution, certain property of the judgment-debtor was sold but subsequently sale was set aside under O. 21, R. 90, Civil P. C., 12 years after the date of decree, and then the decree-holder filed an execution application praying for resale of the property:

Held: that the subsequent application for re-sale of the property which was not declared to be incapable of being sold under the decree was an application for revival of the previous execution. S. 48 is applicable only to fresh application and not to revival applications: *A I R 1916 Pat 101, Rel. on.* [P 43 C 2; P 44 C 1]

(b) Limitation—Execution—Limitation for application for revival of previous execution is governed by Art. 181, Limitation Act, and not by S. 48, Civil P. C.

An application for execution for revival of previous execution, by re-sale of same property, is governed for limitation by Art. 181, Limitation Act, and not by S. 48, Civil P. C. : *A I R 1916 Pat 101, Rel. on.* [P 44 C 1]

Kapildeo Narayan Lal—for Appellants.

Dhyan Chandra—for Respondents.

Madan, J.—This is an appeal by a judgment-debtor against an order directing an execution to proceed against him. The facts are that decree was passed so long ago as 12th March 1921, and after various previous attempts the decree-holder took out execution on 18th January 1927, and some property of the judgment-debtor was sold on 30th January 1928. Thereafter an application was filed under O. 21, R. 90 for setting aside the sale, and on 14th March 1934 the appellate Court set aside the sale. On 2nd July 1934, being more than 12 years from the date of the decree, the decree-holder filed the present execution petition for the resale of the same property. Whatever may have been the exact form of the petition which was filed, there can be no question that its effect was to apply for a revival of the previous execution for the resale of the property and the lower appellate Court rightly held that the de-

cree-holder was entitled to a revival of the execution for sale of a property which had not been declared to be incapable of being sold under the decree. The fact that the revival was more than 12 years from the date of the decree is immaterial, as S. 48, Civil P. C., is confined to fresh applications filed after the period of 12 years. The same point arose in 2 Pat L J 115,[1] where it was held that the application filed was in continuation of the previous application, and was governed by Art. 181, Lim. Act, and not by S. 48, Civil P. C. This appeal is therefore without merit and is dismissed with costs.

Mohamad Noor, J.—I agree.

P.R./A.L. *Appeal dismissed.*

1. Mt. Kaniz Zohra v. Syam Kissen, A I R 1916 Pat 101=39 I C 89=2 Pat L J 115.

A. I. R. 1937 Patna 44

WORT AND AGARWALA, JJ.

Ramparikha Pandey and *others* — Defendants—Appellants.

v.

Mt. Ramjhari Kuer — Plaintiff—Respondent.

Appeal No. 48 and Civil Revn. No. 304 of 1935, Decided on 26th August 1936, from decision of Sub-Judge, Shahabad, D/- 5th October 1934.

(a) Limitation Act (1908), Arts. 111 and 116 —Sale by *A* to *B* of certain property on 5th February 1924—Kabala reciting that full consideration was paid—*A* suing for declaration on 25th April 1924 that sale deed was fraudulent and that consideration had not been paid—Suit dismissed, but trial Court holding that portion of consideration remained unpaid—Suit by *A* on 28th August 1928 for enforcement of statutory charge for unpaid purchase money—Decree for sale of property for amount claimed by *A*—Only portion of amount realized on sale—*A* claiming balance in application under O. 34, R. 6, Civil P. C.—Suit held to be governed by Art. 111 and not by Art. 116 and consequently application held barred by time.

A sold certain property to *B* on 5th February 1924 and there was a recital in the kabala that the full consideration had been paid. On 25th April 1924 *A* brought a suit for a declaration that the sale deed was fraudulent and that contrary to the recital in the deed the consideration had not been paid in full. The suit was dismissed but it was held that the transaction was a completed one and that a particular portion of the consideration remained unpaid. *A* therefore instituted a suit on 28th August 1928 for the enforcement of his statutory charge for the unpaid purchase price and obtained a decree for the sale of the property for the amount claimed by *A* together with interest. Only a portion of the amount was realized in the sale, (*A* himself being the purchaser) and *A* claimed the balance in an application under O. 34, R. 6, Civil P. C. :

Held : that the action was not one for compensation for the breach of registered contract but for the enforcing of a statutory obligation under S. 55, T. P. Act, and as such the application was governed by Art. 111, Lim. Act, and not by Art. 116, and consequently the application was barred by limitation : *Case law discussed.* [P 47 C 1, 2]

(b) Precedent—Extent of authority—Decision expressly directed to one point only is not authority on point not discussed therein.

A decision which was expressly directed to one point and one point only cannot be considered a decision on a point which was not discussed therein. [P 46 C 2]

(c) Transfer of Property Act (1882), Ss. 55, 108-A, Cl. (c)—Quiet enjoyment—Covenant of, is not part of contract under S. 55, as it is under S. 108 (A), Cl. (c), but is merely statutory obligation.

Under S. 108 (A), Cl. (c), the so-called covenant of quiet enjoyment is deemed to be a part of the contract and to be read into the contract, whereas under S. 55 it is not a part of the contract but a statutory obligation merely. [P 47 C 1]

S. M. Mullick and *B. P. Sinha*—for Appellants.

L. N. Sinha and *K. N. Varma*—for Respondent.

Wort, J.—The only question in this appeal is one of limitation. The appellants were the defendants in two actions to which I shall refer and respondents in an application under O. 34, R. 6, Civil P. C., for the balance of the purchase price of certain property remaining unsatisfied after the enforcement of the statutory lien. The circumstances are as follows: On 5th February the respondent in this appeal sold certain property to the appellants for a sum of Rs. 6,000. In the kabala there was a recital to the effect that the full consideration had been paid. On 25th April 1924, however, the vendor brought an action claiming a declaration that the sale deed was fraudulent, and that contrary to the recital in the deed the consideration had not been paid in full. This action was dismissed, but it was held that the transaction was a completed one and that a sum of Rs. 4,742 of the consideration remained unpaid. Appeals to the High Court failed. As a result of that litigation, another suit was brought by the vendor on 28th August 1928 for the enforcement of her statutory charge for the unpaid purchase price. She claimed and succeeded in obtaining a decree for sale of the property for a sum of Rs. 7,657 against her claim for Rs. 4,742 together with interest. In execution the

property was put up for sale and realized a sum of Rs. 6,000, the vendor herself being the purchaser. There remained a balance therefore of Rs. 1,657 as the deficiency which together with interest amounted to Rs. 3,589 which sum she claimed in the application under O. 34, R. 6. In the Court below the application succeeded and, as regards the question of limitation which arises in this appeal, the learned Judge took the view that if Art. 111, Limitation Act, applied, time ran from 11th July 1928, the date upon which the judgment of this Court was pronounced in the appeal arising out of the case instituted on 25th April 1924, that is to say the date upon which the contract was completed, the defendants then having acccepted the title. But in the circumstances it was unnecessary for the Judge to decide that question, as he came to the conclusion that Art. 116, Limitation Act, applied because the right which the applicant was endeavouring to enforce was under a contract in writing registered; and that is the question which is for determination by this Court.

Mr. Sinha who appears on behalf of the respondent argued that there were three Articles under consideration, Art. 111, Limitation Act, which provides a period of three years' limitation for a vendor of an immoveable property for personal payment of the unpaid purchase money ; Art. 116, to which I have already referred providing a period of six years; and Art. 132, a period of 12 years' limitation to enforce payment of money charged upon an immoveable property. It is not now contended that Art. 132 applies as it is admitted, and is clearly the fact, that so far as the lady's remedy of enforcing a charge upon the immoveable property is concerned, that was exhausted by her action of 28th August 1928. We are therefore limited to the question whether Art. 116 or Art. 111, Limitation Act, applies. It is contended by Mr. Sushil Madhab Mullick who appears on behalf of the defendants-appellants, relying upon certain authorities to which I shall make reference, that Art. 111 applies. On the contrary Mr. Sinha on behalf of the respondent urges that Art. 116 applies, and in support of that contention it is suggested that the applicant was enforcing her contract contained in her conveyance to the defendants, and that there was an implied agreement by the defendants to pay the purchase money. That there was an implied agreement that the purchaser should pay the purchase money under the contract for sale or conveyance cannot be disputed. But that does not dispose of the matter. The manner in which this question arises will appear from the decisions relied upon respectively by the parties to the appeal.

Reference was first made to the decision in the well-known case in 44 I A 65,[1] where their Lordships of the Judicial Committee of the Privy Council decided in an action for royalties under a mining lease that although the royalties were in a sense rent, yet as the royalties were payable under a registered contract, the action was governed by Art. 116, Limitation Act, and not Art. 110. This was in consonance with a number of decisions of the High Courts in India and it is needless to say that since the date of that decision in all cases where there has been either a claim for compensation under a contract in writing registered or a claim to enforce sums of money payable under a contract in writing registered, Art. 116 has always been held to apply. It is very largely on the principle of those decisions that Mr. Sinha on behalf of the respondent in this case relies. To revert for the moment to some of the earlier decisions on the point under discussion, I propose first to quote the decision in 24 Mad 233,[2] which is a decision in point. That was an action brought to recover unpaid purchase money due in respect of a sale of land which was held in 1894, and the question there to be considered was whether Art. 111 applied or whether Art. 132, Limitation Act applied. As regards the enforcement of the lien the learned Judges in that case decided that Art. 111 applied to a decision which it is contended and rightly contended has since been overruled. But the second point with which the learned Judges dealt was the question of the period of limitation to be applied to the claim on what was described as the personal remedy. It was there argued that as it was under a registered instrument Art. 116 applied. The learned Judges in the course of their judgment stated :

> Article 116 presupposes a contract in writing registered which contract has been broken. Here there was no contract in writing so far as regards the payment of the purchase money. On the

1. Tricomdas Cooverji Bhoja v. Gopinath Jiu Thakur, A I R 1916 P C 182=39 I C 156=44 I A 65=44 Cal 751 (P C).
2. Avuthala v. Dayumma, (1901) 24 Mad 233.

contrary the registered document states that the money has been paid, and it is therefore in spite of the document and not under it that the plaintiff sues.

There was a similar observation in a case reported in the 9th Vol. of the Rangoon Series to which I shall refer later. Mr. Sushil Madhab Mullick very strongly relies upon this decision in support of his argument. I then come to a series of cases which from one point of view give us no assistance in deciding the point under discussion, as it will be seen that in all the cases to which I am now about to make reference there was an express contract in writing registered under which the party claiming sued. The first of these is the case in 25 Mad 55[3] where during the course of the argument it had been stated that there was a contract implied by law collateral to the sale deed after the same had been executed by the plaintiff and accepted by the defendant. Sir Arnold White, C. J. and Bhashyam Ayyangar, J. pointed out that that argument overlooked the fact that in a document which was known as Ex. 4 in the case all the terms of the contract including the term relating to the payment of consideration were found. It is therefore quite clearly a case in which there was a contract in writing registered. The decision to which I, a moment ago, made reference as overruling the first part of the decision of the learned Judges reported in 24 Mad 233[2] is contained in 29 Mad 305[4] where the learned Judges relied upon the decision of the Privy Council in 31 Cal 57[5] and made these observations:

> On the authority of the judgment of the Privy Council in 31 Cal 57,[5] which is since the decision of the lower appellate Court in this case, we must hold that the District Judge was wrong in his view that the case was governed by Art. 111 of the Schedule to the Limitation Act. It is pointed out in the judgment of the Privy Council that the charge which a vendor obtains under S. 55, T. P. Act, is different in its origin and nature from the vendor's lien given by English Courts of equity to an unpaid vendor.

They then proceeded to apply Art. 132, Lim. Act. I now refer to the decision in 27 I A 93,[6] a decision upon which Mr. Sinha on behalf of the respondent relies as deciding by inference that it is not Art. 111, Lim. Act, which applies to the facts of this case. In this case there was a claim for a sum of Rs. 33,133 odd as the balance of the amount of consideration for a sale deed dated 18th February 1888. The action was brought on 6th December 1892. It will be seen therefore that the action was more than three years after the date upon which it must be deemed that the contract for sale was completed. The only question expressly decided by their Lordships of the Judicial Committee of the Privy Council was whether in view of the fact that the kabala contained a recital that consideration had in fact been paid, the parties were open to prove that the consideration had not in fact been paid. Lord Davey, in delivering the opinion of their Lordships of the Judicial Committee of the Privy Council, makes this observation:

> The Evidence Act does not say that no statement of fact in a written instrument may be contradicted by oral evidence, but that the terms of the contract may not be varied.

The learned Law Lord was referring to S. 92, Evidence Act. They therefore overruled that point. No mention was made nor did any discussion take place as regards the point of limitation; and it is said by Mr. Sinha on behalf of the respondent that, as the point was not taken (this is how I understand his argument) it must be assumed that at any rate by inference it was decided that the Article gave a period of limitation greater than the period which had lapsed between the date of the sale and the date of the action, and that, in the circumstances could not be Art. 111. Apart from the bare statement that it was an action for the recovery of the balance of an unpaid consideration we have no details regarding this point and quite clearly it is not open to us to hold that a decision which was expressly directed to one point and one point only could be considered a decision for a point which as I have already stated was not discussed.

Reference was made to two decisions of this Court. The first was the case in 8 Pat 860.[7] That case gives no assistance to the respondent as it was clearly a case of an express agreement in writing registered which it was sought to enforce in the action. But the other decision of this

3. Seshachala Naickar v. Varada Chariar, (1902) 25 Mad 55=11 M L J 318.
4. Ramakrishna Ayyar v. Subrahmania Ayyer, (1906) 29 Mad 305.
5. Webb v. Macpherson, (1904) 31 Cal 57=30 I A 238=8 Sar 554 (P C).
6. Sahlal Chand v. Indarjit, (1900) 22 All 370=27 I A 93=7 Sar 702 (P C).
7. Ram Rachhya Singh Thakur v. Raghunath Prasad Misser, A I R 1930 Pat 46=122 I C 244=8 Pat 860.

Court in 8 P L T 590[8] does create some little difficulty. On a first reading it appears to be against the contention of Mr. Sushil Madhab Mullick appearing on behalf of the appellants. That was a case in which the plaintiff claimed alternatively possession of a certain property of which he had taken a lease or the return of the salaami. In the result he failed in his first claim but succeeded in the second, and the question that arose was whether Art. 62 or Art. 97, Limitation Act, applied. Das, J. (as he then was) made this statement :

> The question then which I have to consider is whether an action for the breach of duty declared by the express provision of the legislature as contained in S. 108, T. P. Act, is regulated by Art. 62 or Art. 97 if the plaintiff sues to recover the money paid by him as salaami. In my opinion it is quite impossible to maintain this view. It seems to me that an action for breach of duty declared by S. 108, T. P. Act, is regulated by Art. 116, Limitation Act, if the lease is in writing registered, the obligation being deemed to be embodied in the contract.

The only answer to that decision given by Mr. Sushil Madhab Mullick is based on the respective provisions of S. 55, T. P. Act, which applies to this case and S. 108 which applied to the case to which I have referred. Under S. 108 in 8 P L T 590[8] the plaintiff was endeavouring to enforce Cl.(c) of sub-s. (A) of S. 108 which provides:

> The lessor shall be deemed to contract with the lessee that, if the latter pays the rent reserved by the lease, and performs the contract binding on the lessee, he may hold the property during the time limited by the lease without interruption,

what is known in English leases as the covenant for quiet enjoyment. The words of the section are "the lessor shall be deemed to contract." Under S. 55 (5) (b) :

> The buyer is bound to pay or tender, at the time and place of completing the sale, the purchase money to the seller or such person as he directs.

Mr. Mullick's contention is based upon the difference in the language used by the two sections of the statute, and 8 P L T 590[8] is explicable on that ground. In the one case the so-called covenant of quiet enjoyment is deemed to be a part of the contract and to be read into the contract, whereas under S. 55 it is not a part of the contract but a statutory obligation merely. In my judgment that contention is correct and in the case before us it is not action for compensation for the breach of contract in writing registered but the enforcing of a statutory obligation. Therefore, it is Art. 111, Limitation Act, that applies and not Art. 116.

The decision of the Rangoon High Court to which I made a passing reference is that in 9 Rang 56.[9] That was an action in which the plaintiffs sought to recover a part of the unpaid purchase money under an agreement of December 1924. The learned Judges of the Rangoon High Court held that Art. 116 applied on the footing that there was an express contract to pay the consideration within a period of three months. One of the main questions considered in the High Court and by their Lordships of the Judicial Committee of the Privy Council was the question of liability of the parties which is irrelevant for the purposes of the case before us, but their Lordships made this observation on the question of limitation : 60 I A 183.[10] "The learned Judges" (referring to the Judges of the High Court at Rangoon),

> held that the liability of appellant 3 arose, in virtue of the conveyance, upon a contract in writing registered within the meaning of Art. 116, Limitation Act, and that the six years' period allowed by that article applied with the result that the suit was well within time. Their Lordships think that, having regard to the judgment of this Board in 44 I A 65,[1] this view was manifestly correct. It is therefore, unnecessary for them to consider the applicability of Art. 111, by which a shorter period is prescribed and upon which reliance is placed for the company.

The decision, although urged in support of the contention by Mr. Sinha appearing on behalf of the respondent, does not in any way affect the view taken of this case having regard to the fact that there was there an express contract to pay the consideration within a certain time. In my judgment on a proper view of this case Art. 111, Limitation Act, applied, and consequently the application was barred by limitation. The appeal succeeds and the application in the Court below is dismissed with costs throughout. In the circumstances the revisional application which is also made to this Court in conjunction with the appeal need not be considered.

Agarwala, J.—I agree.

R.M./A.L. *Appeal allowed.*

8. Nabin Chandra Ganguli v. Munshi Mander, A I R 1927 Pat 248=101 I C 707=8 P L T 590=6 Pat 606.

9. Ram Raghubir Lal v. United Refineries (Burma) Ltd., A I R 1931 Rang 139=134 I C 737=9 Rang 56.

10. Ram Raghubir Lal v. United Refineries (Burma) Ltd., A I R 1933 P C 143=142 I C 788=60 I A 183=11 Rang 186 (P C).

A. I. R. 1937 Patna 48

WORT, J.

Surpat Sinha and *others*—Defendants—Appellants.

v.

Pratap Mandal — Plaintiff — Respondent.

Appeal No. 83 of 1934, Decided on 12th October 1936, from decision of Sub-Judge, Purnea, D/- 25th July 1935.

Bihar Tenancy Act (8 of 1934), S. 115—Interpretation—Expression 'thereafter' does not mean 'after particulars have been finally recorded after recourse to all the provisions in Ch. 10.'

If the expression 'thereafter' in S. 115 is interpreted so as to mean 'after the particulars have been finally recorded after recourse to all the provisions contained in Ch. 10,' it is definitely adding something to S. 115 of the Act which does not appear in that section and hence such interpretation is wrong: *AIR 1922 Cal 146, Not foll.* [P 48 C 2]

Jagdish Chandra Sinha—for Appellants.

Mahabir Prasad and *D. L. Nandkeolyar*—for Respondent.

Judgment.—This is the landlord's appeal in an action brought by the tenant under S. 104-H, Bihar Tenancy Act. The record of rights was finally published on 27th December 1929, and recorded the tenant as 'istemrari lekenmukarrari nehi'. It is against that record that the suit was brought as I have already indicated. The only question in the appeal is whether the tenant was entitled to the presumption arising by reason of S. 50 of the Act, that is to say, whether it should be presumed in this case that as the tenant was holding at a rent which had not been changed during the 20 years immediately before the institution of the suit, he had held at that rent since the Permanent Settlement, therefore the rent was not liable to enhancement. It is contended on behalf of the tenant-respondent that he is entitled to that presumption in spite of S. 115 of the Act. The words of that section I propose to read; they are:

When the particulars mentioned in S. 102, Cl. (b) have been recorded under this chapter in respect of any tenancy, the presumption under S. 50 shall not thereafter apply to that tenancy.

Had it not been for a number of decisions (one only however directly in point) I should not have the slightest doubt as to what that section means and its proper construction. It seems to me plain that when the record is made, or to use the words of the section 'when the particulars have been recorded' (and they have been recorded in this case) from the time of that record, the presumption under S. 50 of the Act shall not apply. The opposite view is best expressed, by quoting the words of Mookerjee, J., in the decision in 49 Cal 919[1] at p. 922. In referring to the contention between the parties Mookerjee, J., said:

We are unable to accept this interpretation of the scope of S. 115. The expression 'thereafter' in that section clearly signifies 'after the particulars have been finally recorded after recourse to all the provisions contained in Ch. 10 for the attainment of finality in this respect.'

During the course of the argument in that case reference was made to 37 Cal 30.[2] But the point which is before me was not expressly decided in that case; indeed, I might say, that the learned Judges definitely left that matter open. They made this statement:

It is not necessary to consider in this case whether 'recorded' means recorded after all chances of an amendment of the record under any other provision of the chapter are over, including a suit as contemplated by S. 111.

There are decisions of this Court in actions brought under sections other than S. 104-H upon which this action depends. Mr. Mahabir Prasad appearing on behalf of the respondents contends that by inference at any rate those decisions assist him in his contention. But in my judgment the plain meaning of S. 115 of the Act can hardly raise any doubt. But as I have said the only doubt that arises is by reason of the decision of the learned Judges of the Calcutta High Court to which I have referred. I ought to add with regard to the decision in 49 Cal 919[1] that it does not appear (if I may say so with great respect to the learned Judges who decided that case) that by coming to the conclusion that the section meant 'after the particulars have been finally recorded after recourse to all the provisions contained in Ch. 10' the learned Judges definitely add something to S. 115 of the Act which does not appear in the section. I find myself in great difficulty in coming to that conclusion. In the view that I take the presumption under S. 50 of the Act was not a presumption upon which the tenant in this case could rely. It is admitted that that is the only point in the

1. Prasanna Kumar Sen v. Durga Charan Chakravarti, A I R 1922 Cal 146=70 I C 537=49 Cal 919=26 C W N 947.
2. Pirthi Chand Lal v. Basarat Ali, (1910) 37 Cal 30=3 I C 449=13 C W N 1149.

case, and if that point is decided against the plaintiff, he necessarily fails in his suit. For the reasons which I have stated, I think this appeal ought to be allowed and the plaintiff's suit dismissed with costs throughout. The plaintiff may have leave to appeal.

M.D./D.S. *Appeal allowed.*

A. I. R. 1937 Patna 49

ROWLAND, J.

Rameshwar Bhagat and *another*—Petitioners.

v.

Thakur Jeban Narayan Singh, Plaintiff and *others*, Defendants — Opposite Parties.

Civil Revn. No. 214 of 1936, Decided on 31st August 1936, from order of Munsif, Banka, D/- 27th April 1936.

(a) Practice — Addition of parties—Even though suit is already decreed ex parte, Court should add persons entitled to be added as parties and give them opportunity to set aside ex parte decree.

Where suit is decreed ex parte and persons entitled to be added as parties to the suit make an application to add them as parties and to set aside the ex parte decree, Court should add them as parties and give them an opportunity to set aside the ex parte decree : *10 P L T 442, Foll.* [P 49 C 2]

(b) Bihar Tenancy Act (1934), S. 26 (O), Cl. (3) (b)—Consent of landlord shall be deemed to have been given on date on which receipt for deposit was granted—Objection by landlord as to sale price and distribution of rent—Objection cannot affect S. 26 (O), Cl. (3) (b).

Landlord's consent shall be deemed to have been given on the date on which the receipt for deposit of sum, as transfer fee is granted by Collector. If landlord objects to the alleged sale price and distribution of rent, landlord has a separate remedy under S. 26 (*J*) and his objection does not affect the effect of S. 26 (O), Cl. (3) (b) : *A I R 1936 P C 49, Rel. on.* [P 50 C 1]

(c) Practice — Addition of Parties—Rent suit—Claim by intervener alleging purchase of holding to be added as party—Statutory recognition taking effect after institution of suit—Court even then must add intervener as party.

A Court has under O. 1, R. 10, Civil P. C. power to add any person as party whose presence is necessary in order to enable a Court efficiently and completely to adjudicate upon and settle the questions involved in the suit. This power is given to the Court at any stage of the proceedings. [P 50 C 1]

Where in a rent suit the intervener, alleging purchase of the holding claims that he should be added as party to the suit the Court must add the intervener as party even though statutory recognition as transferee has taken place after the institution of the suit : *A I R 1930 Pat 323 and 592, Rel. on.* [P 50 C 2]

K. N. Lal—for Petitioners.

Sarjoo Prasad—for Opposite Parties.

Order.—The petitioners are persons claiming to be added as parties-defendants in a rent suit alleging that they had purchased the greater part of the holding in suit in November 1929 in execution of a mortgage decree. The petitioners on a previous occasion had filed a claim case which was allowed in 1933. The present plaintiff as decree-holder had sought to attach and put to sale the crops on the holding now in suit. The claim of the present petitioners was allowed.

The petitioners in January 1936 made an application in accordance with S. 26 (O), Bihar Tenancy Act, to deposit with the Collector Rs. 120 as transfer fee payable to the landlord, and as stated in the Munsif's judgment a receipt, dated 6th February 1936, was granted to them. They applied on 12th March 1936 to be added as a party in the suit and the application was refused on 27th April 1936, the Munsif being of opinion that he could not implead the interveners when the plaintiff objected.

A preliminary objection is taken that this application is infructuous as the suit has already been decreed ex parte against the raiyat defendants. I do not find any substance in this objection. The circumstances were similar in 10 P L T 442[1] in which the order was that if the Munsif found that the petitioners were entitled to be added as parties he should give them an opportunity to set aside the ex parte order, that is to say, if these petitioners ought to have been added as parties, the fact that since the disposal of their application the suit has been decreed ex parte will not stand in their way. The Munsif thought that the petitioners were not entitled to be joined as parties because their deposit of the transfer fee was made after the commencement of this suit and so the recognition of them as transferees by the landlord would also be deemed to have taken place after the commencement of the suit.

For the petitioners reference is made to the Privy Council decision in 15 Pat 268[2] as authority for the proposition that the recognition will be considered to take

1. Nilambar Jha v. Chandradhari Singh, (1929) 10 P L T 442.
2. K. C. Mukerjee v. Mt. Ramratan Kuar, A I R 1936 P C 49=160 I C 105=15 Pat 268 (P C).

effect retrospectively. Their Lordships in that case were dealing with S. 26 (N) which refers to transfers made before the first day of January 1923. The decision is clear authority that both S. 26 (N) and S. 26 (O) are to be applied in accordance with their terms, but S. 26 (O), Cl. (3) (b) is perfectly clear as to the date on which the landlord's consent is to be deemed to have been given to the transfer. That date, as stated in the section, is the date on which the receipt for the sum is granted by the Collector in this case 6th February 1936. It has been argued for the opposite party that this supposed consent has not yet matured into finality, because the landlord has objected both to the alleged sale price which, he says, has been understated and also to the proposed distribution of the rent between the portion of the holding transferred and the portion remaining in the hands of the original tenant. The effect of such applications by the landlord is provided for in S. 26 (J). The landlord's remedy in the case of understatement of the market value is to get a sum of money by way of penalty and if the distribution of rent is inequitable his remedy is to get an order distributing the rent equitably. There is nothing here to take away the effect of S. 26 (O) (3) (b) providing that the consent shall be deemed to have been given on the date on which the receipt for the deposit is granted by the Collector.

The question then arises whether in such a case as the present it was proper to join the interveners as parties. The petitioners rely on O. 1, R. 10, Civil P. C., and contend that they are persons who ought to have been joined. The opposite party contends that the petitioners were not necessary parties at the time of the institution of the suit and that the question of who are proper parties should be determined with reference to the state of things at the institution of the suit and not at a later date. However O. 1, R. 10, Cl. (2) authorizes adding the name as a party of any one

> whose presence before the Court may be necessary in order to enable the Court effectively and completely to adjudicate upon and settle all the questions involved in the suit.

This power is given to the Court "at any stage of the proceeding"; and therefore in my opinion the power may be exercised in order to bring on the record persons who are found to be proper parties at any stage, not necessarily only those who were proper parties on the date of the institution of the suit. This view seems to me to be consistent with O. 22, R. 10 which makes similar provision for assignment etc. of interest during the pendency of a suit; but in the present instance the interest of the interveners had come into existence some years before although the recognition only came during the pendency of the suit. It has been held in more than one decision of this Court that where an intervening third party alleges his purchase of the holding and alleges recognition of that transfer by the landlord the trial Court must add the intervener as a party (11 P L T 243[3] and 11 P L T 628[4]). These are cases in which recognition before the institution of the suit was alleged by the transferees. But I think the principle must be held applicable also to the case where there is a statutory recognition taking effect after the institution of the suit.

In the result the application will be allowed, the order of the Munsif set aside, the petitioners must be added as parties to the suit and it will be open to them to apply to the Munsif to set aside the ex parte decree and to re-hear the suit in their presence. The petitioners will get their costs of this application: hearing fee two gold mohurs.

P.R./D.S. *Application allowed.*

3. Sham Sunder Kuer v. Kailas Singh, A I R 1930 Pat 323=125 I C 119=11 P L T 243.
4. Kasi Das v. Krishna Gopal Singh, A I R 1930 Pat 592=128 I C 790=11 P L T 628.

A. I. R. 1937 Patna 50

VARMA AND ROWLAND, JJ.

Durga Prasad Shraff—Appellant.

v.

Mahadeb Lal Singhania and *others*—Respondents.

Civil Misc. Appeal No. 299 of 1935, Decided on 8th October 1936, from order of Sub-Judge, Bhagalpur, D/- 22nd July 1935.

(a) Execution sale—Setting aside—Attachment not mentioned in sale-proclamation is not material irregularity in publishing sale.

Attachment does not mean an incumbrance or a charge on the property within the meaning of O. 21, R. 66 (2) (c), Civil P. C. Attachment means only that the party whose property is attached is not allowed to sell the property. It does not create any title. Hence it is not necessary to notify it in the sale proclamation and hence it is not material irregularity if in publishing the sale, the attachment on the property is not notified : *25 Cal 179 (P C), Ref.* [P 51 C 2 ; P 52 C 1]

(b) Execution sale—Setting aside—Material irregularity in conducting sale—Court allowing subsequent decree-holder to set-off whole purchase money against his debt knowing that there was another decree-holder entitled to rateable distribution—Sale should be set aside owing to material irregularity.

A obtained a money decree against *B* and attached some properties in execution. After this *C* obtained a money decree against *B* and also attached and sold the same property in its execution. *C* himself purchased the properties and obtained a set-off of the whole purchase money in his money decree under O. 21, R. 72, Civil P. C. :

Held : that there was material irregularity in conducting the sale as the Court did not follow the mandatory provisions in O. 21, R. 72 (2) and R. 84, Civil P. C., inasmuch as it allowed the subsequent decree-holder to set off the whole purchase money against his debt when the Court knew that there was another decree-holder who was entitled to rateable distribution. [P 53 C 1]

K. N. Moitra—for Appellant.

Sultan Ahmed and *K. Dayal*—for Respondents.

Varma, J.—This is an appeal on behalf of one Durga Prasad Shraff who was a decree-holder and whose application under O. 21, R. 90 for setting aside a sale held at the instance of respondents first party who were subsequent decree-holders was dismissed. It appears that on 18th April 1933 the appellant instituted a money suit against his judgment-debtors who are respondents second party in this case and that suit was numbered 65 of 1933. A number of properties were attached before judgment and these attachments took place on 3rd September, 6th September and 7th September 1933. He succeeded in obtaining a decree on 22nd March 1934 for a sum of Rs. 7,327-13-6 with costs. Then he started execution proceedings by an application dated 6th April 1934 which was numbered as Execution Case No. 65 of 1934. He again got the properties attached on 13th, 15th and 18th April 1934. Then on 21st May 1934 it appears that the respondents first party sued the respondents second party in the same Court for a sum of Rs. 10,508 based on a handnote and that suit was numbered as Money Suit No. 93 of 1934. This suit was, however, very quickly decided inasmuch as a compromise was arrived at and a decree was passed on the compromise on 30th June 1934 for Rs. 11,301. Execution was started in this case also on 23rd July 1934, and it was numbered as Execution Case No. 166 of 1934. Three properties belonging to the judgment-debtors were sold on 3rd December 1934 for Rs. 3,700. The appellant in this case having heard of this sale on 16th December 1934, filed the application under O. 21, R. 90 on 21st December 1934. This application was dismissed on 22nd July 1935 and the present appeal is directed against that order.

The grounds taken before the Court below were that the properties were sold at a grossly inadequate price causing substantial injury to the applicant; that the processes were not properly served and that the decree-holder and the judgment-debtors colluded with one another and the decree-holder purchased the property for the benefit of the judgment-debtors themselves. Now the execution Court went into these matters and came to the conclusion that the processes were not suppressed ; that it was too late to go behind the decree in the execution proceedings ; that no fraud had been made out, and he further held that there was nothing to indicate that the properties were sold for an inadequate price. On these grounds he rejected the application under O. 21, R. 90.

Mr. K. N. Moitra appearing on behalf of the appellant has raised several points. First of all he says that as he was a person who had got the properties that were sold attached after his decree, he was a person interested in the properties and he could file an application under O. 21, R. 90. This point has been conceded by Sir Sultan Ahmed appearing on behalf of the respondents.

There were several other points urged, for example, that the appellant had a prior right to put up the properties to sale in his execution, especially when he had got the properties attached before there was any suit or decree obtained by the respondents first party. There does not seem to be any authority for that proposition ; but the next point urged deserves some consideration and that was whether there was any material irregularity inasmuch as the Court did not notify in the sale proclamation that there was an attachment subsisting in the execution of the decree obtained by the present applicant. So far as this point is concerned, as a proposition of law, I doubt very much if an attachment can be said to be an incumbrance or a charge upon the property. As was pointed out in 25 Cal 179[1] an attachment

1. Motilal v. Karrabuldin, (1898) 25 Cal 179=24 I A 170=1 C W N 639=7 Sar 222 (P C).

means only this: that the party whose property is attched is not allowed to sell the property. It does not create any title. I am of opinion that it was not necessary to mention this attachment in the sale proclamation. There was another point with which I am afraid I cannot agree. Mr. Moitra referred to S. 64, Civil P. C., which prohibits any private transfer during the period of attachment. The section runs as follows :

Where an attachment has been made, any private transfer or delivery of the property attached or of any interest therein and any payment to the judgment-debtor of any debt, dividend or other moneys contrary to such attachment, shall be void as against all claims enforceable under the attachment.

Then there is an explanation which runs as follows :

For the purposes of this section, claims enforceable under an attachment include claims for the rateable distribution of assets.

Now this refers to private transfer or private delivery of property attached. Although Mr. Moitra tried his very best to argue before us with his usual ability that this rule can be extended to transfers or sales that took place under orders of the Court, I am of opinion that there is nothing to justify reading into this section anything which extends its meaning to this extent that even sales under orders of the Court are not allowed if a property is once attached.

These are the chief points that were urged by Mr. Moitra, but the matter does not end here. There is one thing more that has to be taken into consideration and that is that the Court that sold these properties in execution of the decree obtained by the respondents first party knew that there was this attachment. This is apparent from the order sheet in Order No. 11 of the present execution case, dated 1st October 1934. Now when the property was sold for Rs. 3,700 it appears that the poundage fee was paid on 3rd December 1934 and then the Court allowed a set-off as prayed for by the decree-holders. All this happened on 3rd December 1934 and 4th January was the date fixed for the confirmation of sale ; that is to say, it is clear from the order sheet that the decree-holders who purchased the property did not bring any money into Court. Now let us see how far this proceeding affects the present sale. R. 84 of O. 21 runs as follows :

On every sale of immoveable property the person declared to be the purchaser shall pay immediately after such declaration a deposit of twenty-five per cent on the amount of his purchase money to the officer or other person conducting the sale, and in default of such deposit, the property shall forthwith be re-sold. (2) Where the decree-holder is the purchaser and is entitled to set off the purchase-money under R. 72, the Court may dispense with the requirements of this rule.

No doubt the Court can dispense with the deposit of the purchase money; but it can do so subject to the provisions of R. 72. Now R. 72 says :

No holder of a decree in execution of which property is sold shall be precluded from bidding for or purchasing the property unless an express order to that effect is made by the Court. (2) Where a decree-holder purchases the property the purchase money and the amount due on the decree may, subject to the provisions of S. 73, be set off against one another, and the Court executing the decree shall enter up satisfaction of the decree in whole or in part accordingly.

Now we have to see what S. 73 says. S. 73 which is a section dealing with the question of rateable distribution of proceeds of an execution sale among decree-holders runs as follows :

(1) Where assets are held by a Court and more persons than one have, before the receipt of such assets, made application to the Court for the execution of decrees for the payment of money passed against the same judgment-debtor and have not obtained satisfaction thereof, the assets, after deducting the costs of realization, shall be rateably distributed among all such persons.

Then there are the provisos. Now here in this case there was a decree in favour of the present appellant. He had initiated execution proceedings on account of which the properties were attached and amongst the attached properties were the properties that were ultimately sold to the respondents first party and till then the present appellant's decree was not satisfied. On these facts S. 73 comes into play at once and the next thing to be done by the Court was that it should have rateably distributed the proceeds of the execution sale among the creditors. The decree-holders purchasers could not be allowed to set off the whole purchase money against their own debt as was done in this case. In this connexion I would like to refer to O. 21, R. 85 as well. R. 85 deals with the purchase money which must be deposited before the close of the 15th day from the sale of the property; and if this is not done, then R. 86 comes into play which is imperative and says that the property shall be re-sold if the conditions contemplated by R. 85 are not satisfied. In this particular case although there was a creditor whose debt was not satisfied and who had obtained a decree, the Court

allowing a set off to the subsequent decree-holders has acted against the mandatory provisions of law. Sir Sultan Ahmed on behalf of the respondents first party has urged that setting off the purchase money cannot be a ground for setting aside the sale inasmuch as R. 90 contemplates "material irregularity or fraud in publishing or conducting it." So far as I understood his argument it was this: that a sale cannot be set aside for material irregularity or fraud which takes place after the sale; but as I have mentioned above, it is clear from the facts narrated that material irregularity in conducting the sale also is a matter to be taken into consideration and here, as I have already pointed out, the Court has not followed some of the mandatory provisions of the Code of Civil Procedure in conducting the sale inasmuch as it has allowed the subsequent decree-holders to set off the purchase money against their debt when the Court knew that there was another decree-holder who was entitled to a rateable distribution. In these circumstances I think that the proper order to pass is that the present sale should be set aside. The appeal will be allowed with costs and the property will be resold in pursuance of R. 86.

Rowland, J.—I agree.

K.B./D.S. *Appeal allowed.*

A. I. R. 1937 Patna 53

WORT, J.

Mahendra Nath Sikhar — Plaintiff — Appellant.

v.

Bhabendra Chandra Ray, Defendant and *others*, Pro forma Defendants — Respondents.

Appeals Nos. 81 and 82 of 1934, Decided on 9th October 1936, from appellate decrees of Sub-Judge, Purulia, D/- 4th September 1933.

Grant—Presumption — Lost grant — Presumption of lost grant from a state of facts is a question of fact — The Court is not bound, but it may presume a lost grant—Question of presumption of lost grant arises only on long possession under the claim of definite right.

It is clear that whether a lost grant is to be presumed from a given state of facts is a question of fact. A Court is not bound to presume a lost grant but it may do so. It is only in case of long possession under the claim of definite right that the question of presumption of a lost grant arises : *A I R 1927 Cal 210, Foll.* ; *6 Cal 394* (*P C*) and *A I R 1914 P C 48, Disting.* [P 53 C 2]

S. C. Mazumdar—for Appellant.

R. S. Chatterji—for Respondents.

Judgment. — I do not propose to say very much with regard to this case, as Mr. Mazumdar agrees that the whole of his appeal depends upon the finding of the Judge in the Court below that there could be no presumption of a rent-free grant in this case. According to the learned advocate it rests upon the question of whether the Judge is right or wrong in coming to that conclusion. It is abundantly clear that whether a lost grant is to be presumed from a given state of facts is a question of fact ; that is to say, a Court is not bound to presume a lost grant ; it may do so. That is the position in this case. In support of his contention Mr. Mazumdar appearing on behalf of the plaintiff-appellant relied upon the decision in 31 C W N 135,[1] where the Judges of the Calcutta High Court confirmed the decision of the lower Court in its conclusion that "there was a presumption of a lost grant." During the course of the judgment in that case this statement was made :

> The learned Subordinate Judge has presumed the existence of a lost grant. It is only in case of long possession under the claim of a definite right that the question of presumption of a lost grant arises.

The learned Judges of the Calcutta High Court relied upon two authorities (1) 7 I A 240,[2] decided by their Lordships of the Judicial Committee of the Privy Council, a case of a right to a pyne or artificial water-course, and (2) 41 I A 221[3] decided by the Privy Council—a claim to an exclusive right of fishery. The nature of those two cases is only to be stated to realize that it is very different from the nature of the one before me. But apart from that, 31 C W N 135[1] is of no assistance to Mr. Mazumdar for the reason which I have indicated from the statement of the learned Judges :

> It is only in case of long possession under the claim of a definite right that the question of presumption of the lost grant arises.

In the present case the learned Judge in the Court below has made this statement:

1. Kiran Chandra Roy v. Srinath Chakravarti, A I R 1927 Cal 210=100 I C 453=31 C W N 135.
2. Maharani Raj Roop Koer v. Syed Abul Hossein, (1879) 6 Cal 394=7 I A 240=4 Sar 199 (P C).
3. Sri Nath Roy v. Dina Bandhu Sen, A I R 1914 P C 48=25 I C 467=41 I A 221=42 Cal 489 (P C).

"Now, in this particular case there was no definite claim of this right at all," and that in my judgment concludes the whole case. Apart from the other question it is not suggested that the learned Judge has misdirected himself on any question of law. No other point arises in this case. The appeals fail and must be dismissed with costs.

S.C./A.L. *Appeals dismissed.*

A. I. R. 1937 Patna 54

WORT, J.

Bissessar Pathak and *others* — Defendants—Appellants.

v.

Harbans Lal and *others*—Plaintiffs and *another*—Defendant—Respondents.

Appeal No. 237 of 1934, Decided on 13th October 1936, from appellate decree of Addl. Sub-Judge, Shahabad, D/- 18th September 1933.

Nuisance—Village lane is public highway—Osara built on it is nuisance—Person bringing action must observe provisions of S. 91, Civil P. C.—Even assuming that village lane is one over which certain class of community has right, notice to persons interested is necessary under O. 1, R. 8.

There are three kinds of pathway : a public highway, a public path or lane over which a certain class of the community has a right, and a private way. A village lane is of the class of public highway; it has not its origin in custom but in dedication. An osara built on such lane is a nuisance and in an action against it provisions of S. 91 must be observed. But even assuming that such lane is of the second class, notice to other persons interested will be necessary under O. 1, R. 8, Civil P. C. : *15 Cal 460 (F B)* and *17 C W N 73, Expl.*

[P 54 C 2; P 55 C 1]

B. P. Sinha—for Appellants.

Harihar Prasad Sinha—for Respondents.

Judgment. — This appeal has had a somewhat long history having been to this Court on a former occasion and remanded to the trial Court for further consideration, the learned Judge who remanded the case having allowed the plaintiffs to amend their claim. The subject-matter of the suit was an osara, a *nad* and a charan which were said by the plaintiffs to be on a village pathway or lane and it is with regard to that that this action was brought. The trial Court after remand came to the conclusion that the action was incompetent. The learned Judge decided that O. 1, R. 8, Civil P. C., was a bar to the suit. The learned Judge, on appeal, however reversed the decision of the trial Court. Now, I have to point out in the first place that the appeal is limited to one of the three objects to which I referred—the osara only. I am rather surprised that the appellants have so limited their case because I can see no possible answer to their claim even if they had appealed as regards all three: the osasa, the *nad* and the charan. But I repeat that they limit their claim to the osara only and there is no doubt that this osara was built (according to the plaintiffs) on what was either a village path or village lane. In that sense it was a public nuisance, and in my judgment the learned Judge in the Court below has entirely misdirected himself as regards the operation of O. 1, R. 8, Civil P. C. It is contended by the learned advocate for the respondents that this is not a public nuisance within the meaning of S. 91 of the Code as it was not a public high way but was merely a village lane. The decision of Wilson, J. in 15 Cal 460,[1] which was referred to in 17 C W N 73,[2] says that there are three kinds of pathway: a public highway, a public path or lane over which a certain class of the community has a right, and a private way. The words in the decision in *Chuni Lal's case*[1] are these :

> Secondly, there are rights belonging to certain classes of persons, certain portions of the public, such as the freemen of a city, tenants of a manor or the inhabitants of a parish or village. Such rights commonly have their origin in custom.

Now, I have no hesitation in coming to the conclusion that a village lane is not of that class. It is of the class of a public highway; it has not its origin in custom; but a village pathway or lane has its origin in dedication. But I am assuming for the purpose of the argument in this case that it is of the second class. Now, it is not contended, and it certainly could not be, that this is a private way over which one or two or a very limited number of persons have rights. It is a lane or pathway in which the community of the village has a right, and therefore when the plaintiffs sue they are suing with regard to a matter over which numerous persons have the same interest. Now, Jenkins, C. J., in deciding 17 C W N 73[2] while referring to the judgment of Wil-

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1. Chuni Lal v. Ram Kishen Sahu, (1888) 15 Cal 460 (F B).
2. Kali Charan Naskar v. Ramkumar Sardar, (1913) 17 C W N 73=18 I C 67.

son, J. in 15 Cal 460,[1] did not point out that Wilson, J. made this observation :

> First, where such a right is claimed (the learned Judge was referring to the right of the second class), it would seem that a member of the class entitled might, by taking the proper steps under S. 30, Civil P. C., obtain permission to sue on behalf of himself and the other members of the class, anyone who disturbed or sought to disturb the right of way.

The case in which Wilson, J. was giving judgment was the converse of the case which is before me. The person who was claiming the property, over which private, or semi-private or quasi private right existed, wanted to have it freed from that right. But it is to be noted, as I have just stated, that Wilson, J. indicated that the second class of right and actions with regard to the second class came under S. 30 of the former Civil Procedure Code which is now O. 1, R. 8. I have never yet heard it contended that a person or more than one person having a right with regard to a right of way is at liberty to bring an action without notice to other persons interested with the leave of the Court under O. 1, R. 8. That is one aspect of the case. But it is admitted in this case that the plaintiffs made no claim as regards the damages which they themselves suffered, and taking the other view of the case, namely that this was in a sense a public way belonging to the first class of the classes to which Wilson, J. referred, the infringement is a public nuisance and therefore an action could be brought only by observing the conditions laid down in S. 91, Civil P. C. So whichever way one looks at it whether as a public highway or a village lane, some form of consent was necessary. And if we treat it as a lane or as a right of the second class, notice will be necessary and leave also will be necessary under O. 1, R. 8 of the Code. The learned Judge in my opinion clearly misdirected himself on this question of law and his judgment was therefore vitiated. The appeal so far as the osara is concerned is allowed, the judgment of the appellate Court is reversed and the judgment of the trial Court as regards the osara is restored. The appellant is entitled to costs throughout. Leave to appeal is refused.

M.D./D.S. *Appeal allowed.*

A. I. R. 1937 Patna 55

AGARWALA, J.

Lachmichand Jagarnath Firm — Appellant.

v.

Jagoo Lal Jasaraj Firm—Respondents.

Appeal No. 245 of 1934, Decided on 12th October 1936, from appellate decree of Dist. Judge, Purulia, D/- 22nd June 1933.

Partnership—Accounts—Ordinarily no suit for partial accounts lies unless special ground is made out.

Ordinarily a partner is not entitled to partial accounts; before such a suit can be instituted a special ground must be made out. If he wants an account of partnership dealings he must sue for a general account: *A I R 1931 Mad 300, Foll.*

[P 56 C 1]

S. C. Mazumdar—for Appellant.

Baldeo Sahay—for Respondents.

Judgment. — The plaintiff-appellant sued the respondents to recover the price of 18 wagons of coal despatched to Nasirabad. The plaintiff's case was that he had entered into an agreement with the defendants to send coal from Kirkend to Nazirabad; that the defendants were to pay the freight and that the profit on re-sale of the coal was to be shared between them. He further included in his plaint a claim for the estimated profits as well as the price of the coal. The first Court passed a decree directing the defendants to render accounts. In appeal by the defendants that decree has been set aside by the appellate Court which has held that the relationship between the parties was that of partners and that in the absence of a prayer for dissolution of the partnership, the suit as framed was not maintainable. The appellate Court has also held that the suit was not maintainable at Kirkend.

In this second appeal by the plaintiff, it is contended that on the finding arrived at by the Court below, namely that there was a partnership between the parties, the Court should have directed accounts. Reliance has been placed on certain decisions in which it has been held that it is not an invariable rule that a partner is not entitled to maintain a suit for accounts against a co-partner without seeking dissolution of the partnership; but it has been pointed out in the decision in 54 Mad 671[1] that before such a suit can be insti-

1. Krishnaswami Naidu v. Jayalakshmi Ammal, A I R 1931 Mad 300=130 I C 766=54 Mad 671=60 M L J 315.

tuted, a special ground must be made out; that is to say, that ordinarily a partner is not entitled to partial accounts, but if he wants an account of the partnership dealings, he must sue for a general account. In the suit as framed no special grounds for a partial account of the partnership transactions were made out, and could not in the circumstances in which the plaintiff instituted his suit, be made out, for the reason that the plaintiff chose to sue as if he had supplied coal to the defendants on credit and was now entitled to the price of that coal. At a late stage of the litigation the plaintiff offered to amend his plaint; but even in the amendment which was sought to be made it was not alleged that there was any special ground why the general rule should not prevail. In these circumstances the decision of the Court of appeal below was correct and this appeal must be dismissed with costs.

S.C./V.V. *Appeal dismissed.*

A. I. R. 1937 Patna 56

JAMES AND ROWLAND, JJ.

Baijnath Sahu and *another*—Defendants—Appellants.

v.

Jaimangal Prasad Singh and *others*—Plaintiffs and *another*—Defendant—Respondents.

Appeal No. 298 of 1933, Decided on 31st July 1936, from appellate decree of Dist. Judge, Patna, D/- 23rd November 1932.

(a) Adverse Possession—Co-tenant—No definite act of ouster proved—Possession of one tenant-in-common must be treated as possession of both and is not adverse.

Where no definite act of ouster has been proved, the possession of one of the tenants-in-common must be treated as possession of both and cannot be treated as adverse to the other. Unless a definite act of ouster is pleaded, the co-tenant must be regarded as having been in possession of his share of the property: *A I R 1936 Pat 136, Foll.*

[P 58 C 1, 2]

(b) Res judicata—Co-defendants—Previous suit dismissed—Finding adverse to co-defendant is not res judicata—More so when decision in previous suit does not rest on the finding.

A finding adverse to a defendant in a suit cannot be treated as res judicata if the suit be dismissed, more so when the finding was not in fact necessary for the determination of the suit.

[P 57 C 1]

(c) Evidence Act (1872), S. 35—Entry in register of vehicles maintained by Municipality has little corroborative value, without independent evidence.

An entry in a register of vehicles maintained by a Municipality under the Municipal Act can have very little corroborative value without independent evidence of how it came to be made.

[P 57 C 2]

Manohar Lal, *B. N. Rai*, *G. P. Singh* and *K. P. Sukul*—for Appellants.

S. M. Mullick and *B. P. Sinha*—for Respondents.

James, J.—The suit out of which this appeal arises was instituted on the following allegations: Nannu Sahu had two sons, Baijnath Sahu by his first wife and Bundi Sahu by his second. After Nannu Sahu's death Baijnath Sahu and Bundi Sahu entered jointly into possession of his property, but shortly after his death and before 1927 the two brothers amicably separated without partition of property, so that they ceased to be members of a joint family, and they held the inheritance of Nannu Sahu as tenants-in-common. On 27th July 1927, Bundi Sahu sold his half share in a little over half an acre of land and three houses to the plaintiffs. The plaintiffs instituted this suit for partition. The suit was contested by Baijnath Sahu who denied that Bundi Sahu was his brother and denied that Bundi Sahu had any right in the property which he had purported to convey by the sale. He further objected that Bundi had not been in possession of the property within 12 years of the suit, so that any claim of Bundi Sahu or the plaintiffs would be barred by limitation.

The Subordinate Judge found that Baijnath Sahu and Bundi Sahu were sons of Nannu Sahu, but that they had separated and that it had not been proved that this separation had taken place within 12 years of the suit. He found that the plaintiffs had proved the execution of the sale-deed and passing of consideration, but as no possession on the part of their vendor had been proved within 12 years of the date of the suit, he held that the suit was barred by limitation and that it must be dismissed. On appeal the District Judge confirmed the finding of the Subordinate Judge that Bundi Sahu was the son of Nannu Sahu, but on the question of limitation he held that as no definite act of ouster had been proved, the possession of one tenant-in-common could not be treated as adverse to the other, and that therefore the suit could not be properly regarded as barred by limitation. He set aside the decree of the Subordinate Judge and decreed the suit.

In discussing the question of the relationship of Baijnath Sahu and Bundi Sahu,

each of the Courts below gave consideration to the judgment in a suit of 1927. One Ramlal Gop had given land in usufructuary mortgage to Nannu Sahu. Dipa Gop, as the heir of Ramlal Gop, sued Baijnath and Bundi as sons of Nannu Sahu for redemption of the mortgage. Baijnath objected that there had been misjoinder of parties because Bundi Sahu was not his brother. An issue was framed on this question, on which the decision of the Court was that Baijnath and Bundi were both sons of Nannu Sahu; but the suit was dismissed on the ground that the plaintiff, Dipa Gop was not the heir of Ramlal Gop, and so he was not entitled to sue for redemption. The Subordinate Judge treated this judment as evidence of the fact that the claim was asserted at that time by Bundi Sahu. He also referred to admissions made by witnesses which were mentioned in the course of that judgment and of another judgment as evidence of the fact of relationship. The District Judge treated the judgment as binding on Baijnath Sahu: but he criticised the Subordinate Judge for his reference to the statement of the witness taken from that judgment. The District Judge remarked that it was open to the Subordinate Judge to record that in a previous litigation between defendant 1 and defendant 3 it was held that defendant 3 was a son of Nannu.

Mr. Manohar Lal, on behalf of the appellant, Baijnath Sahu, argues that the judgment should have been regarded as inadmissible in evidence. It is not quite clear whether the learned District Judge regarded the finding in that judgment as amounting to res judicata between Baijnath and Bundi; but if he did so regard it, he was in error because a finding adverse to a defendant in a suit cannot be treated as res judicata if the suit be dismissed. The finding was in fact not necessary for the determination of the suit, because if the plaintiff was not entitled to sue for redemption of the mortgage it made no difference for the determination of the suit whether he had impleaded the true heirs of Nannu Sahu or whether he had not. But the finding of the learned District Judge on this question of relationship did not (rest?) exclusively on this judgment of 1928. He apparently regarded the position established by the previous litigation as a point of law; and he then went on to discuss the question of fact whether the relationship had been proved by evidence in the present proceeding. He remarked that a Cart Register of the Barh Municipality showed that Bundi was the son of Nannu Sahu. This Ex. 3 consisted of the two extracts from the register of vehicles maintained by the Barh Municipality under S. 146, Municipal Act.

Under S. 35, Evidence Act, it was admissible as evidence if it proved any relevant fact. Mr. Manohar Lal argued that it should not be regarded as admissible in evidence at all, because no independent proof was given of who made the entry or of who furnished the information on which the entry was based. The entry proves no more than that two persons Baijnath Sahu and Bundi Sahu described as sons of Nannu Sahu were jointly assessed for tax on a bullock cart in two different years. We cannot presume that the description of the ownership of the cart was correctly given or that the information on which the entry was based was furnished by Baijnath Sahu. The entry without independent evidence of how it came to be made, would indeed have very little corroborative value. We know that Bundi Sahu was setting up a claim to be the son of Nannu Sahu and brother of Baijnath, so that unless this entry was made on information furnished by Baijnath, it would have little or no value as evidence of the paternity of Bundi. The learned District Judge then proceeded to accept the discussion of the oral evidence which was made by the Subordinate Judge. The learned Subordinate Judge has discussed the oral evidence of the witnesses for the plaintiffs and the defendants in some detail, giving specific reasons for trusting the evidence of the witnesses Mangru Mia, Babulal Halwai, Bachai Ganreri and Nemchand Teli for the plaintiffs, and taking no account of the plaintiffs' witness Shambehari Sahai, so far as he professes to know anything of the affairs of Baijnath and Bundi. He criticises severely the evidence of the witnesses for the defendants, and gives his reasons for regarding their evidence as untrue. The learned Subordinate Judge concludes this discussion by saying :

> Under all these circumstances I cannot but believe the evidence adduced by the plaintiffs' witnesses, and hold that defendant 3 is also a son of Nannu Sahu.

The learned District Judge has accepted the view of the evidence of these witnesses taken by the learned Subordinate

Judge and in view of the provisions of S. 167, Evidence Act, it would not be proper to remand the case for a decision on facts merely because the learned District Judge took an erroneous view of the legal effect of the judgment of 1928, or rated too highly the value of the evidence of the entry in the Municipal Cart Registers.

Mr. Manohar Lal further argues that the suit should be treated as barred by limitation, since no possession of Bundi Sahu within 12 years of the suit had been proved. The learned District Judge found that Baijnath and Bundi were brothers who were joint at the time of the death of Nannu Sahu. It was alleged by the plaintiffs' witnesses that there had been a separation in mess, but not formal partition of the property at some time after Nannu's death. The learned District Judge held that as no definite act of ouster had been proved, the possession of one of the tenants in common must be treated as possession on behalf of both and could not be, in the circumstances, treated as adverse. Mr. Mahohar Lal argues that there is no evidence of formal partition between the brothers; but there is sufficient evidence of the fact that they were not joint in mess in the technical sense of the word. It was alleged in the plaint that there had been a separation but not formal partition of property and that the appellants were tenants-in-common. This allegation was not specifically denied in the written statement and indeed the form of defence which Baijnath put forward, made it impossible for him to deny specifically that there had been separation of any kind; because his case was that, so far from having ever been joint, there had never been any connexion at all between himself and Bundi Sahu. When he failed to establish this defence, the averment of the plaintiffs was left uncontradicted, that there had been separation but without division of the property. That being so, the learned District Judge was right in holding that since there was no definite proof of ouster, the defendant Baijnath Sahu could not establish adverse possession against his co-tenant : A I R 1936 Pat 136.[1] The defendant Baijnath ought to have pleaded a definite act of ouster; but since a definite act of ouster has not been pleaded, the co-tenant must be regarded as having been in possession of his share of the property.

Lastly Mr. Manohar Lal argues that the Court below should have treated the alienation as invalid from the beginning on the ground that Bundi was joint with Baijnath Sahu at the time when it was made. This point, as Mr. S. M. Mullick objects, was not raised at any stage of the litigation, and it was not taken in the grounds of appeal. It is enough to say that for the establishment of this point Mr. Manohar Lal would rely on the evidence of the plaintiffs' witness Shambehari Sahai whom the learned Subordinate Judge pointedly omitted when he was discussing the evidence of the witnesses regarding relationship, thereby implying that he placed no reliance upon his evidence. I would affirm the decree of the lower appellate Court and dismiss this appeal with costs.

Rowland, J.—I agree.

R.M./A.L. *Appeal dismissed.*

1. Bibi Zainab v. Muhammad Ayub, A I R 1936 Pat 136=161 I C 331=17 P L T 366.

*** * A. I. R. 1937 Patna 58**

VARMA AND ROWLAND, JJ.

(*Sheikh*) *Ghasit Mian*—Appellant.

v.

Thakur Panchanan Singh and *others*—Respondents.

Appeal No. 67 of 1935, Decided on 15th September 1936, from appellate order of Judicial Commissioner, Chota Nagpur, D/- 8th December 1934.

*** * Hindu Law—Widow—Debt on hand-notes — Decree against widow — To make decree binding on reversioners, it is not enough for creditor to show that debt was for legal necessity — There must be some indication in suit that he wanted to make reversioners liable for payment of debt.**

In order to make the estate in the hands of the reversioners, liable for the debts incurred by a widow, on hand-notes, the creditor must not only show that the debt was for some legal necessity so as to bind the reversioners but that there must be some indication in his suit that he wanted to make the reversioners liable for the payment of his debt. [P 62 C 1, 2]

So where a suit on hand-notes was filed only against the widow and a decree was obtained thereon, and on her death, the decree-holder sought to execute the decree against the estate in the hands of the reversioners :

Held : that the mere fact that the decree was obtained during the life-time of the widow and that the property was attached would not be enough to make the decree liable on the reversioners and the estate : *A I R 1925 Cal 401*; *A I R 1915 Cal 141* and *A I R 1927 P C 41, Rel. on.*; *Case law discussed.* [P 62 C 2]

B. C. De and *Jyotirmoy Ghosh* — for Appellant.

S. S. Bose and *P. B. Ganguly* — for Respondents.

Varma, J.—This is an appeal on behalf of the decree-holder who obtained a money decree against Rani Jagdamba Kumari of Hazaribagh. The decree-holder had obtained the decree on two hand-notes one executed by herself and the other by her agent and after her death the decree-holder applied for execution of the decree by selling the property which came into the hands of the reversioners of the estate. They happened to be the sons of a daughter of Rani Jagdamba Kumari's co-wife. In the execution proceedings the reversioners objected under S. 47, Civil P. C., that as the decree was passed against Rani Jagdamba Kumari personally her husband's estate which is under attachment could not be sold in execution of the same. Before the first Court the decree-holder relied upon the cases in 33 Mad 492,[1] 6 Cal 36,[2] 10 Cal 823[3] and A I R 1929 Nag 191[4] for the proposition that the reversioners are bound to repay the debts incurred by the widowed Rani for the benefit of her husband's estate. On the other hand the case in A I R 1925 Cal 401,[5] A I R 1927 P C 41[6] and A I R 1934 Pat 216[7] were relied upon by the Court of first instance for the proposition that a money decree against a widow on the basis of a hand-note makes her liable personally and does not bind the reversioners although if the suit were so framed as to claim relief against the estate the estate could have been bound for the debts incurred for legal necessities by the widow.

The decree-holder went in appeal before the Judicial Commissioner of Chota Nagpur who relying further upon the case in 19 All 300,[8] and distinguishing the case of 47 All 490,[9] dismissed the appeal. Mr. B. C. De, appearing on behalf of the appellant relied upon the case reported in 6 Cal 36[2] in which it was held that in the case of a Hindu widow who borrowed money for the purpose of defraying the marriage expenses of her grand-daughter it could not be properly considered a charge on the estate ; yet on the death of the widow the sum was legally recoverable from the heirs who succeeded to the possession of such estate. What appealed to their Lordships in that case was that if the daughters had not been married before they attained the age of puberty, spiritual consequences of a most serious kind might be expected according to Hindu doctrines to arise both to their deceased father and deceased grand-father, and therefore the widow must be held to have been right in doing what she did to avert such consequences. The next case is the case in 10 Cal 823.[3] This was a case in which a daughter who succeeded to the estate of her father ordered a quantity of lime for the purpose of making repairs to the house, but before paying off the debt the lady died and at the time she died a large amount of money was due to her as rent which she had not collected. The question that was referred to the Full Bench was whether the amount due from the lady was realizable from the estate which was in the hands of the reversioner and whether it was realizable from the rents that yet remained uncollected by the widow. It was held that the plaintiff was entitled to be paid out of the arrears of rent collected ; it was further held that he was also entitled to enforce his claim against the heirs of the last full owner of the estate generally.

Mr. Satya Sundar Bose appearing on behalf of the respondents has referred to the case in 12 C W N 769,[10] in which it was held that simple bond executed by a Hindu widow for legal necessity did not bind any immovable property and the interest of the reversioners was not affected by the sale. In this case their Lordships relied on the case reported in 1 Cal 133.[11] The case reported in 1 Cal 133[11] was a case in which the widow was sued

1. Regella Jogayya v. Nimushakavi Venkataratnamma, (1910) 33 Mad 492=5 I C 271=20 M L J 412.
2. Ramcoomar Mitter v. Ichamoyi Dasi, (1881) 6 Cal 36=6 C L R 429.
3. Hurry Mohun Rai v. Gonesh Chunder Doss, (1884) 10 Cal 823 (F B).
4. Kongski v. Kandaji, A I R 1929 Nag 191=117 I C 266.
5. Dayamoyee Ray Choudhury v. Lalit Mohan Pal Ray, A I R 1925 Cal 401=82 I C 1001.
6. Lalit Mohan Pal v. Dayamoyee Roy Choudhurani, A I R 1927 P C 41=105 I C 469 (P C).
7. Barameshwar Singh v. Lal Bahadur Sah, A I R 1934 Pat 216=149 I C 152=15 P L T 583.
8. Dhiraj Singh v. Manga Ram, (1897) 19 All 300 =1897 A W N 69.
9. Sarju Prasad v. Mangal Singh, A I R 1925 All 339=87 I C 294=23 A L J 254=47 All 490.
10. Giribala Dassi v. Srinath Chandra Singh, (1908) 12 C W N 769.
11. Baijun Doobey v. Brij Bhookum Lal, (1875) 1 Cal 133=2 I A 275=24 W R 306=3 Suther 207=3 Sar 541 (P C).

Jammu & Kashmir High Court Srinagar,

for a maintenance debt and in execution of that decree the widow's right, title and interest left by her husband were sold. Neither the decree nor the sale proceedings declared the property itself to be liable for the debt. After the death of the widow the reversioners brought a suit to recover the property. It was held that the purchaser at the execution sale took only the widow's interest and not the absolute interest and the plaintiff therefore was entitled to recover. In 19 C W N 313,[12] it was held that where a Hindu widow obtains a loan she is at liberty to bind herself personally or when for the purpose for which she borrows is a necessity, she is at liberty to bind her husband's estate and the intention must be gathered from the statement in the deed or in the surrounding circumstances. It was further held that the mere fact that the widow intended to create a liability on the estate is not enough. The creditor is also to show that he intended to enforce such liability and the true test is to see whether the proceeding was brought against the widow personally or with a view to affect the whole inheritance. Now, in A I R 1925 Cal 401,[5] a similar view was expressed. In that case it was held that if a decree against a Hindu widow is merely a personal decree it binds only her and not the reversionary interest, but a creditor suing such a female can so frame his suit as to make it clear that he intends to bind the entire estate and not merely the limited heir personally so as to put other persons interested on their guard and to enable to protect the estate if they care to do so; for, a Hindu female heir represents the entire interest in respect of her interest as well as the reversionary interest. This case went to the Privy Council, A I R 1927 P C 41,[6] and their Lordships of the Judicial Committee expressed their agreement with the decision of the Calcutta High Court and especially quoted a passage from the judgment of the Calcutta High Court. The passage quoted runs as follows :

> It is possible that although no charge was created, the original debt having been for lawful purposes, the creditor might have recovered his debt from the estate left by Bharat, if he had chosen to do so (Bharat was the last male-holder). But in order to make the estate liable he ought to have framed his suit in a proper manner. What he asked for was simply to have a personal decree against Monomohini and the guardian who was made defendant 2. The Court passed a decree against the minor alone. It does not appear anywhere that the minor was made a party to the suit as representing her father's estate.

So far as the Allahabad High Court is concerned the case in 19 All 300[8] has been relied upon by the lower appellate Court in this case. This case is in favour of the respondents and lays down that the creditor of a Hindu widow cannot after her death have recourse to the ancestral property in the hands of the reversioners in respect of which property the widow had enjoyed only a widow's life-estate, if in fact no instrument charging the property beyond the widow's life-time has been executed by the widow, even though the debt sued upon was incurred for legal necessity and was one in respect of which such property might have been made liable beyond the widow's lifetime. The Allahabad High Court distinctly differs from the case reported in 6 Cal 36,[2] but they referred to the case reported in 4 Mad 375[13] and the earlier cases of the Allahabad High Court. They held that unless they (creditors) wanted to make the estate liable for having the charge created by the widow upon the estate, they could not sue the reversioners who inherited the estate. The next case of the Allahabad High Court is the case in 30 All 394.[14] In this case the case in 19 All 300[8] was followed and it was held that where money is lent to a Hindu widow on her personal security, a decree for such a debt and a sale of property late of the widow's husband in execution of such decree binds only the widow's estate, notwithstanding that the original debt may have been incurred for legal necessity. There is another case in the Allahabad High Court, 42 All 109,[15] to which reference has been made, which although a case of alienation by a Hindu widow, is of importance inasmuch as it refers to the case in 26 Bom 206.[16] In this case difference had been drawn between the case of a widow alienating immoveable property which she inherited from her husband and of a widow who

12. Rameswar Mondal v. Provabati Debi, A I R 1915 Cal 141=25 I C 84=19 C W N 313=20 C L J 23.

13. Ramsami Mudaliar v. Sellatammal, (1882) 4 Mad 375.

14. Kallu v. Faiyaz Ali Khan, (1908) 30 All 394=1908 A W N 173=5 A L J 367.

15. Pahalwan Singh v. Jiwan Das, A I R 1920 All 345=59 I C 162=18 A L J 41=42 All 109.

16. Sakrabhai Nathubhai v. Maganlal Mulchand, (1902) 26 Bom 206=3 Bom L R 738.

inherited a trade or business belonging to her husband. It was held that in the case of immoveable property she could sell only her life-estate whereas she had greater powers in the case of trade or business. The case in 47 All 490[9] is the next case from Allahabad, and is a case of alienation, but there a difference was drawn between a debt which is a charge upon the estate and a debt which is not.

Coming to Madras, the earliest case on the point is the case in 4 Mad 375.[13] In this case the suit was upon a promissory-note renewed in the name of the plaintiff by a Hindu widow. The first handnote was executed much earlier. The money was borrowed for the purpose of defending her title to certain properties. The widow died and the plaintiff wanted to realise the debts from the properties in the hands of reversioners. The case first came up for trial on the Original Side and was dismissed on the ground that no cause of action was shown. The case then came up in appeal. Of the two Judges, Innes, J., following the case reported in 3 Bom 237,[17] was of opinion that this suit was rightly dismissed. He indicated in his judgment that a Hindu widow could charge the estate but it must be clear that she intended to charge her estate even after her death. Kindersley, J. was of opinion that a note was merely a personal security and there being nothing in the plaint to indicate that the estate was to be bound by that, he held that the suit was rightly dismissed.

In the next case from Madras, 33 Mad 492[1] decided in the year 1910, it was held that no distinction could be properly drawn between a case where a charge is formally created and in a case where the creditor lends for the necessary purposes of the estate. There reference was made to the case in 4 Mad 375[13] and one of the learned Judges held that a reversioner was not bound by a debt unless it was a charge on the estate. The other learned Judge held that unless it was clear that a promissory note was made by the widow as a representative of the estate and alleged the circumstances which would make the reversioners liable under the Hindu law the reversioners were not bound. Their Lordships distinguished the case in 4 Mad 375,[13] by saying that neither of the Judges was of opinion as a matter of law that the reversioners cannot be bound unless the debt is made formally a charge on the estate, and later on they held that there is no distinction between a case where a charge is formally created and a case where the creditor lends for the necessary purposes of the estate. In A I R 1925 Mad 401,[5] which is a single Judge decision the High Court refused to interfere with a decree against the reversioners for realizing debts incurred by a widow for family necessity. This case is important inasmuch as it refers to some of the decisions that I have mentioned already and shall mention later on. In Bombay the earliest case is in 3 Bom 237.[17] In this case a Hindu widow had borrowed money from the plaintiff on an ordinary bond for the purpose of paying the Government assessment on a certain property and subsequently adopted a son and died. The son was sued after the death of the widow for the money due. It was held that the plaintiff could not recover his debt either from the defendant personally or from the property which was in his possession. His only remedy was against the widow's property, if any, in the hands of the defendant.

In the next case, 26 Bom 206,[16] a trade was carried on by the lady on behalf of the family and for the purpose of carrying on the trade the debts were incurred. It was held that the assets of the business in the hands of the reversioners were even in the absence of a regular charge liable for the debts incurred by the lady. In 52 Bom 542[18] it was held the property in the hands of a reversioner is not liable to satisfy a personal debt not secured on such property which a widow while enjoying a widow's estate has properly incurred in the course of the management of the property. There their Lordships expressed an opinion that the case in 26 Bom 206[16] had not expressly or by necessary implication overruled the case in 3 Bom 237.[17] A recent Full Bench decision of the Bombay High Court in A I R 1936 Bom 59,[19] has overruled 3 Bom 237.[17] Their Lordships applied the case in 26 Bom 206[16] and dissented from the view taken in 4 Mad

17. Gadgeppa Desai v. Apaji Jivanrao, (1878) 3 Bom 237.

18. Bhagwantrao Abaji v. Ramanath Kaniram, A I R 1928 Bom 310=111 I C 704=52 Bom 542=30 Bom L R 881.

19. Dhondo Yeshvant Kulkarni v. Mishrilal Surajmal, A I R 1936 Bom 59=160 I C 1046=38 Bom L R 6=60 Bom 311 (F B).

375;[13] 19 All 300[8] and 30 All 394.[14] They followed 6 Cal 36[2] and 10 Cal 823.[3] The judgment of the Court was delivered by Divatia, J. wherein it was held that there is no warrant in Hindu law for making a distinction between a secured and an unsecured debt provided they are both for legal necessity, and the opinion of the Court was that where the widow incurs the necessary liability in her character as such, that is as representing the husband's estate, the intention of binding an estate as opposed to binding herself alone is to be implied because the reversioners' obligation depends upon the purpose of the debt rather than on the intention of the parties contracting it. In this Full Bench decision I find no reference to the case in A I R 1925 Cal 401[5] which was upheld by the Privy Council, A I R 1927 P C 41.[6]

We then come to a case in the Patna High Court, 15 P L T 583,[20] which is a decision by Saunders, J. who later on as Judicial Commissioner of Chota Nagpur delivered the judgment which is under appeal. It was held in that case that the debt incurred by a widow on a handnote was her personal obligation only and the reversioners were not bound to discharge the debt. There, apart from the other cases, reference was made to 52 Bom 542,[18] where it was pointed out that the decision in 26 Bom 206[16] did not overrule the earlier case in 3 Bom 237;[17] and in 52 Bom 542[18] it appears that the creditor relied upon these cases for the purpose of showing that there is no difference between a secured debt and an unsecured debt and if legal necessity is proved, of which there is no question in this particular case, the estate is liable in the hands of the reversioners. A review of these cases makes it clear that there are differences of opinion on the question how and when a Hindu widow may incur a liability which can be enforced against the estate in the hands of the reversioners, but so far as debts on handnotes are concerned it is clear from the decisions in 19 C W N 313[12] and A I R 1925 Cal 401[5] which was upheld by the Privy Council, A I R 1927 P C 41,[6] that for a creditor it is not enough to show that the debt was for legal necessity so as to bind the reversioners, but there must be some indication in his suit that he wanted to make the reversioners liable for the payment of the debt. The learned Subordinate Judge before whom this matter first came very aptly remarks that there is nothing to indicate that the creditor wanted to make the reversioners a party to the suit. The suit was filed in the life-time of the widow and the property was attached, but this does not affect the rights of the reversioners. Relying upon the cases in 19 C W N 313,[12] A I R 1925 Cal 401[5] and the decision of the Privy Council reported in 1927 P C 41,[6] I am of opinion that in this case the reversioners are not liable. In the result the appeal fails and is dismissed with costs.

Rowland, J.—I entirely agree.

A.L./R.K. *Appeal dismissed.*

20. Baramdeo Singh v. Lal Bahadur Sah, A I R 1934 Pat 216=149 I C 152=15 P L T 583.

A. I. R. 1937 Patna 62

AGARWALA AND MADAN, JJ.

Bindeshari Prasad—Liquidator—Applt.

v.

Biso Singh—Insolvent—Respondent.

Appeal No. 335 of 1934, Decided on 29th July 1936.

Insolvency—Application by debtor—Duty of Court—Court should be satisfied prima facie, and after necessary investigation, that application is honest and bona fide.

In administering the Insolvency Act, it is the duty of the Court to be satisfied prima facie and after following the necessary procedure and making the necessary investigation to come to a conclusion that the statements of debtor are true and insolvency application is honest and bona fide: *A I R 1933 Pat 43, Rel. on.* [P 63 C 1, 2]

Aditya Narain Lal and *Ram Chandra Prasad*—for Appellant.

Sarjoo Prasad—for Respondent.

Madan, J.— The appellant Bindeshri Prasad is Liquidator of the Garobigha Co-operative Society in the Gaya district having taken charge on 2nd May 1932. He afterwards took out a certificate at Nawadah against Biso Singh, a member of the society. Meanwhile Biso Singh, on 26th January 1933, had filed an application for being declared insolvent giving the society as his sole creditor. He did not mention that the society was under liquidation and was declared insolvent without the knowledge of the liquidator. On 8th November 1933 the insolvent filed an application before the Certificate Officer to the effect that the certificate could not proceed against him, and the liquidator then approached the District Judge of Gaya for annulment of the insolvency under S. 35, Insolvency Act, on the ground that by fraud of the insolvent no notice had been served upon him, and that the insolvent had concealed assets. He also

applied for the prosecution of the insolvent. The District Judge rejected the application, and the liquidator has now appealed under S. 75 of the Act, valuing his application at the sum of Rs. 2,149.

The learned District Judge rejected the liquidator's application on the ground that even if the insolvent had concealed part of his assets, still witnesses of the liquidator had admitted that at present it is difficult to sell immoveable properties, and it could not therefore be said that the insolvent was able to pay his debts even if he had concealed property. This cannot be accepted as an adequate disposal of the matter. In the lower Court the liquidator filed four mortgage bonds of the year 1927 and 1928, whereby the insolvent as karta of a joint family mortgaged substantial properties to the Co-operative Society as security for his debts. It appears that only a share in these properties have now been shown by the insolvent as available to the creditor, and this is a matter for which the insolvent should be called on to account. Also we are aware that Co-operative Societies maintain a haisiyat register, or register of properties and debts of the members of the society, and that register, if produced, should show by what representations the insolvent obtained his loans from the society, and how far those representations were consistent with the position taken by him before the Insolvency Court. In 12 Pat 107[1] it is observed:

> There has been a tendency for Courts administering the Insolvency Act to believe that the hearing of a petition is a more or less formal matter and that if the petition is as it were merely verified by the evidence of the debtor the Court is bound to accede to the petition. That is not the case. It is the duty of the Court to be satisfied prima facie and after following the necessary procedure and making the necessary investigation to come to a conclusion that the statements by the debtor are true. After all the procedure of insolvency is for the protection of creditors quite as much as for the protection of debtors. It is unfortunately more often used by debtors than by creditors with the consequence that the interest of the creditor has a tendency to be forgotton.

Under S. 35, Insolvency Act, the Court is bound to annul a declaration of insolvency if a person interested is able to show that the debtor ought not to have been adjudged insolvent. I would remand this case for a decision as to how far the insolvency application in this case was honest and bona fide, and whether the insolvent is a person entitled to the protection of the Insolvency Act. Parties will bear their own costs in this Court.

Agarwala, J.—I agree.

M.D./D.S. *Case remanded.*

1. Ganesh Lal Sarawgi v. Sanehi Ram, A I R 1933 Pat 43=141 I C 223=12 Pat 107=13 P L T 714.

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* A. I. R. 1937 Patna 63

FULL BENCH

COURTNEY-TERREL, C. J., FAZL ALI AND JAMES, JJ.

Sunder Prasad Singh—Petitioner.

v.

Deodhari Singh and *others*—Opposite Parties.

Civil Revn. No. 350 of 1935, Decided on 12th October 1936.

*** (a) Civil P. C. (1908), O. 21, Rr. 58 and 63—Money deree-holder bringing mortgaged property to sale—Mortgagee objecting to sale under O. 21, R. 58—Mere equity of redemption is brought to sale — Mortgagee cannot apply under O. 21, R. 58 and therefore R. 63 also is not applicable.**

Under a money decree the judgment-creditor can merely sell the rights, title and interest of the judgment-debtor in the property to be sold. Hence what is sold in the case of mortgaged property is the equity of redemption. The rights of mortgagee, if any, could merely be asserted by virtue of his mortgagee rights and the threatened sale by judgment-debtor cannot affect his rights even if he were the mortgagee in possession. [P 64 C 1]

A mortgagee in possession brought a claim under O. 21, R. 58 in respect of his mortgagee rights objecting to the sale of the property:

Held : that O. 21, R. 58 and R. 63, were inapplicable inasmuch as the mortgagee objecting to the sale was claiming merely in respect of his mortgagee rights which were not threatened and equity of redemption was only brought for sale, there being no fight between judgment-creditor and mortgagee in respect of property. [P 64 C 1, 2]

*** (b) Civil P. C. (1908), O. 21, Rr. 58, 63 and 100—Claim by mortgagee under O. 21, R. 58 dismissed for default—Mortgagee not taking recourse to O. 21, R. 63—He can still press his claim under R. 100.**

An objection under O. 21, R. 58, of the mortgagee in possession was dismissed for default, and he did not take recourse to O. 21, R. 63, but put his claim under O. 21, R. 100:

Held : that the O. 21, R. 58, being inapplicable to the claim by mortgagee, O. 21, R. 63 was not applicable; and mortgagee therefore was not barred from pressing his claim under R. 100 : *A I R 1922 Pat 548* and *A I R 1923 Mad 76, Rel. on.* [P C]

S. N. Rai and *A. D. Sinha*—for Petitioner.

B. C. De, D. L. Nandkeolyar and *Balaram Kumar Sinha*—for Opposite Parties.

Courtney-Terrell, C.J.—This case comes before the Full Bench on a reference by two learned Judges of this Court to whom as a Bench the case had been referred when the matter first came before a single Judge

of this Court sitting in Civil revision. The facts which have given rise to the discussion which has come before us for solution are simple.

In 1932, the petitioner brought a mortgage suit against defendants 2 to 7. Before a decree was granted, that is to say on 3rd April 1933, the defendants mortgaged certain of their property to the opposite party 1. On 19th June 1933, the petitioner got his money decree and proceeded to execute it by the sale of the property which had been mortgaged. The opposite party 1 under O. 21, R. 58, Civil P. C., instituted a claim case. That claim case was on 27th April dismissed for default; but it is obvious that the claim case even if it had been heard on the merits must necessarily have been dismissed because in the circumstances O. 21, R. 58 had no application whatever to the facts. Under a money decree the judgment creditor could merely sell the right, title and interest of the judgment-debtor in the property to be sold, that is to say all he could do would be to put up for sale the equity of redemption. The rights of the mortgagee, if any, could merely be asserted by virtue of his mortgagee rights and the threatened sale by the judgment creditor could not affect his rights even if he were the mortgagee in possession, because if O. 21, R. 54 be examined it will be seen that the effect of the attachment was merely to prohibit the judgment-debtor from transferring or charging the property in any way and the only thing which could be transferred or charged was the equity of redemption in the mortgage. Accordingly O. 21, R. 58 being inapplicable to the circumstances of the case, O. 21, R. 63 has also no application and could not be used by the mortgagee. O. 21, R. 63 enables a person whose claim has been dismissed under O. 21, R. 58 to sue in order that he may have his rights determined, that is to say if the claimant and the judgment-creditor are in conflict as to the rights in a certain property and if a decision has been given on the merits in the claim case, should the party who loses the claim case desire to push his claim further, he must have resort to a suit for that purpose. In this case the mortgagee was merely claiming in respect of his mortgage rights which were not threatened and the judgment-creditor could merely claim in respect of the right to put up for sale the equity of redemption, that is to say they were not fighting about the same property at all and there could in the circumstances be no decision which could be made the subject of litigation under O. 21, R. 63.

The next stage in the proceedings was that on 1st October 1934, the property, that is to say, the equity of redemption, being the right, title and interest of the judgment-debtor, was put up for sale and purchased by the decree-holder himself and on 3rd March 1935, the decree-holder obtained delivery of possession. The mortgagee then had resort to O. 21, R. 100, that is to say he said, "I, being dispossessed by the decree-holder, am entitled to have the merits of my claim heard under that rule." The objection was taken by the decree-holder purchaser that whereas the mortgagee had already taken proceedings under O. 21, R. 58 and whereas the claim by the mortgagee had been dismissed by default, the mortgagee not having had recourse to O. 21, R. 63, that is to say not having brought a suit as contemplated by that rule, he could not now be heard to press his claim for possession under O. 21, R. 100. To put it at its best this is but an exceedingly technical plea and moreover it is wrong on the merits. O. 21, R. 58 had no application; O. 21, R. 63 had therefore no application whatever; and in that case the only remedy properly left to the mortgagee was to press his claim under O. 21, R. 100. This has always been the view of this Court and it was so decided in I L R 1 Pat 159.[1] The learned Judges who referred this case had some doubt as to whether the reasoning of the decision in that case was correct; but, in my view it was correct and the Full Bench decision of the Madras High Court in 45 Mad 827[2] indirectly supports this view. It is sufficient to say that the abortive proceedings under O. 21, R. 58 did not bar the subsequent proceedings by the mortgagee under O. 21, R. 63 and that the case I have referred to in I L R 1 Pat 159[1] was correctly decided. The judgment-creditor must therefore pay the costs throughout.

Fazl Ali, J.—I agree.

James, J.—I agree.

P.R./A.L. *Order accordingly.*

1. Biswanath v. Lingarai, A I R 1922 Pat 408=70 I C 306=1 Pat 159.
2. Abdul Kadir Sahib v. U. T. M. Somasundaram, Chettiar, A I R 1923 Mad 76=70 I C 648=45 Mad 827=43 M L J 467.

* A. I. R. 1937 Patna 65
SPECIAL BENCH

COURTNEY-TERRELL, C. J., MOHAMAD NOOR AND VARMA, JJ.

Kuchwar Lime & Stone Co., Ltd.—Petitioners.

v.

Secy. of State—Defendant and *others*—Opposite Parties.

Misc. J. C. No. 42 of 1936, Decided on 9th October 1936, arising out of F. A. No. 68 of 1936, as reported in *A. I. R. 1936 Pat 372.*

(a) Contract Act (1872), S. 20 — Mutual mistake of fact regarding title — Contract is void.

If parties contract under a mutual mistake and misapprehension as to their relative and respective rights, the result is that the agreement is void : *Cooper* v. *Phibbs, (1867) 2 H L 149* and *A I R 1917 Cal 786, Rel. on.* [P 71 C 2]

*** (b) Crown—Duty of—To abide and obey law—In case of difficulty in ascertaining law it is duty of Crown to ask for directions from the Court.**

It is the duty of the Crown and of every branch of executive to abide by and obey the law. If there is any difficulty in ascertaining it, it is the duty of the executive in cases of doubt to ask for directions from the Court to ascertain the law, in order to obey it, and not to disregard it : *Eastern Trust Co.* v. *McKenzie, Mann & Co., Ltd., (1915) A C 750, Rel. on.* [P 71 C 2]

*** (c) Contempt—Intentional disobedience—Injunction against Government, not to interfere with the possession of those already in possession — Persons having knowledge of this injunction, but not parties to suit in which injunction was issued, interfering with possession, with permission of Government—Conduct of such persons amounts to contempt of authority of Court.**

Where the Government were restrained by an injunction from disturbing the possession of the persons who were in possession of the quarries under their lease, but some persons continued working in the quarry with the permission of Government and though they were not parties to the suit in which injunction was granted, they had thorough knowledge that their presence on the quarry was in breach of the injunction :

Held : the persons were thoroughly aware of the injunction and were thoroughly aware that their presence upon the quarry with the permission of the Government was a setting at naught the order of the Court, and in these circumstances the conduct of those persons was a contempt of the authority of the Court whether or not they were themselves bound by the injunction : *Seaward* v. *Patterson, (1897) 1 Ch 545, Ref.* [P 72 C 1]

B. Bose, S. M. Mullick, Mahabir Prasad and *Tarkeswar Nath*—for Petitioner.

Govt. Advocate, P. R. Das, S. N. Bose, P. K. Sen and *K. K. Banerjee* — for Opposite Parties.

Courtney-Terrell, C. J.—The Collector of Shahabad, through the Secretary of State for India in Council, one S. N. Ghose, described as the manager of the Kalyanpur Lime Works, Limited and one S. N. Banerjee, the Managing Director of the said Company, have been called upon to show cause why they should not be dealt with for alleged contempt of Court in respect of an injunction granted against the Secretary of State in a suit brought by the petitioners, the Kuchwar Lime & Stone Works, Limited, against the Secretary of State. It is necessary to narrate the circumstances of this litigation.

The Government were the owners of the mineral rights in two adjacent properties known, respectively, as the Upper and Lower Murli Hill. In respect of the Upper Murli Hill they also owned the surface rights. The surface rights in the Lower Murli Hill had been purchased by the plaintiff company from the zamindars. On 1st April 1928, the Government leased the mineral rights in the Lower Murli Hill and the surface and the mineral rights in the Upper Murli Hill to the plaintiffs for a period of twenty years. The mineral rights concerned are in respect of the quarrying of lime stone, and royalties were to be paid at a specified rate per ton on all lime stone extracted. The plaintiff company worked the quarries on both properties until January 1933, when they went into voluntary liquidation. The lease is a peculiar one inasmuch as it does not provide for any minimum royalty, nor does there seem to be any clause imposing upon the lessees the obligation to work the quarries to any defined extent. On 23rd March 1933 the Government, under a mistaken impression that there was a clause in the leases providing for minimum royalty, asked for payment thereof and on 27th March the plaintiffs' solicitors replied that there was no such obligation upon the plaintiff company. The Government seem to have examined the leases and found that this was the fact. Cl. 5 of one lease and Cl. 6 of the other run as follows :

> That neither the lessee nor any person claiming through or under it shall assign the lease or transfer any right or interest thereunder or underlet the hill or any portion of the premises comprised in such lease without the assent of the Board of Revenue first obtained. The penalty for the infraction of this condition shall be the forfeiture of the lease.

On 30th September 1933, the plaintiff company through their liquidators entered into an agreement in writing with one S. G. Bose. It was agreed that, subject to the sanction of the Government (the Board of Revenue) the company should sell their rights under the leases in question to Bose for a sum of Rs. 6,000. Until the attitude of the Government with regard to the prospective transfer should be ascertained, Bose was to be appointed local agent of the company in respect of their leasehold rights and to continue so to act until either the transfer of the legal right should be effected or until the Government refused to sanction such transfer. Bose was to work the quarries for his own benefit and to pay to the plaintiff all royalties and other dues in respect of the leased property which might become due from the company to the Government. On 9th October 1933, Bose entered on the property and began to work on the terms of the said agreement, and on the same day the company applied to the Collector for permission to assign the leases to him. Following the normal procedure, the Collector, on 25th October 1933, enquired as to the financial position and status of Bose. On 15th November 1933, the Commissioner wrote to the Collector inquiring as to Bose's solvency and on 16th the Deputy Collector reported to the Commissioner that he was a suitable transferee. On 20th October Bose informed the Sub-divisional Officer at Sasaram, in whose jurisdiction the quarries lay, that he had opened the quarry on 9th October and had begun work and expected the despatch of limestone to begin on 23rd October, but on 26th October the Sub-divisional Officer had written to the Collector a letter in which, referring to Bose's letter, announcing the commencement of work, he called attention to the fact that the transfer of the leases could only be made with the permission of the Board of Revenue and that in his (the Sub-divisional Officer's) opinion Bose, though styling himself the agent, appeared to be the proprietor of the quarries, and then went on to say that this was an opportunity to get rid of the disadvantages of the lease (i. e., the lack of provision for a minimum royalty). He wrote :

> This is the opportunity for us to get the previous mistake rectified. Since no permission has been taken from the Board the lease becomes null and void. So I am soliciting instructions whether despatch should be stopped at once or not.

On 21st November 1933 the Commissioner wrote to the Collector of Shahabad to say that the working by Bose must be stopped at once. On 6th December the Sub-divisional Officer ordered Bose to stop working. On 9th December the Solicitors to the plaintiff company wrote to the Collector complaining of the action of the Sub-divisional Officer, stating that Bose was the agent of the company and that the Government would be held liable to pay compensation to the company. There was a long delay in replying to this letter ; reminders were sent by the Solicitors on 4th January 1934, on 12th January, on 10th February and on 14th March. On 21st March 1934 the Commissioner wrote to the Solicitors stating that the matter had been referred to the Government for orders. On 12th April the Solicitors again reminded the Commissioner, and on 20th April the Commissioner wrote to the Solicitors stating that the Government had forfeited the leases. It appears that the Government had " sanctioned " the forfeiture (whatever that may mean) on 27th March. This fact was not communicated to the plaintiff until 20th April 1934, but the Government resolution to that effect was not passed until 18th July, nor was the intimation of the resolution conveyed to the plaintiff company until 10th August 1934.

On 24th September 1934, the plaintiff company began a suit against the Government. In their plaint they set out a statement of the action of the Sub-divisional Officer in stopping the work of their agent Bose and further complained that the Government had wrongfully authorized a company called the Kalyanpur Lime Works Limited to carry on quarrying operations on the lands demised to the plaintiff company with a view to granting a lease thereof to the said Kalyanpur Lime Works Limited and to oust the plaintiff company therefrom. They asked for an injunction restraining the grant of a lease to Kalyanpur Lime Works Limited or any other person and to restrain the defendant from authorising such person or persons to carry on operations on the demised lands and from otherwise interfering with the rights and possession of the plaintiff company. On 15th November the Secretary of State filed a written statement alleging that the agreement with Bose of September 1933 justified forfeiture of the lease and that the leases were forfeited under

the order of 18th July 1934. Paras. 11-(d) and 11-(e) of the written statement are as follows :

11-(d). That the Government rightly re-entered, authorized and inducted the Kalyanpur Lime Works Co. to quarry or to carry on quarrying operations in the lands previously leased out to the Kuchwar Limestone Co. with a view to avoid loss to the Government and to grant subsequently a lease thereof to the said company.

(e) That the plaintiff company was rightly ejected under the terms of the lease from the leased premises.

The plaintiff company by their plaint had not in fact complained of ejectment, but sought protection against interference with their rights, and based such claim upon threats of ejectment. This must be noted in view of a contention to be hereinafter considered that the plaintiffs admitted dispossession by that defendant, the Secretary of State or by any one else. It may be noted in passing that the written statement also contended that the plaintiff company had failed to work the quarry since it went into liquidation and by para. 17 a further grievance of the Secretary of State was also pleaded :

That the company also claimed not to pay a minimum royalty as there was no such clause in the leases to pay the same.

This last statement is a curious defence and needs no further comment. No suggestion was made that a lease had been in fact granted to anyone by the Secretary of State. It is further to be noted that the Collector of Shahabad verified the written statement ; para. 11-(d) was stated to be a matter of his " personal knowledge, information and record " which he believed to be true, but para. 11-(e) was " verified " as a "matter of legal opinion."

On 12th January 1935 the application for an interim injunction was heard, but it was ordered to be adjourned until the trial of the suit and an order for expedition was made. The suit came on for hearing on 1st March 1935 and was dismissed by the Subordinate Judge on 7th March. On 10th April the plaintiffs appealed to the High Court (First Appeal No. 68 of 1935) and on 23rd April they made an ex parte application to the High Court for an interim injunction. On 25th April an interim injunction was ordered by the Court with a rule calling upon the defendant to show cause. The Secretary of State applied for security for costs which was rejected on the ground that the plaintiffs had already put in security.

On 25th July 1935 the defendant was heard on the rule and the ex parte injunction which had been granted on 25th April was continued until the trial of the suit. It is this injunction which on the final hearing of the appeal was made permanent. Therefore, from 25th April 1935, the opposite party to this motion, the Secretary of State, has been under injunction restraining him from interfering with the plaintiff company's leasehold. It is necessary at this stage to interrupt the narration in order to trace the activity of the Kalyanpur Lime Works Limited of which the respondent Banerjee is managing director and the respondent Ghose is the local manager. The earliest recorded appearance on the scene of this company is in the month of January 1934, though whether the Kalyanpur Lime Works Limited had opened up negotiations at an earlier date is not clear. On 25th January they wrote a letter to the Collector through the Sub-divisional Officer of Sasaram and they stated that they understood that the lease to the plaintiffs had been terminated since the firm went into liquidation and desired to apply for a lease. They set forth the extent of their business and offered to guarantee a minimum royalty of Rs. 10,000 per annum and pointed out that the interest of the Government had suffered by the arrangement (without such minimum royalty) with the plaintiffs. They also stated that the plaintiffs had improperly worked the quarries and had damaged them. On 31st March 1934 the Secretary to the Board of Revenue wrote to the Commissioner approving of the grant of a lease to the Kalyanpur Company on the terms and conditions set forth in Chap. 5 of the Bihar and Orissa Waste Lands and Mineral Concessions Manual :

On the understanding that after the lease is executed the question of royalty would be re-examined by the Board provided it is well understood that any reduction, if made, would be a matter of grace.

An examination of the Manual referred to shows that leases might be arranged on varying terms both as to period and royalty. It is contended on behalf of the respondent that these documents constitute an agreement to grant a lease but the essential terms were not settled and no such agreement was in fact come to. The Government appear, however, to have given permission to the Kalyanpur Company to work the quarries, and on 15th

April 1934 the respondent Ghose, the local manager, wrote to the Collector referring to an interview between the managing director and the Collector three days before, and stated that he had received a copy of a letter dated 14th April 1934 from the Board of Revenue to the Sub-divisional Officer at Sasaram sanctioning the beginning of work on the quarries. He asked that a draft lease might be sent to him without delay and stated that he was "arranging to start quarrying limestone and manufacturing lime." On 2nd May Ghose wrote a letter to the Collector asking formal permission to start quarrying operations and on 13th May the Collector replied:

> Having been granted a lease for limestone concession in the Upper and Lower Murli areas, you are lawfully entitled to start work in them at once. The draft leases have been submitted to the Board of Revenue.

It is interesting to observe that at this time, although the matter of granting permission to the plaintiff company to transfer the lease to Bose had been "under the consideration" of Government since December 1933, the Government resolution to forfeit the lease was not passed until 18th July 1934 and the "sanctioning" of forfeiture (however that may have been effected) did not take place until 27th March 1934 and it was not until 10th August 1934 as hereinbefore narrated that the resolution was conveyed to the plaintiff company. The respondent Banerjee in his affidavit says that the forfeiture was acquiesced in by the plaintiff company but there appears to be no ground for this assertion. There must also be narrated the effort on the part of Bose whom the plaintiff company had, pending the decision on the matter of the transfer of the lease to him by Government, appointed as their agent to work the quarries, to obstruct the Kalyanpur Company from getting into possession of the quarries. At the beginning of this judgment it was stated that as to the Lower Murli Hill estate the Government possessed the mineral rights only; the surface was owned by the zamindars who, on 23rd September 1928, sold the surface rights to the plaintiff company. They in their turn sold the surface rights to Bose who carried on business as the "Kuchwar Lime and Stone Co." It would seem that Bose decided to obstruct the Kalyanpur Company's men from crossing the surface of the Lower Murli Hill on their journey to the quarries. No doubt this behaviour of Bose, relying upon his personal rights as the owner of the surface, was with the approval of the plaintiff company.

On 23rd April 1934, on a report of the Sub-Inspector of Police, the Sub-divisional Officer issued notice to Bose (describing him as the manager of the Kuchwar Lime and Stone Co.) under S. 144, Criminal P. C. Bose, instead of showing cause, moved the High Court to quash the proceedings or to transfer the same to some other Magistrate. This petition was rejected by the Court on 7th June. It has been contended before us that in his petition to the High Court the plaintiffs admitted that the Kalyanpur Company had obtained possession on 22nd April 1934. The answer to this is that the plaintiff company were not parties to the proceedings and an examination of the petition makes it perfectly clear that the only question in dispute between the parties was as to whether Bose, as the owner of the surface rights over the Lower Murli Hill, had the right to obstruct the Kalyanpur workmen from proceeding to and from the quarry. The order under S. 144 was made absolute by the Sub-divisional Officer. Later on certain employees of Bose were prosecuted under Ss. 143 and 341, Penal Code, for obstructing the Kalyanpur men. The Magistrate acquitted them but stated that as the Kalyanpur men had to get to the Upper Murli Hill quarries and there was no other road other than over the Lower Murli land, they had a right to pass over such land. The circumstances of this litigation in the Magistrate's Court has nothing to do with the question of fact as to whether the plaintiffs had been ousted by the Kalyanpur Company from possession of the quarries: it is concerned solely with the surface rights of the Lower Murli Hill of which the plaintiff company had no legal control.

On 11th May 1935 the Civil Suit Deputy Collector of Arrah wrote to the Sub-divisional Officer of Sasaram, forwarding a copy of the injunction which had been granted by the High Court; and on 14th May he wrote that the order of the High Court should be carried out at once and requesting him to report immediately. The Sub-divisional Officer on 17th May also forwarded a copy of the High Court's injunction to Ghose and on 21st, the Civil Suit Deputy Collector wrote to the Sub-divisional Officer stating that he had been

asked by the Collector to inform the Kalyanpur Company that they should be directed to stop work as ordered by the High Court. On 4th June Banerjee wrote to the Sub-divisional Officer of Sasaram stating that the Khasmahal Tahsildar had sent to Ghose asking him to stop work, that Ghose had asked for a written order and that, since writing, a copy of the Collector's letter of 20th May forwarding the injunction had been received. Then follows this extraordinary passage :

> In compliance with your executive order communicated through the Khasmahal Tahsildar, we have stopped all quarrying operations from the 21st ultimo and we have been suffering daily losses and damages to a considerable extent. Would you kindly let us know as early as possible how long you direct us to stop work ?

The reply of the Sub-divisional Officer is dated 7th June. He states that he is surprised at Banerjee's letter, that no executive order was passed, and that the work was stopped by the injunction of the High Court and not by an executive order. On the 13th, Banerjee replies that his company is suffering daily losses and damages and earnestly requests that instructions may be issued to the Government Pleader to move the High Court to get the injunction set aside. On 3rd July the managing director writes again to the Sub-divisional Officer stating that the injunction order is not binding on his company as it was not a party to the suit, that the work had been stopped on account of the administrative order through the Khasmahal Officer and again requesting that the Government Pleader might be instructed to get the High Court order set aside. A copy of this letter was sent by the Sub-divisional Officer to the Collector, stating that the Kalyanpur Company appear to persist in their determination to misunderstand the order to stop work as an executive order and saying :

> As it appears to me they have some ulterior motive in doing so, I have thought it better to bring to your notice before replying to them.

On 12th July the Collector wrote to Banerjee stating that if he disobeyed the High Court order he would do so at his own risk. The High Court appeal was duly heard at the end of December and beginning of January 1936 and on 7th February judgment was delivered, allowing the appeal of the plaintiffs and making the temporary injunction permanent. It was held that the plaintiffs had committed no breach of the conditions of their lease which would justify forfeiture under the terms thereof; that the lease had not been forfeited and that the plaintiffs were still the lessees of the Government. At the hearing of this appeal there was a suggestion that the Government or their nominees the Kalyanpur Company had succeeded in ousting the plaintiffs from possession; but there was no suggestion that any lease had in fact been granted to the Kalyanpur Company, and as the point of dispossession had not been raised in the Court below the learned Judges rightly refused to entertain it.

As a matter of fact it was admitted on behalf of the opposite party on this motion that the plant and machinery of the plaintiffs is still on the quarries. They include a light, railway track and tub cars for the conveyance of limestone from the immediate site of the quarry to the railway line. Such work as has been done by the Kalyanpur Company is quite trifling in extent and the total royalty paid to the Government in respect thereof amounts only to Rs. 2,344-6-9. The first payment was of Rs. 100-14-9 on 4th January 1935. If this is in respect of the previous quarter then it was in respect of working after the institution of the suit. There is no evidence of any working before the institution of the suit on 24th September 1934, and at the rate of As. 13-6 per ton which is the rate quoted in the Manual the amount of limestone quarried comes to only a little more than 2,000 tons. We are told that the limestone has been carried down from the quarry in baskets on the heads of labourers and tipped into bullock carts which have been the sole means of removing it from the quarry. This degree of "working" of the quarry is insignificant and does not constitute an ouster of the plaintiffs from possession.

The Kalyanpur Company at any time might have intervened in the suit and asked to be joined as a party but they refrained from so doing. In the affidavit filed on behalf of the plaintiff company on this motion it is stated that on 19/20th December 1935, and on 2nd/3rd January 1936, Ghose and Banerjee were both present throughout the hearing of the appeal, either instructing the Government Pleader or watching the proceedings on behalf of the Kalyanpur Lime Works, Limited. On 9th March 1936 the plaintiffs' Solicitors wrote to the Collector complaining that Bose was not allowed to work and that

the Kalyanpur Company had begun to work and asking that Bose might be put in undisturbed possession. On the 16th March the Collector replied stating that the matter was under consideration. This evidently crossed with a letter of the 18th March in which the Solicitors sent a reminder to the Collector and on the same date the Solicitors also wrote to the Commissioner. They again wrote on the 30th March and this letter crossed with a reply by the Collector to the Solicitors dated the 28th March. It is a very important letter because it makes it quite clear that the Government had made up their minds to depart from the correct attitude of the Collector (who had warned the Kalyanpur Company of the risk of working in view of the injunction) and had decided to come out into the open and support the cause of the Kalyanpur Company. The letter is as follows :

With reference to your Letter Number M/N-7463, dated 18th March 1936, I have the honour to say that on the authority of Letter Number 21-27-4 dated 31st March 1934, issued by the Board of Revenue of Bihar and Orissa, possession of the quarries at the Murli Hill was delivered to Messrs. The Kalyanpur Lime Works Limited on 15th April 1934. That company took possession of the quarry on that date and they have been working in it since 15th May 1934. Messrs. The Kalyanpur Lime Works Limited were not parties to the suit which was brought against Government by the liquidators of the Kuchwar Lime and Stone Company Limited, and the decree passed by the High Court does not give Government authority to eject their present lessees. You may take such legal action against Messrs. The Kalyanpur Lime Works Limited as you are advised.

It would be interesting to know how this change of attitude was brought about. Up to a point the Collector and apparently the Commissioner had acted correctly in warning the Kalyanpur Company that any resumption of work by them would involve risk in view of the High Court order. They did not, as they should have done, inform the company that the Government's authority could no longer be relied upon to support the claim of the Kalyanpur Company to work the quarry. The Government in view of the judgment of the High Court were not entitled to treat the Kalyanpur Company as their lessees, for it had been held that the lease to the plaintiff company still subsisted and had not been forfeited. Having regard to the injunction, they were not entitled to authorise licensees to work in the quarries. By the letter above reproduced the Government through the Collector made it quite clear that the Kalyanpur Company were treated by the Government as lessees and that the Government would support their supposed lessees in that attitude. On the 31st March the plaintiffs' Solicitors wrote to the Kalyanpur Company stating that although they were not parties to the suit they were aware of the injunction and should have obeyed it, and on 21st April 1936, Ghose wrote to the plaintiffs' Solicitors in reply stating:

I beg to point out that I have been in peaceful and continuous possession of the Murli limestone quarries in Upper and Lower Murli Hill areas since April 1934, and have been working the same as lessees of the Government paying royalties, etc., to them ever since. In spite of full knowledge and repeated intimation . . . did not choose to make us parties or to ask for recovery of possession. We had no knowledge of the title suit filed by your clients in the second Sub-Judge's Court, Arrah, until at a very late stage after the matter had gone up to the High Court in appeal and not having been made parties we have had no opportunity to put in our papers and evidence and present our case as bona fide lessees of Government in which capacity we had taken full and complete possession of the quarries, etc., long before your clients filed this suit, referred to.

It is not attempted on behalf of either Banerjee or Ghose to support the truth of the statement by Ghose as to the lack of knowledge of the Kalyanpur Company as to the suit or the filing of the appeal. The statement is a manifest falsehood and it is sought to excuse Ghose on the ground that he was merely the local manager without knowledge of the litigation. We have been informed, though there is no evidence to that effect, that the assistance or intervention of Banerjee was positively declined by the Government Pleader in the course of the suit and the appeal. It may well be that the Government Pleader had been instructed not to allow any interference on behalf of the Kalyanpur Company. The Kalyanpur Company could, however, had they so chosen, have intervened and stated, if it were the fact, that they were in possession under a title from the lessor and that they had a right to be heard. There is little doubt that the real reason for the non-intervention of the Kalyanpur Company was with a view that they might be able at a later stage, in the event of the decision being against the Government, to offer a second line of defence in subsequent proceedings, and it is difficult to believe that this was done without complete co-operation between the Kalyanpur Company and the Government though it may be that the Govern-

ment Pleader was not instructed to that effect. It is much to be regretted that an open and candid attitude was not adopted. Similarly, after the disposal of the appeal, there was a change of attitude, when the Kalyanpur Company re-started work which they had stopped after the temporary injunction. On 16th March 1936, the Collector warned the company of the danger of working the quarry in view of the High Court judgment. The later letter of the 28th March, which I have quoted above, cannot be explained on any other basis than that by some means the Kalyanpur Company had persuaded the higher authorities in the Government hierarchy to support their possession. In June, during the vacation, an application was tentatively made to the Vacation Judge to issue notice to the Government to show cause why they should not be dealt with for contempt. The Vacation Judge directed that the application might well wait until the beginning of the term and on 4th August 1936 the present petition was lodged.

I now proceed to deal with the arguments in support of and against the application for an order of committal for contempt of Court. As against the Government it is urged, and rightly urged, that they are in contempt by direct breach of the injunction by allowing Banerjee and Ghose to work the quarries and encouraging them by their support. On behalf of the Government Sir Sultan Ahmad took the correct attitude that the Government were anxious to obey the orders of the Court and that if their action should be held by the Court to be in breach of the injunction, the Government would unreservedly apologise and refrain from such action as the Court might consider a breach. He nevertheless contended that the decision of the High Court against the Government did not compel the Government to eject the Kalyanpur Co. from the works. He contended that the Government were bound to the Kalyanpur Co. by an agreement to grant a lease and had let them into possession of the quarries. This argument has no substance. Until the judgment of the High Court be set aside the Government are precluded from denying the title of the petitioners from being considered as tenants of the Government in possession of the quarries. The supposed contract has no binding effect even if it be true that the Government in granting and the Kalyanpur Co. in accepting a lease or a contract for a lease were under the impression that the Government had a title to grant such a lease or a contract, for they are under a mutual mistake of fact as to the plaintiffs' title and it was the duty of the Government after the judgment to repudiate the contract and to withdraw any license or authority given by them to the Kalyanpur Co. As was said in (1867) 2 H L 149[1] :

> Private right of ownership is a matter of fact; it may be the result also of matter of law; but if parties contract under a mutual mistake and misapprehension as to their relative and respective rights, the result is that that agreement is liable to be set aside as having proceeded upon a common mistake.

See also 21 C W N 404.[2] No shelter is afforded either to the Government or to the other respondents by such a contract even if it existed. Moreover the contract relied upon is not a contract at all, for the essential term of the contract of the proposed lease is omitted as also is the matter of royalty. If the Government had had any doubt as to their position after the injunction in the matter of abiding by the contract with the Kalyanpur Co. they should have asked for directions from the Court. As was said by their Lordships of the Privy Council in (1915) A C 750[3] at 759[1]:

> It is the duty of the Crown and of every branch of the executive to abide by and obey the law. If there is any difficulty in ascertaining it, the Courts are open to the Crown to sue, and it is the duty of the executive in cases of doubt to ascertain the law in order to obey it, not to disregard it.

It may well be as in the present case, that the Government may have thought that the decision of the High Court in the suit by the present petitioners was erroneous, and we are informed that they intend to appeal to His Majesty in Council; but until the decision of the High Court was reversed the executive should have adopted the course that they had no power to grant any lease inconsistent with the lease to the petitioners; that they had no power to let into possession any person other than the petitioners, and if such other person had entered into possession or was attempting to enter into possession

1. Cooper v. Phibbs, (1867) 2 H L 149=16 L T 378=15 W R 1049.
2. Ram Chandra Misra v. Ganesh Chandra Gangopadhaya, A I R 1917 Cal 786=39 I C 78=21 C W N 404=25 C L J 459.
3. Eastern Trust Co. v. McKenzie, Mann & Co., Ltd., (1915) A C 750=84 L J P C 152=113 L T 346.

on the strength of any authority granted by the Government, they should have notified that person that the authority was terminated. The letter cited above dated 28th March from the Collector to the Solicitors to the petitioners indicates that the Government were treating the Kalyanpur Lime Works Co. Ltd. as in possession granted by the Government and that the Government endorsed the action of the Kalyanpur Co. The arguments presented on behalf of Banerjee by Mr. P. R. Das and adopted by Mr. P. K. Sen on behalf of Ghose may now be examined. They may very simply be summarised as follows :

Firstly, it is contended, and rightly contended, that these persons were not parties to the suit by the petitioners against the Government and are therefore not bound by the injunction granted against the Government and cannot be held guilty of a breach thereof. But if the Kalyanpur Lime Works and Banerjee and Ghose are considered as servants or agents of the Government, they are undoubtedly liable for breach of the injunction if they knowingly acted as servants or agents of the Government. We are unable to say what the precise relationship between the Government and the Kalyanpur Co. really was. The almost simultaneous adoption in March and April 1935 of a common line of defence may indicate that the action of the Kalyanpur Co. was at the instance of the Government, or it may be that the Kalyanpur Co. had been able by some means to persuade the higher authorities of Government to override the Collector and give their support to the Kalyanpur Co. But quite apart from the question of service or agency, there can be no doubt whatever that from the beginning the opposite party Banerjee and Ghose, were thoroughly aware of the injunction and were thoroughly aware that their presence upon the quarry with the permission of the Government was a setting at naught the order of the Court, and in these circumstances the conduct of these respondents was a contempt of the authority of the Court whether or no they were themselves bound by the injunction. The distinction between the two kinds of contempt has long been well recognised and was clearly explained by the Court of Appeal in (1897) 1 Ch 545,[1] where all the authorities were examined.

4. Seaward v. Patterson, (1897) 1 Ch 545=66 L J Ch 267=76 L T 215=45 W R 610.

Secondly, Mr. P. R. Das endeavoured to argue that the possession of his client was analogous to that of a third party who under the Civil Procedure Code in execution proceedings sets up a claim to possession of property of which delivery of possession had been granted to the plaintiffs as against the defendant. The analogy is quite fallacious. In the first place, as has been pointed out above, neither the Kalyanpur Co. nor Banerjee nor Ghose is in possession of the quarry in question. Moreover, even if the analogy be good, it is incumbent upon the opposite party to show that he was bona fide in possession on his own behalf and such bona fides is in this case conspicuous by its absence. From the very beginning the course of affairs was clearly known to these respondents. Had their possession been bona fide they could have, and would have, insisted on appearing as parties at the trial or in the appeal. They were well aware that the Government could have had no power to grant them a lease or enter into a contract or let them into possession until the lease to the plaintiffs had been validly forfeited, and after the injunction the Government had no title to allow them to continue in possession. It is contended further by Mr. Das that the Kalyanpur Co. would, had they been parties to the suit, have been able to present further arguments which would have convinced the Court that the lease by the Government to the petitioners had been rightly forfeited. By way of illustration it is said that it had not been pointed out to the Court that the grant of the lease was governed by the Crown Grants Act, 1895, and that this Act renders inapplicable to such a grant the provisions of the Transfer of Property Act with regard to the requirements of notice of forfeiture, and that re-entry by the Crown was the only necessary condition to be fulfilled by their forfeiture. To this argument, if it had been offered, a simple reply might be made that the Court had held that, quite apart from the question of notice, no ground for forfeiture, either by re-entry or by notice, had been committed by the plaintiffs.

In conclusion it was said on behalf of both the Secretary of State and of the two other respondents, that if the Court holds that they or any of them have been guilty of contempt, they unreservedly apologise and plead in extenuation that they had committed a bona fide mistake as to their

respective legal position. That each of the three opposite parties has been guilty of contempt, the Government by a breach of the injunction, and the two other respondents by setting at defiance the authority of the Court, there is no doubt in our minds. In the circumstances we deem it sufficient to direct that the Secretary of State do forthwith pay to the petitioners one half of their costs and that the other respondents, Banerjee and Ghose shall also pay to the petitioners one half of their costs and shall be jointly and severally liable therefor; and we fix the hearing fee of this petition at two hundred and fifty gold mohurs. In view of the correct attitude taken on behalf of the respondents, that they had and have every intention of treating with respect the authority of the Court, we do not make any further order. We are much indebted to Mr. Baren Bose for his very able and lucid argument in support of the petition.

Mohamad Noor, J.—I agree.

Varma, J.—I agree.

S.C./A.L. *Order accordingly.*

** A. I. R. 1937 Patna 73

COURTNEY-TERRELL, C. J. AND JAMES, J.

Krishna Kumar Chatterji—Plaintiff—Appellant.

v.

Mt. Jagpati Kuer and *others* — Defendants—Respondents.

Appeal No. 155 of 1933, Decided on 18th September 1936, from original decree of Sub-Judge, Muzaffarpur, D/- 18th April 1933.

*** (a) Stamp Act (1899), S. 36 — Judge by endorsement admitting hand-note to evidence — Subsequent discovery that some of the stamps were not properly cancelled — Document is not open to objection from point of time of admission.**

Under S. 36 it matters nothing whether a document was wrongly or rightly admitted or admitted without objection, or after hearing or without hearing such objection. So where a Judge admits a hand-note to evidence by endorsement and subsequently it is discovered that some of the stamps were not properly cancelled, the document would not be open to objection from the point of time of admission and the Court will not be entitled to reject it : *A I R 1930 Cal 577, Rel. on.* [P 74 C 2]

**** (b) Stamp Act (1899), S. 12, sub-s. (2) — Cancellation of stamps merely refers to condition of stamps at time document is presented in evidence—It does not mean cancellation at some particular time anterior to its presentment in evidence.**

The wording of sub-s. (2) makes it clear that a document is to be deemed unstamped, if, when the Court looks at the same, it finds that it has not been cancelled so that it cannot be used again, and the criterion of cancellation is the appearance of the stamp. If the stamp is in such a condition that it cannot be used again then it has been cancelled and the document cannot be treated as unstamped. Sub-s. (2) has nothing to do with the penalties for failing to cancel the stamp. That is provided by S. 63 and there is nothing in this section which prevents the document from being used in evidence, if, when it is presented to the Court, it is in fact cancelled within the meaning of sub-s. (2). That sub-section does not mean that it must have been cancelled at some particular time anterior to its presentment in evidence but merely refers to the condition of the stamps at the time it is so presented. [P 75 C 1, 2]

(c) Interest—Rate of — Unsecured loan — Rate at 12 per cent. is not unreasonable in particular circumstances.

In case of an entirely unsecured loan the rate of interest at 12 per cent. was held by no means unreasonable in the circumstances of the case. [P 76 C 1]

A. K. Mitra—for Appellant.

S. K. Mitra and *R. Misra*—for Respondents.

Courtney-Terrell, C. J. — This is an appeal by the plaintiff from a judgment of the Subordinate Judge of Muzaffarpur. The case arose out of the following facts : There was a firm of partners who carried on business under the name of Damri Sahu Halkhori Sahu and the partners in that firm were Damri Sahu and Halkhori Sahu respectively. They carried on business at various places and on the occasion of the transaction in question they were negotiating through the plaintiff as their agent for a contract with a certain sugar mill for the purchase of molasses which is one of the by-products of sugar manufacture. They desired to purchase the outturn of molasses by that particular sugar mill. The plaintiff in November 1926 secured a contract for the firm out of which, if the contract were carried through, he would be paid a remuneration by way of commission. The sugar mill was willing to sell their output of molasses provided that the firm would deposit Rs. 10,000 as earnest money for the molasses they would buy, within one week. The partner Halkhori Sahu came to Mazuffarpur where the sugar mill was, and was told the terms upon which the mill would be willing to conduct the business. He had not the necessary sum of Rs. 10,000 with him to

make the required deposit and therefore he borrowed from the plaintiff a sum of Rs. 5,000 and with that money made the required deposit with the sugar mill. To secure the loan Halkhori Ram executed a hand-note promising to repay the loan together with interest at a reasonable market rate. The loan not being repaid and the partners having since died, the plaintiff began this suit against the widow amongst other persons of the partner Damri Sahu and in his plaint he set forth the story of the loan and claimed to recover upon the hand-note. He claimed Rs. 5,000 principal lent and interest at the rate of 12 per cent. per annum which he said was the reasonable market rate, according to the contract, for three years.

When the case came on for hearing before the lower Court, for some reason the defendants were not represented and judgment for the plaintiff went by default, the plaintiff producing the hand-note in question. There was an appeal to the High Court from this decision on the ground that the learned Judge ought not to have given judgment by default but should have given the defendants an opportunity of being heard. The High Court agreed with the contention and remanded the case to be heard upon the merits. The plaintiff went into the witness box and towards the end of the cross-examination he was asked questions about the hand-note in question, having proved the hand-note on the previous day, (when the hand-note was endorsed by the Judge with a statement that it was admitted to evidence). The further questions on the following day related to this hand-note. He was asked about the cancellation of the stamps which the hand-note bears. The hand-note bears six adhesive stamps, two of them being one-anna each and four others half-anna, and across the half-anna stamp, which is in the right hand bottom corner of the group of stamps, the signature of the executant of the hand-note appears. There also appear two lines drawn across the stamps, one lying across each row from left to right. He was asked whether those lines came into existence at the time of the execution of the note : he said no, the stamps were free at that time from the lines which they now bear and he stated that as a matter of fact that could be demonstrated by a photograph which he had had taken after the note was executed for greater caution. An examination of the hand-note bears out what he says with the result that it would appear that at the time of the execution of the hand-note the right hand bottom corner half-anna stamp alone of the six had been cancelled, the horizontal lines drawn across the rows of stamps having been added at some later time and before the note was tendered as evidence.

The learned Judge took a somewhat peculiar course. He held that the stamps had not been properly cancelled and that under the Act this was equivalent to the document not being properly stamped and therefore he refused to consider the suit as one brought on the hand-note ; but on the merits of the question of whether the loan had in fact been granted or not, he used the hand-note as very good evidence of the loan and gave judgment for the plaintiff for the capital sum, Rs. 5,000 of the loan. He held however that inasmuch as the contract to pay interest was evidenced by the hand-note alone, and that inasmuch as it was not properly stamped it could not be used by the plaintiff, and he declined to grant any decree for interest. From that decision the plaintiff appealed and his appeal is before us. There is also a cross-objection by the defendants to which I will presently refer. The contention on behalf of the appellant is based upon S. 36, Stamp Act, which provides :

> Where an instrument has been admitted in evidence, such admission shall not, except as provided in S. 61, be called in question at any stage of the same suit or proceeding on the ground that the instrument has not been duly stamped.

In this case the learned Judge had on the first day of the trial admitted the hand-note to evidence and had marked it as an exhibit. It was not until the second day when the defendant made the discovery, by cross-examination, of the fact that the cancellation of five out of the six stamps had not been effected at the date of execution, that the point for consideration by the Judge arose. In my opinion, at the time that the Judge entered into this matter the instrument had already been admitted in evidence and that is proved by the endorsement on the note, and further it is conclusively proved by the fact that the Judge in considering whether the plaintiff could recover upon a contract apart from the note definitely took the note into evidence as cogent evidence of the contract. It is therefore not open to objection from the point of time of admission. The section has been dis-

cussed in many cases, but I do not think I can do better than quote from the judgment of Sir George Rankin in 128 I C 187 :[1]

On the merits of the appeal, it appears to me that S. 36, Stamp Act, makes it reasonably clear that the instrument having once been admitted in evidence is not to be called in question at any stage of the same suit. The Special Judge has seen this section but has thought to avoid the consequence of it by taking notice of an affidavit in which it is said that the tenure-holders did object when the document was tendered and that there was a discussion as to its admissibility. The learned Judge has entirely failed to see that, under S. 36, it matters nothing whether it was wrongly admitted or rightly admitted or admitted without objection or after hearing or without hearing such objection. These stamp matters are really no concern of the parties, and if the objection was taken at the time when the record was made up by the trial Court, there it might be rejected; if not, the matter stopped there.

In my opinion this point is conclusive against the respondent. There is a further objection to the argument of the respondent. The section which deals with the cancellation of stamps is S. 12. By para. 1, sub-s. 1, it is provided:

Whoever affixes any adhesive stamp to any instrument chargeable with duty which has been executed by any person shall, when affixing such stamp, cancel the same so that it cannot be used again.

Sub-s. 2 is the sub-section which really is used by the respondent in this case:

Any instrument bearing an adhesive stamp which has not been cancelled, so that it cannot be used again, shall, so far as such stamp is concerned, be deemed to be unstamped.

Now by S. 63 of the Act any person required by S. 12 to cancel an adhesive stamp, and failing to cancel such stamp in the manner prescribed by that section shall be punishable with fine which may extend to Rs. 100. By this means a penalty is provided to enforce the provisions of sub-s. 1 to S. 12. It is argued on behalf of the respondent that there is a further penalty on persons who do not cancel the stamp at the time of affixing, namely, that if it should turn out that the cancellation, however effective, was effected at some later time than the affixing of the stamp, the document is not receivable in evidence. In my opinion that construction is unsound. The wording of sub-s. (2) makes it clear that a document is to be deemed unstamped if, when the Court looks at the same it finds that it has not been cancelled so that it cannot be used again, and the criterion of cancellation is the appearance of the stamp. If the stamp is in such a condition that it cannot be used again then it has been cancelled and the document cannot be treated as unstamped. The sub-section has nothing to do with the penalties for failing to cancel the stamp. That is provided by S. 63 and I cannot find anything in this section which prevents the document from being used in evidence if, when it is presented to the Court, it is in fact cancelled within the meaning of sub-s. (2), and that does not mean that it must have been cancelled at some particular time anterior to its presentment in evidence but merely refers to the condition of the stamp at the time it is so presented.

Mr. S. K. Mitra on behalf of the respondent would have us believe that the object of the legislature would by such a construction be defeated. That is not so. The object of the legislature is to protect the revenue. If when the Court comes to examine the document the stamps are intact the danger of a second use of the stamps has not yet occurred and if cancellation is, before it is presented in evidence, effected, no danger arises as to the second use of the stamps in the future. On these two grounds therefore the document should properly be considered as having been properly stamped and should have been received in evidence by the Judge and no other question as to the authenticity of the hand-note has been presented to us. The appeal therefore of the plaintiff should succeed.

We have now to consider the contentions of the defendant on her cross-objection. Defendant 1 is the widow of the deceased partner, Damri Sahu. The debt was incurred on 6th November 1926, that is to say the 16th Kartick 1334. It is said that the partner of whom defendant 1 is the widow died on 30th October 1926, that is to say the 9th Kartick 1334, and therefore his estate cannot be liable under his partnership contract for debts incurred by another partner after his death. If that fact had been pleaded and established by the respondent she would have been entitled clearly to succeed, but she did not plead it. An examination of her written statement, involved as it is, discloses no hint whatever of such a point being taken in her favour. Furthermore in the depositions given before the Court there is no evidence whatever that her late husband died after the debt was incurred. It is said that there were certain land regis-

1. Nirode Basini Mitra v. Sital Chandra, A I R 1930 Cal 577=128 I C 187=51 C L J 569.

tration proceedings in which the death of the husband was mentioned, and the judgment in those proceedings has been put before us; but needless to say the judgment is no evidence of the facts therein stated more particularly as the litigation was not between the same parties. The only witness who deals with the question of the date of death merely mentions that it took place in Kartick 1334 which is consistent with the death either being after or before the date of the debt in question. Having failed to plead or indeed to argue the point in the trial Court, it is clear that it is too late at this stage of the matter to consider its merits, and there is no evidence before us upon which it could be supported.

A further argument was addressed to us on behalf of the defendant that there are no materials upon which we could grant interest at other than some purely nominal rate. There was evidence however before the Subordinate Judge as to the rate at which the deceased partner, when he borrowed money, was able to borrow from his bank by way of overdraft and the rate was at 12 per cent. It must be remembered that this was an entirely unsecured loan, and in the circumstances the rate of interest at 12 per cent. is by no means unreasonable, and it certainly could not be obtained in the market for less than that rate. I would allow the appeal and direct that the decree of the lower Court be varied by adding to the decree for Rs. 5,000, interest at the rate of 12 per cent. per annum from the date of the hand-note up to the date of the decree and thereafter at 6 per cent. until realization. The defendant must pay the costs in this Court and in the Court below.

James, J.—I agree.

M.D./D.S. *Appeal allowed.*

A. I. R. 1937 Patna 76

COURTNEY-TERRELL, C. J. AND JAMES, J.

Radhakishun and *others*—Defendants—Appellants.

v.

Keola Prasad—Plaintiff and *others*—Defendants—Respondents.

Letters Patent Appeal No. 103 of 1933, Decided on 17th September 1936, from decision of Kulwant Sahay, J., D/- 8th September 1933.

Attachment—Objection to attached property rejected by executing Court under O. 21, R. 61, Civil P. C., claimant being benamidar of judgment-debtor — Suit by claimant under O. 21, R. 63—Onus to prove that he is not benamidar but bona fide purchaser is upon claimant.

When an executing Court dismisses a claim under O. 21, R. 61, Civil P. C., the decision is final as to the right asserted till it is displaced by the result of a civil suit, and when the claimant brings such a declaratory suit the onus in such suit is upon the claimant to prove that he has the right which he claims. [P 77 C 1]

An objection to attachment was rejected by the executing Court under O. 21, R. 61, Civil P. C., on the ground that the claimant was a mere benamidar of the judgment-debtor. The claimant therefore brought a suit under O. 21, R. 63 to establish his right:

Held: that the onus to prove that he was not a benamidar but a bona fide purchaser was upon the claimant: *A. I. R. 1930 P C 255, Rel. on.* [P 78 C 1]

S. M. Mullick, A. C. Ray and *A. K. Mitra*—for Appellants.

Har Narain Prasad—for Respondents.

Courtney-Terrell, C. J.—This is a Letters Patent appeal from a decision of a single Judge of this Court. The defendants first party to the suit are the appellants and the suit is one which was brought under O. 21, R. 63, Civil P. C., after the rejection of a claim case. When the case first came by way of Letters Patent appeal it came before Dhavle, J. and myself and we considered that it was necessary to look into the evidence and accordingly we sent for the record. At this hearing we have examined the evidence and in our opinion a perusal of the evidence thoroughly justifies the view taken of it by the trial Court. Indeed it was possible for the learned Munsif in the trial Court to have taken a very much stronger view than he did in fact in the same direction as the finding at which he actually arrived.

The defendants first party had got a money decree against the defendants second party and in execution of that decree they attached an area of 30 bighas odd, the property of the judgment-debtors, being their bakast land. The plaintiff, Keola Prasad, preferred a claim case under O. 21, R. 58, Civil P. C., saying that the lands in question were his. The claim was rejected in the execution Court and it was there held that the plaintiff was a mere benamidar of the judgment-debtor. The plaintiff therefore brought this suit under O. 21, R. 63. The lower appellate Court

and the learned Judge of this Court before whom the matter came in second appeal had apparently not had their attention drawn to the law as to the onus of proof. There have been many such cases and the leading judgment is that of their Lordships of the Privy Council in 35 C W N 324.[1] That judgment has since been consistently followed in this Court. When an executing Court dismisses a claim under O. 21, R. 61, Civil P. C., the decision is final as to the right asserted till it is displaced by the result of a civil suit and when the claimant brings such a declaratory suit, the onus in such suit is on the claimant to prove that he has the right which he claims. The Munsif, who heard this suit, was of opinion that the transaction upon which the plaintiff relied in support of his alleged title to the land was a thoroughly farzi transaction on behalf of the judgment-debtor. When the case went up on appeal to the learned District Judge, he reviewed the evidence not, it may be said, with that degree of thoroughness which was displayed in the Munsif's judgment and was of opinion that, although the circumstances of the transaction relied upon by the plaintiff were in the highest degree suspicious, yet nevertheless they were not sufficient to prove that the transaction was a farzi transaction; and treating the matter as though the onus of proof lay upon the judgment-creditor, he allowed the appeal. He made no reference to the burden of proof beyond this sentence :

> Now the onus is on the defendants first party, who allege farzi, to prove it, but at the same time this is not an ordinary case of a farzidar turning round and claiming to be the real owner but one in which it is alleged that the real owner and the farzidar are in collusion to avoid a decree, and this is a circumstance which also requires to be taken into consideration.

In placing the onus upon the defendants first party who had already obtained a judgment in their favour in the decision of the claim case, the District Judge was clearly making a mistake. To adopt the learned District Judge's view would mean that in a suit after a decision of a claim case against the claimant one would begin with the assumption that the claim case was wrongly decided. The error of that point of view was pointed out in the decision of the Judicial Committee to which I have just referred. When the matter came up in second appeal the question of onus was apparently not presented to the learned Judge and he dealt with it as being merely an appeal from a decision of fact and decided that he would not disturb the view of the District Judge in second appeal. Accordingly he dismissed the appeal. It is hardly necessary to investigate again in detail the evidence which was given in the case. It was thoroughly dealt with by the learned Munsif and again by the District Judge, although in lesser detail. The learned District Judge agrees with the view of the Munsif to this extent : that the evidence adduced by the defendants first party in this suit showed that the circumstances of the transaction relied upon by the plaintiff were of a highly suspicious character. It was however the business of the claimant in this case to not merely stand upon defence and to say that the defendants first party had not made out their case but to prove affirmatively in view of the decision in the claim case that the transaction relied upon by him was a bona fide transaction. There was one element of the evidence to which the learned District Judge and the learned Judge of this Court might have given very much greater weight.

The plaintiff sought to establish his title to the land in question on the basis of a sale-deed from the defendants. The deed upon which the plaintiff relied was executed in the following circumstances : There was a certain factory who were thikadars under the defendants second party and the defendants fourth party. There were certain tenants of the thikadars who had not paid their rent and as a result of rent suits the thikadars bought up the land of these tenants including the land which is in dispute in this case. By an arrangement between the thikadars and the superior landlords any land which might be acquired by such process by thikadars at the termination of the thika lease had to be surrendered to the landlords. The landlords held their land in certain definite shares, the shares being in the proportion (roughly speaking) of $8\frac{1}{2}$ annas, the share of the defendants second party, and $7\frac{1}{2}$ annas, the share of the defendants fourth party. The plaintiff was at one time certainly a servant of the defendants second party. The sale was by the thikadar to the plaintiff, together with another person named Raghu-

1. Mohammad Ali Khan v. Mt. Bismillah Begum, A I R 1930 P C 255=128 I C 647=35 C W N 324 (P C).

nandan, of this 30 bighas and the plaintiff and his co-purchaser appear to have purchased this 30 bighas, the plaintiff purchasing exactly that proportion of the 30 bighas which was proportionate to the share in the property held by the defendants second party and the co-purchaser Raghunandan purchasing the proportion of the 30 bighas which was in proportion to the share held by the co-owner with the defendants second party. No possible reason can be offered for such a curious document and the only inference which can be made from the transaction was that the plaintiff in purchasing the share was purchasing the particular share of the defendants second party and Raghunandan was purchasing the share of the other party at the distinct request of the defendants second party and that collaboration between the defendants second party and the plaintiff was manifest.

There are many other circumstances from which the same inference is to be drawn : the matter of the consideration which was paid having regard to the value of the land in question, the fact that the land has not been cultivated by the plaintiff, though he attempted to shew that the cultivation was carried on on his behalf by tenants whom he introduced on to the land. We cannot but agree with the learned Judge that the evidence of those alleged tenants is of the most unsatisfactory description and could not carry conviction to any mind. Indeed the nature of the evidence is such as to lead one not only to distrust it but to come to the conclusion that it was clearly and manifestly false. There is no part of the evidence which can be pointed to on behalf of the plaintiff tending to shew that this transaction is in any way genuine. Looked at from a prima facie point of view the transaction must be presumed to be farzi until the contrary is proved, by reason of the decision in the claim case ; and the onus being clearly upon the plaintiff to disestablish the presumption arising from the decision in the claim case, he signally failed. For this reason, in my opinion, the appeal should succeed, the decision of the learned Judge of this Court and that of the District Judge should be reversed, the decision of the Munsif restored and the suit dismissed. The plaintiff to pay the costs throughout.

James, J.—I agree.

M.D./D.S. *Appeal allowed.*

*** A. I. R. 1937 Patna 78**

DHAVLE AND AGARWALA, JJ.

Suraj Kumar Singh and *others* — Plaintiffs—Appellants.

v.

Radha Krishnaji — Defendant — Respondent.

Appeal No. 1179 of 1932, Decided on 1st May 1936, from appellate decree of Addl. Dist. Judge, Purnea, D/- 10th June 1932.

*** Hindu Law—Alienation— Widow — Gift —"Wakfnama" of property by widow with object of assigning some property to possible reversioner — Benefit under "wakfnama" taken by possible reversioner to exclusion of actual reversioners—Construction of temple by widow and application of part of income for its services are not enough to support alienation (wakfnama)—Alienation proved to be for temporal benefit of possible reversioner and not for the spiritual benefit of her husband—Alienation (wakfnama) is invalid.**

It is not competent to a Hindu widow to alienate any portion of her husband's property for her own spiritual benefit, especially where it is accompanied by a temporal benefit to one of the possible reversioners, to which he is not entitled. The Hindu law, however, recognises the validity of the dedication or alienation of a small fraction of a deceased husband's property by a Hindu female for the continuous benefit of the soul of the deceased owner. The 'pious observances' on which a Hindu widow may spend money by alienating her husband's estate must be such as 'conduce to the bliss of the deceased's soul.'

[P 80 C 1, 2; P 81 C 1]

Where after the death of the husband a widow alienated her husband's property by a "wakfnama" and subsequently erected a temple and applied part of the income of the property for the services of the temple, but it was found that the sole object of the widow in creating the "wakfnama" was to assign some property to a possible reversioner who lived with her and was maintained by her and it was also proved that benefit under the "wakfnama" was taken exclusively by the possible reversioner to the exclusion of the actual reversioners:

Held : that inasmuch as the "wakfnama" was executed by the widow with the sole object of a temporal benefit to a possible reversioner and not with the object of conducing bliss to the deceased husband's soul, the mere erection of a temple by the widow and application of part of income for its services would not be enough to support the "wakfnama." Alienation therefore under the "wakfnama" was invalid irrespective of the extent of the property dedicated : *1 W R 48*; *A I R 1931 Pat 442*; *A I R 1918 Pat 230* and *A I R 1922 P C 261*, *Rel. on*; *A I R 1916 Cal 792*, *Disting.*

[P 80 C 2; P 81 C 1]

A. B. Mukherji and *S. N. Banerji*—for Appellants.

Mahabir Prasad and *Tarkeshwar Nath* —for Respondent.

Dhavle, J.—This appeal arises out of a suit brought by the sons of an actual reversioner for getting a deed of dedication of "wakfnama" executed in 1894 by

their relative Mt. Pankhawati Chaudhrain, a Hindu widow, declared inoperative, and for recovery of possession of the properties covered by the deed. Mt. Pankhawati was the wife of one Mathur Lal Singh, who separated from his brother Brij Lal in the year 1277 of the mulki era (corresponding to 1869 A. D.) and died the following year. Bijoy Gopal, the father of the plaintiffs, who died in 1927, was the only son of Brij Lal to survive Mt. Pankhawati who died in 1333 (1925 A. D.); he was thus the sole actual reversioner and has been succeeded by the plaintiffs. Nanihal was another son of Brij Lal's and father of Raghunath who, as a minor under the guardianship of Mt. Pankhawati's sister's husband Dharanidhar, was appointed shebait by the "wakfnama" in question. It appears from Ex. B, the judgment in a suit brought by Mt. Pankhawati herself in 1913 to have the wakfnama set aside as fictitious, that Raghunath died in 1313; and the defendant in the present suit was the idol Shri Radha Krishnaji through shebait Sharat Sundari Dasi, widow of Raghunath.

The wakfnama dedicated certain properties yielding a yearly income of Rs. 600 to a Thakurbari which, according to the deed, had been erected, and pujas and sevas instituted, by Mathur Lal Singh himself. The deed speaks of the endowment being made in accordance with the wishes and oral instructions of Mathur Lal. The Subordinate Judge who tried the suit found that the defence story that the endowment was made in consonance with the desires of Mathur Lal Singh was neither more nor less than a myth, that contrary to the statement in the deed, there was no temple built by Mathur Lal himself, and that though Mt. Pankhawati constructed a temple, it was not shown that she really did this for the spiritual welfare of her husband. Raghunath had been living with her and was being maintained by her, and the learned Judge apparently believed that the wakfnama was executed under the influence of her manager Nanihal with the real object of assigning some properties to his minor son Raghunath. He also found that the proportion of property dedicated was in excess of the power of a Hindu widow to alienate for the spiritual benefit of her husband. He accordingly held that the endowment was not binding upon the plaintiffs and decreed the suit. An appeal was heard by the Additional District Judge and allowed the suit being dismissed with costs. The plaintiffs have therefore appealed, and it has been contended on their behalf that the learned District Judge, having agreed with the lower Court that there was no satisfactory evidence to show that Mathur Lal had actually enjoined his wife to dedicate the property, erred in proceeding to find that it was not solely with a secular object that the dedication was made, and in holding on "a perusal of Ex. 4," the wakf deed, that,

> the thought of her husband was uppermost in the Musammat's mind at the time the deed was executed.

There is force in this contention. The plaintiffs had not denied the construction of a temple by the widow, and their case was that the dedication was not bona fide (i. e. for the spiritual benefit of her husband) but really for the maintenance of Raghunath and his heirs: see para. 7 of the plaint. That does not mean that the dedication was made solely with a secular object. Nor is it easy to see how a widow bent on the spiritual good of her husband would indulge in such myths as that her husband had erected the Thakurbari and that he had orally instructed her to dedicate some properties, which we do find in the deed of dedication, she could hardly have hoped to deceive the deity. The learned District Judge has also not referred to Ex. 1, a document executed by Mt. Pankhawati shortly after her husband's death, promising to conserve the property that had come to her from Mathur Lal for Brij Lal and his heirs. He has also not considered Exs. 6 and 7, judgments, which in the words of the trial Court,

> go to show that Nanihal Singh was acting as the manager of Mt. Pankhawati from 1301 to 1315 M. S.

These materials have an obvious bearing on the real object of the dedication, and the omission to consider them vitiates the view of the learned Judge that the thought of her husband was uppermost in her mind. On his own findings of fact the statement in the deed of dedication, that the temple was erected by her husband, was "not true," and the statement there that he had enjoined her to dedicate the property in the manner she did was "most improbable." The only inference in the circumstances would be that the husband's name was taken in the deed only because it was felt that it was neces-

sary to do so in order to justify the alienation.

The learned Judge also shows a misconception of the plaintiffs' case when he finds that Ex. 4 is not a sham document as the temple and the deity "are genuine and do exist," for this is not what was ever denied by the plaintiffs. He speaks of three classes of cases in which a Hindu widow can alienate her husband's property: (1) for legal necessity; (2) for the spiritual necessity of her deceased husband; and (3) for acts "which are calculated to confer spiritual benefit on his soul." He accepted the defence contention that the wakfnama came under the third category, but he did not notice that that deed makes no reference to the spiritual benefit of the deceased husband of the lady. He did himself (as I have already indicated) disbelieve, in agreement with the lower Court, such statements in the deed as that her husband had erected the temple and established pujas and sevas there, and that he had instructed her orally to dedicate some property for its upkeep, which was the justification made out in the deed itself for the alienation of the property, but he nevertheless upheld the alienation on the authority of 43 Cal 574.[1] That, however, was not a case where the alleged instructions of the husband were found to be untrue. There was, moreover, in that case a temple founded by the husband, and the widow had by the leases impugned raised money for the excavation and consecration of a tank and the erection of a wall in connexion with the temple. And the alienations were not (as here) in favour of one possible reversioner in preference to others—the lessee was a Singh while the lady belonged to a Misra family. The excavation and consecration of the tank in connexion with the temple founded by the husband stands on a very different footing from the temple in this case which was built years after the husband's death and was, so it has been found as a fact, falsely attributed to the husband. The law is well settled that it is not competent to a Hindu widow to alienate any portion of her husband's property for her own spiritual benefit, especially where it is accompanied by a temporal benefit to one of the possible reversioners to which he was not entitled: *see* 1 W R 48[2] and other cases discussed in 10 Pat 352.[3] But this aspect of the matter has escaped the District Judge, who erroneously addressed himself to such questions as whether it can be said that the wakfnama was executed "solely with a secular object,"

thinking of none else except her own self and the object of her affection, namely, Raghunath Prasad son of Nanihal Singh

and whether the admission of the first witness for the plaintiffs tha pujas are performed in the temple

does not give a direct lie to the entire case of the plaintiffs that the wakfnama is more apparent than real.

Raghunath takes a benefit under the wakfnama to the exclusion of the actual reversioner and his heirs, and this benefit is conferred on him at a time when his father was looking after the widow's affairs, and conferred on a basis of false allegations regarding the erection of a temple by Mathur Lal Singh and his wishes and oral directions that it should be endowed. That a temple was actually built by Mt. Pankhawati and that the income of the dedicated property was applied at least in part for its services will not suffice to support the alienation: *see* 1918 P H C C 323.[4] The Hindu law recognizes the validity of the dedication or alienation of a small fraction of a deceased husband's property by a Hindu female for the continuous benefit of the soul of the deceased owner (44 All 503[5]), but this principle cannot apply in the circumstances of the present case. The learned Subordinate Judge, who scrutinized the evidence carefully and dealt with the questions that properly arose, and unlike the lower appellate Court kept in mind the distinction between the spiritual benefit of the husband as distinguished from her own, found no satisfactory evidence that she had constructed the Thakurbari for the spiritual benefit of her husband, and had aimed at it in doing so; and he found that the real object of the wakfnama was to assign some properties to Raghunath Prasad and his heir, though:

1. Khub Lal Singh v. Ajodhya Misser, A I R 1916 Cal 792=31 I C 433=43 Cal 574=22 C L J 345.

2. Kartick Chunder v. Gour Mohun, (1864) 1 W R 48.
3. Thakur Prasad v. Mt. Dipa Kuer, A I R 1931 Pat 442=134 I C 129=10 Pat 352=12 P L T 521.
4. Bishen Dayal v. Mt. Jaiseri Kuer, A I R 1918 Pat 230=48 I C 746=1918 P H C C 323.
5. Sardar Singh v. Kunj Bihari Lal, A I R 1922 P C 261=69 I C 36=49 I A 383=44 All 503.

To give a show of validity to the wakfnama, it was necessary that there should be a Thakurbari.

In my opinion these findings have not been properly displaced by the lower appellate Court. The learned District Judge wrongly read Ex. 4, after his agreement with the trial Court about the falsehood of the recitals, to mean that the Musammat had dedicated the properties for the spiritual benefit of her husband. We have not been referred to any evidence, apart from Ex. 4, which the learned District Judge has taken to show that the thought of her husband was uppermost in her mind at the time the deed was executed, in support of the conclusion that it was for the spiritual benefit of her husband that the Musammat had dedicated the properties. The learned District Judge states without qualification that:

It is permissible under the Hindu law for a widow to dedicate some of her husband's properties for a religious purpose such as the construction of a temple and the installation of an idol therein.

The distinction between the spiritual benefit of the husband and that of his widow cannot be ignored under the Hindu Law as it is settled at present, and the "pious observances," on which a Hindu widow may spend money by alienating her husband's estate, must be such as "conduce to the bliss of the deceased's soul," 44 All 503.[5] The learned District Judge differed from the trial Court and held, mainly on a consideration of the necessities of the temple, that the proportion of the property dedicated was not "at all excessive. A temple, however modest it may be, can hardly be run on less than this amount." This, however, is immaterial in view of the fact that the alienation was not for the benefit of her husband's soul and cannot therefore be supported irrespective of its extent. There was also a question of estoppel raised in the case on which the lower Courts have differed. This arose on Ex. A, a sale deed of 1919 by plaintiff 1 in favour of the then living sons of Nanihal Singh, which recites at the end that the dedication now in question, was not benami but real. The learned Subordinate Judge found that the recital had been "surreptitiously inserted," having regard to the fact that it was not to be found in the compromise which led to the kabala. The learned District Judge on the other hand took the view that it must be presumed, the sale deed being registered, that the recital was properly made, and that being an admission it bound plaintiff 1. But the admission, such as it was, was not made in favour of the defendant deity or his Shebait at all, and the learned advocate for the respondent has not attempted to support the view of the lower appellate Court.

As the learned District Judge was in error in holding that under the Hindu Law the widow had power to make this dedication, the appeal ought, in my opinion, to be allowed. I would accordingly decree the plaintiffs' suit with costs in all Courts.

Agarwala, J.—I agree.

P.R./A.L. *Appeal allowed.*

A. I. R. 1937 Patna 81

WORT, J.

Bihari Mian—Plaintiff—Appellant.

v.

Sona Marik and *others*—Defendants—Respondents.

Appeal No. 202 of 1934, Decided on 30th September 1936, from appellate decree of special Sub-Judge, Ranchi, D/- 28th November 1933.

Bihar Tenancy Act (8 of 1934), S. 5—Tenancy—Settlement by unregistered hukumnama—Giving possession and acceptance of rent constitute contract of tenancy—Hukumnama need not be registered—Landlord cannot grant fresh patta to anyone else whether it is registered or not.

Where a landlord's son settled certain property with *X* by an unregistered hukumnama and the landlord accepted rent through his son and the person so settled got into possession of the property :

Held : that it was not necessary to register the hukumnama and that a contract of tenancy was constituted between the parties and that the landlord thereafter could not grant a patta of the same property to anyone else by either a registered or unregistered deed. [P 81 C 2; P 82 C 1]

S. K. Roy—for Appellant.

B. N. Mitter and *J. C. Sinha*—for Respondents.

Judgment.—This is an appeal by the unsuccessful plaintiff claiming possession of a certain holding. It appears that the son of the landlord settled the property with the tenants, defendants 1 to 4, by an unregistered hukumnama of 1927 and thereafter rent was paid in October of 1928, although the hukumnama was not registered ; in my opinion there was no necessity for so doing. But I do not decide the case on that ground.

The fact is that the defendants got into possession, paid rent, and whatever the

circumstances of their entering into possession of the land are, there is no doubt that, by being in possession and the landlord accepting rent through his son, a contract of tenancy was constituted. Then came an unregistered patta of the plaintiff of the same land in August 1928 and a registered patta in January 1929 ; hence the dispute as to possession between the plaintiff and the defendants. Now there being an existing tenancy by reason of possession of defendants 1 to 4, the landlord had no right to execute any patta registered or unregistered in favour of the plaintiff ; and in so far as the plaintiff paid salaami as consideration of his patta, it is quite clear the consideration wholly failed. No question of law arises in the appeal as the other point relating to the settlement of the defendants by the son of defendant 5 is disposed of on the finding of the Judge that he acted for his father. But even assuming that finding is not enough, the finding of the existence of the tenancy is sufficient. So far as the plaintiff's appeal against defendants 1 to 4 is concerned, it must fail. But it appears that the plaintiff asked in the Court below for the return of the salaami against the landlord who was also a party to the suit, and in the notice of appeal in this case which was served upon the landlord the plaintiff again made the same claim. There is no doubt whatever on the facts as found by the Judge in the Court below that the plaintiff-appellant is entitled to that sum of Rs. 100 which was the salaami paid by him. He is entitled therefore to a judgment and a decree against the landlord for Rs. 100 with costs.

But the appellant, as he fails against defendants 1 to 4 (the respondents), must pay the respondents' costs. In the circumstances in my judgment the plaintiff was entitled to join both the landlord and defendants 1 to 4 and he might have, had the Judge in the Court below been so minded, recovered either possession of the land which he has failed to do, or the salaami with regard to which in this Court he has succeeded. The plaintiff is therefore entitled to add the costs which he has to pay to the defendants-respondents to the costs which he is entitled to recover against the landlord-respondent.

B.D./D.S. *Order accordingly.*

A. I. R. 1937 Patna 82

WORT, J.

Elena Mary Grant—Petitioner.

v.

Norman Maling Grant — Opposite Party.

Matrimonial Suit No. 1 of 1935, Decided on 21st September 1936.

(a) Divorce Act (1869), S. 51—Petition for dissolution of marriage by wife—Evidence of all witnesses including petitioner taken on commission in England — Evidence though taken on commission held acceptable in view of complete dependence of petitioner on her husband as to means of travel to India.

On a petition by wife for dissolution of marriage filed in India, evidence of all the witnesses including the petitioner was taken on commission in England, though, in fact, she ought to have given evidence in the Court itself :

Held : on considering that the petitioner was the wife and completely at the mercy of her husband so far as her means were concerned and necessarily with regard to her opportunity of travel to India, the evidence though taken on commission could be accepted in view of the law as to evidence on commission in England.

[P 83 C 1]

(b) Divorce Act (1869), S. 2—Jurisdiction—Domicile — Last place of cohabitation in India gives domicile to both parties and gives also jurisdiction to Courts in India to hear divorce petition.

Where in a petition for dissolution of marriage, the petitioner stated that her husband went to and fro from India and cohabited at various places and the last place of cohabitation was at some definite place in India :

Held : that at the time of cohabitation both parties were domiciled in India and thus it conferred jurisdiction on Court in India to hear the petition. [P 83 C 1]

(c) Divorce Act (1869), S. 10—Petition by wife stating that the woman with whom her husband committed adultery was unknown to her—Petitioner and her witnesses identifying particular woman — Though petition was not amended, this identification was sufficient ground to grant decree nisi.

Where in a petition for dissolution of marriage by wife, the petitioner stated that the person with whom her husband committed adultery was unknown to her, but in evidence she and her witnesses identified a particular woman with whom her husband committed adultery :

Held : even though no amendment in the petition was made as to the name, the identification by the petitioner and her witness was sufficient to grant a decree nisi for dissolution of marriage.

[P 83 C 2]

B. N. Mitter and *S. S. Rakshit* — for Petitioner.

Order.—Had there not been one peculiar feature in this petition, a wife's petition for a dissolution of her marriage, I should have contented myself with follow-

ing the usual practice of granting a decree nisi for a dissolution of the marriage without stating my reasons, being satisfied on the evidence of the allegations in the petition, and the petition being undefended. But all the evidence has been taken in England and I propose to make one or two observations with regard to the matter. The petitioner Elena Mary Grant prays for a dissolution of the marriage on the ground of adultery with a person unknown in July 1933. It has, however, emerged from the evidence in the case that the person unknown is the Nurse Redfern who stayed in a certain hotel in England with the respondent on or about 26th July of that year, that is, 1933.

The case is a somewhat serious one having regard to the fact that not only all the witnesses for the petitioner, but the petitioner herself, have been examined on commission in England. I should have had very great hesitation in accepting this evidence of the petitioner on commission had it not been for the fact that the petitioner in this case is the wife and, therefore, presumably at the mercy of her husband so far as her means are concerned and necessarily, therefore, with regard to her opportunities to travel. I propose to follow the view taken in England with regard to evidence on commission that is, although evidence was taken *de bene esse*, I may assume that the petitioner is still abroad and, therefore, unable to come to this Court and give evidence on her behalf. The fact that the petitioner is the wife is a reason in my judgment why I should accept her evidence which was given on commission in England.

According to the petitioner's case she and the respondent went to and fro from India and cohabited at various places and the last place in India where they cohabited was at Ranchi about the year 1927. I should state at this juncture that both parties are domiciled in India thus giving this Court jurisdiction in the matter.

As regards the merits of the case there is no possible doubt in my judgment that the adultery alleged by the petitioner against her husband was in fact committed sometime in July 1933. The manner in which the evidence has been given and taken in England facilitates the determination of this case. The evidence is clear that the respondent and a person now known to be Nurse Redfern stayed as husband and wife occupying the same room at the hotel at Reigate Hill. I do not propose to mention the witnesses in detail, but their identification has been established beyond any reasonable doubt. Identity has been proved by persons who have seen the parties ; identification of the photographs exhibited in the case connected by the clearest evidence identifying both the petitioner and the respondent before the Commissioner at the time of taking the evidence. Witnesses have sworn that the person staying with the respondent on the occasion deposed to was not the petitioner. The petitioner herself clearly identified Nurse Redfern with whom the respondent is alleged to have committed adultery. One matter is to be noticed in this connexion, and that is that the evidence established, as I have already indicated, that it was with Nurse Redfern that the adultery was committed, although the petitioner has stated that the person with whom the adultery was committed was unknown. No application has been made to amend the petition and, therefore, I do not propose to deal with that matter ; indeed, as it has been pointed out in a case in the Calcutta High Court, there is no section in the Indian Divorce Act similar to S. 28, Matrimonial Causes Act, and, therefore, Nurse Redfern would not have been entitled to intervene.

So far as the question of desertion is concerned, I think that is also clearly established ; it is established by the evidence of the petitioner and the correspondence which passed between the parties. It appears that somewhere in the summer of 1932 the respondent went to a Nursing Home to be treated for asthma and it was at that time that a letter was written by him dated in July to his wife (the petitioner) in which he quite clearly stated that he had no intention of again cohabiting with her. It is not necessary to go into the details of that letter, but as I say and repeat his intentions are there clearly stated, and from the evidence of the petitioner herself it is also clear to me that from that date not only did the respondent not cohabit with the petitioner, but he was guilty of deserting her. The adultery and the desertion having been established, the petitioner is entitled to a decree nisi. The petitioner is entitled to the custody of the three minor children Helen Rhylva Marian Grant, Douglas Wyndham Grant, and Audrea Francis

Marian Grant. The petitioner is entitled to her costs.

A.L./R.K. *Petition granted.*

A. I. R. 1937 Patna 84

ROWLAND, J.

Sahadeo Karan Singh and *another*—Petitioners.

v.

Emperor—Opposite Party.

Criminal Revn. Nos. 440 and 464 of 1936, Decided on 28th September 1936, from order of Addl. Sess. Judge, Gaya, D/- 31st July 1936.

(a) Penal Code (1860), S. 211—Prosecution under — It should be considered whether complaint is substantially false or true.

To say that a criminal prosecution under S. 211 cannot stand in respect of a complaint which is partly false and partly true is putting the matter a little too broadly. [P 85 C 1]

In a prosecution under S. 211, I. P. C., it should be considered whether the complaint is substantially true and what is false is a mere fringe to the complaint or whether the substantial complaint is false and what is true is a mere fringe or in other words a mere accessory circumstance : *5 C W N 727, Rel. on.* [P 85 C 1]

(b) Penal Code (1860), S. 211 — Abettor—For abettor's prosecution, abettor must be aware of falsity of complaint.

In order to substantiate a charge of abetment of offence under S. 211, I. P. C., it is necessary to prove that the abettor was aware of the falsity of the complaint. If the abettor believed the story of the accused in good faith and told him to file a complaint, the fact that the accused's story turned out to be untrue would be no ground for criminal prosecution of abettor even if during the inquiry he assisted the accused in the production of evidence. [P 85 C 2]

S. N. Sahay, Baldeo Sahay and *R. K. Sinha*—for Petitioners.

W. H. Akbari—for the Crown.

Order.—These two criminal revision applications have been heard together. Lachhman the petitioner in Criminal Revision No. 464, is a servant of Sahadeo Karan, the petitioner in Criminal Revision No. 440. Sahadeo Karan has had some litigation with one Korban and his wife against whom he brought a title suit, obtained a decree for possession and took delivery of possession in 1930. Thereafter the son of Korban whose name is Usman claimed that, that property was his by reason of a gift from his parents. He brought a title suit for a declaration which was given to him by the Court on 17th February 1935. The suit was only declaratory, but in fact an order of delivery of possession was given by the Court in execution and possession was delivered on 11th August 1935 over the property which was the subject matter of the suit. That did not entitle Usman to eject Sahadeo Karan from the whole of his interest in the village because Sahadeo was a one-anna co-sharer in the village from before. The writ of delivery of possession does not mention the kucheri of Sahadeo Karan and the peon did not give possession over the kucheri.

Now, the complaint of Lachhman which is alleged to be false was a complaint presented on 22nd October 1935. He alleged that during the Dasarah holidays he had been to his home, that he had returned on 18th, October and found that between 12th and 18th Usman and others had raided the kucheri of his master Sahadeo Karan, had removed materials such as door-frames, leaves and roofing materials and had also taken articles kept inside the kucheri such as utensils and grain ; that he himself had seen some of the rafters or beams at the house of Korban, father of Usman ; that he had informed his master Sahadeo Karan and been instructed by him to file the complaint. The Sub-divisional Officer referred the complaint to the Sub-Inspector of Police for local investigation and the Sub-Inspector reported that the case appeared to be false being apparently under the impression that by virtue of the delivery of possession Usman was entitled to take and had taken possession of the kucheri. Thereafter a Magistrate also held a local inquiry and he too came to the conclusion that Lachhman's complaint could not be supported. After the dismissal of the complaint and after calling on the petitioners to show cause against their prosecution, a complaint under S. 476, Criminal P. C., was presented for the prosecution of the petitioners under Ss. 211 and 211 read with S. 109 respectively. They have been convicted and have appealed without success.

The main point taken in revision is that the complaint being as the appellate Court has held " partly false and partly true," there ought not to have been a prosecution and neither of the petitioners ought to have been convicted. This ground applies to both the petitioners. For Sahadeo Karan it is further contended that there was no evidence that he had

abetted the making of a complaint by Lachhman Lall. To say that a criminal prosecution cannot stand in respect of a complaint which is partly false and partly true is putting the matter a little too broadly. The law is stated in 5 C W N 727.[1] In this case the learned Judges after reciting the provisions of S. 211 say that it is difficult to lay down any precise rule. Each case must depend upon its own circumstances and what is to be considered is the nature of the complaint or charge made by the accused; in other words, whether the complaint is substantially true and what is false is a mere fringe to the complaint or whether the substantial complaint is false and what is true is a mere fringe, or in other words a mere accessory circumstance. In the present case the charge is of theft and removal of the materials of the kucheri and the contents of the kucheri. The answer that Usman and his men were entitled to remove the materials of the kucheri by virtue of the dakhal-dehani has broken down. It has been found that the dakhal-dehani did not give possession of the kucheri and did not authorize Usman to do anything to the kucheri. It is manifest therefore that Usman and his men, when they dismantled the kucheri and removed the materials, committed offences of mischief and theft. This is so whether or no there were valuable properties kept inside the kucheri and whether or not theft of such properties also took place. Some of the witnesses for the prosecution in the present trial have attempted to maintain that the removal of the materials of the kucheri took place at the time of the dakhal-dehani ; but the prosecution evidence, I must say, is in considerable confusion as to the exact date of this alleged removal and the Courts below did not appear to have accepted Usman's case that the removal was at the time of the dakhal-dehani, though they were of opinion that the removal took place sometime during August and not in October.

The question has not been considered what motive there was for Lachhman or Sahadeo Karan to postpone the presentation of a complaint for six weeks or so when the act committed was indisputably a criminal offence and when the relations between Sahadeo and Usman were by no means of a kind to dispose Sahadeo to show forbearance or to contemplate for a time forgiving his adversary. In my opinion the evidence will hardly support the conclusion that the main part of Lachhman's complaint was false. Even if it was so, it would require to be proved that Lachhman knew at the time of instituting the complaint that there was no just and lawful ground for it. It would not be enough to say that Usman had committed theft but that Lachhman had distorted the facts by altering the date. That would not make his complaint a false complaint within the meaning of S. 211 if the offence alleged had been in fact committed. Then as against Sahadeo Karan it would not be enough for the prosecution to say that Lachhman's complaint was false. It would be necessary to prove also that Sahadeo was aware of its falsity. If Sahadeo believed what Lachhman told him and in good faith ordered the latter to file a complaint, the fact that Lachhman's story turned out to be untrue would be no ground for criminal prosecution of Sahadeo even if during the inquiry he assisted his servant in the production of evidence. In the result it seems to me that it is not possible to support the conviction of either of the petitioners. The applications will be allowed and the petitioners will be acquitted.

K.B./D.S. *Applications allowed.*

1. Giridhari Naik v. Empress, (1901) 5 C W N 727.

A. I. R. 1937 Patna 85

MOHAMAD NOOR AND MADAN, JJ.

Nathuni Singh and *others*—Defendants—Appellants.

v.

Khub Lal Singh and *others*—Plaintiffs—Respondents.

Appeal No. 145 of 1935, Decided on 2nd September 1936, from original order of Addl. Sub-Judge, Darbhanga, D/- 30th March 1935.

Decree—Ex parte—Setting aside—Application for time to compromise suit rejected — One party ready to proceed with suit while other was not—Ex parte decree passed— Application to set it aside — On day for hearing applicants ready with witnesses while other party applied for time—Certain day fixed for hearing but one of applicants absent being ill — Medical certificate produced — Trial Judge rejecting certificate and dismissing application to set aside ex parte decree—Application held was not mala fide — Summary rejection of medical certificate further held

was not justified —Refusal of application for time to compromise was reasonable ground for restoration of suit.

An application for time to compromise a suit by both parties was rejected summarily. One of the parties was ready to proceed with the suit, while the other party was not ready. An ex parte decree was passed. An application for setting aside ex parte decree was filed. On a day for hearing, applicants were ready with witnesses, while the other party applied for time and the time was granted. On a certain day fixed for hearing one of the applicants was absent being ill. A medical certificate by a practitioner employed by the District Board was produced. The trial Judge rejected summarily the medical certificate and dismissed the application for setting aside the ex parte decree. On appeal :

Held : if the applicants were ready with witnesses on a previous date fixed for hearing the application for time on a subsequent date of hearing was not mala fide. [P 86 C 2]

Held further : the summary rejection of the medical certificate of a practitioner employed by the District Board was not justified. [P 86 C 2]

Held also : the refusal of the application for time to compromise a suit by both the parties was a reasonable ground for the restoration of the suit. [P 86 C 2]

Syed Safdar Imam and *Kali Prasad Sukul*—for Appellants.

Manohar Lal, *S. N. Ray*, *L. K. Jha* and *P. Jha*—for Respondents.

Madan, J. — This is an appeal against an order dismissing for default an application under O. 9, R. 13, for setting aside an ex parte decree. The appellants were defendants in a mortgage suit in the course of which, on 22nd August 1934, a petition for a month's time to compromise was filed on behalf of both the parties. This petition was rejected summarily by the Subordinate Judge and the plaintiffs then declared themselves to be ready to proceed with the suit, while the appellants were not ready. The Subordinate Judge then heard the plaintiffs and decreed the suit ex parte the next day. The application for setting aside the decree was filed within time on 19th September, and on 18th March, after some adjournments, the appellants were ready with their witnesses while the opposite party applied for time. 30th March was fixed, and on that date a medical certificate was filed to the effect that Kailu Singh, who was one of the appellants and was looking after the appellants' case, was suffering from dyspepsia and could not attend the Court. The learned Subordinate Judge summarily rejected this petition and dismissed the application, and the appellants have now come before this Court.

In this case there are considerations favourable to the appellants, as the order-sheet shows that the appellants were ready with their witnesses on the previous date, which makes it less easy to hold that their application for time on 30th March was mala fide or to justify the summary rejection of the medical certificate which was granted by a practitioner under the employment of the District Board. Also it appears that the appellants had reasonable ground for asking for the restoration of the suit, namely that a petition for time to compromise filed on behalf of both the parties was refused. In the circumstances we think it proper to allow this appeal, as well as the application under O. 9, R. 13, and to set aside the ex parte decree in its entirety : parties will bear their own costs in this Court.

Mohamad Noor, J.—I agree.

W.D./D.S. *Appeal allowed.*

A. I. R. 1937 Patna 86

JAMES, J.

Matber Singh and *another*—Appellants.

v.

Rai Krishna Bahadur and *others*—Respondents.

Appeals Nos. 489 to 491 of 1934, Decided on 20th March 1936, from appellate decree of Dist. Judge, Saran, D/- 18th December 1933.

(a) Bihar Tenancy Act (8 of 1934), S. 148-A —Joining of parties—Only landholders and not co-proprietors are to be joined as co-defendants.

Section 148-A, Bihar Tenancy Act, requires the plaintiff to join as co-defendants only the other landlords of the holding, not the other proprietors of the estate, and for whatever share the other proprietors may be recorded in Register D, they are not in the sense in which the word is used, in the Tenancy Act, landlords of these holdings unless they are actually co-sharers in the patti within which the holdings lie : *S. A. Nos. 395 to 397 of 1929, Disting.* [P 87 C 1]

(b) Evidence—Judgment in former suit — Same parties in former and present suit— Judgment in former suit is good evidence in present suit for the issues in and result of former suit.

Where all the persons who are parties to a present case were parties to a former litigation, the judgment in the former proceedings is certainly evidence of what were the points in issue between the parties in that suit and of what was the result of the suit. [P 87 C 2]

Hareshwar Prasad Sinha—for Appellants.

Janak Kishore, *A. N. Lal* and *Rai Parasnath*—for Respondents.

Judgment.—These appeals arise out of three suits for arrears of rent. The plaintiff claimed as landlord in respect of a one-third share of his patti but the tenant-defendants took the defence that he was entitled only to a share of one-sixth. The parties were also at issue regarding the rate of rent which was payable for this land, and the defendants further claimed that during the years in suit the greater part of the land had been unfit for cultivation. On these points the Courts below have found against the tenant-defendants, who have now come up in second appeal from the decree.

Mr. Hareshwar Prasad Sinha on behalf of the defendants argues in the first place that the suits could not be treated as properly framed under S. 148-A, Bihar Tenancy Act, because all the co-sharers who are named in Register D have not been joined as defendants; and further that since the plaintiff is recorded in Register D for a share of two annas eight pies, he cannot now claim a larger share. In support of this last ground of appeal, Mr. Hareshwar Prasad Sinha cites the decision of this Court in *Sarafat Karim* v. *Harangi Singh* (*Second Appeals Nos. 395 to 397 of 1929*); but in that case the plaintiff who was recorded in the khewat and Register D for a share of six annas claimed that he had obtained title to the whole sixteen annas by adverse possession. It was held that he could only claim the share for which he was recorded in Register D. It has not been held, and it never could be held, that the holder of a separate patti can recover in his patti nothing more than the share calculated in terms of the whole mahal which is entered in Register D. S. 148-A, Bihar Tenancy Act, requires the plaintiff to join as co-defendants only the other landlords of the holding, not the other proprietors of the estate, and for whatever share the other proprietors may be recorded in Register D, they are not in the sense in which the word is used in the Tenancy Act landlords of these holdings unless they are actually co-sharers in the patti within which the holdings lie.

The question of whether there has been pattidari division of this kind is a question of fact, but Mr. Hareshwar Prasad Sinha objects that in arriving at their decision, the Courts below have relied on inadmissible evidence, or on documents which were not properly proved. A written statement which purports to have been filed by the defendant Matber Singh in a case under S. 144, Criminal P. C., was put in evidence, but although objection was taken at the time no attempt was made by the plaintiff to connect this written statement with Matber Singh, that is to say, there is no evidence that he filed it or that he authorized the filing of it.

Another piece of evidence to which Mr. Hareshwar Prasad Sinha takes objection is a judgment (Ex. 8-A) wherein this question of the existence of the pattis was discussed in a case to which Matber Singh was not a party. The learned District Judge has remarked on the written statement (Ex. 5) that the appellant Matber Singh said therein that the plaintiff had settled the land in dispute with him, and that he did not suggest there that co-sharers of the other patti had any concern with the land. The learned District Judge also referred to the judgment (Ex. 8-A) relying on it as an expression of judicial opinion, wherein he was in error. Mr. Hareshwar Prasad Sinha also objects to the admission of the judgment (Ex. 8-B); but that is certainly admissible, because all the persons who are parties here were parties to that litigation, and the judgment is certainly evidence of what were the points in issue between the parties in that suit and of what was the result of the suit. In that case Chabi Lal Raut sued Matber Singh in ejectment, joining as defendants the landlords who are parties to the present suits. He also joined Rai Bahadur Raghunath Prasad, whose widow is now put forward as a co-sharer who ought to have been joined in the present suits. Chabi Lal Raut claimed that he had obtained settlement from Rai Bahadur Raghunath Prasad, and that this gave him title to the land of which Matber Singh had taken possession. Matber Singh defended the suit on the ground that this diara land lay in the eight annas patti of Rai Krishna Bahadur and the other two parties of the present suits, and that Rai Bahadur Raghunath Prasad had no concern with it, because the land did not lie within his patti. Matber Singh succeeded in his plea and the attempt to eject him failed.

Apart from Ex. 8-B there is a great deal of other evidence on which the learned District Judge has relied. He has relied only to a slight extent on Ex. 5 and Ex. 8-A and unless the provisions of S. 167, Evidence Act, are to be completely ignored, it would be impossible to hold that the admission of these two documents in any way vitiates the finding on this question of pattidari possession.

The document, Ex. 5, is mentioned again by the learned District Judge in dealing with the question of what is the rate of rent; but it does not appear that the rate of rent appears in that written statement. The learned District Judge remarks that Matber Singh said there that he had obtained printed receipts from his landlord; but he does not now produce any. Here again a mass of documentary evidence was produced on behalf of the landlord which the learned District Judge accepted as true and the casual reference to the written statement, Ex. 5, is of no importance.

The defendant claimed that the land in suit was entirely sandy during the years in respect of which rent was claimed. The argument at the trial was interrupted for the deputation of a commissioner who reported on the present condition of the land, to which Mr. Hareshwar Prasad Sinha takes objection, though it does not appear that any objection was taken at the time of the deputation of the commissioner. Mr. Hareshwar Prasad Sinha points out that the commissioner reported that certain land was not fit for cultivation and probably never had been; but this was land outside the area mentioned in the plaint, of a holding wherein the plaintiff claimed rent for twelve bighas whereas Matber Singh said, he possessed twenty-four. For the rest the present condition of the land did not prove in itself what had been the condition during the years in suit ; but this fact did not escape the notice of the learned District Judge who decided the point on the evidence which was before him.

I find no ground for interference with the decision of the lower appellate Court and these appeals must be dismissed with costs.

B.D./D.S. *Appeals dismissed.*

A. I. R. 1937 Patna 88

WORT AND FAZL ALI, JJ.

Kameshar Singh Bahadur—Defendant—Appellant.

v.

Ramdhari Mandal, Plaintiff and *others*, Defendants—Respondents.

Appeal No. 122 of 1932, Decided on 2nd September 1936, from decree of Sub-Judge, Purnea, D/- 12th May 1932.

(a) Record of Rights—Dispute about land—*R* claiming certain lands in his village—*K* contesting—Cadastral survey records in favour of *K*—*R* who is unable to prove records as wrong cannot succeed.

R claimed that certain plots of land belonged to him and were included in his village; *K* contested the claim saying that the lands were his and were situated in *K*'s village. The cadastral survey records showed the lands forming part of *K*'s village. *R* contended that the cadastral survey records were wrong but he failed to prove it:

Held: that his suit could not succeed. [P 91 C 2; P 92 C 1]

(b) Revenue sale—Position of purchaser—What passes is interest of Crown subject to liability to pay assessment due—Purchaser can get rid of all intermediate tenures or encumbrances.

So far as the legal position of a purchaser at a revenue sale is concerned what passes to such a purchaser in law is the interest of the Crown subject to the payment of the Government assessment and he is remitted to all the rights possessed by the original settlor at the date of the settlement and may take advantage of that position to sweep away or get rid of all the intermediate tenures and encumbrances created by the preceding zamindar since that date: *A I R 1935 Pat 306*; *A I R 1914 P C 82* and *A I R 1927 P C 135*, *Ref.* [P 91 C 2]

(c) Record of Rights—Onus of proof—Person challenging record of rights must prove it—Person alleging adverse possession must prove that.

The onus of proving adverse possession is upon persons who allege adverse possession but the onus of proving that the cadastral survey entries are wrong is upon the person who challenges such entries. [P 92 C 1]

Murari Prasad, *K. P. Upadhaya*, *R. Misra*, *M. N. Pal*, and *S. P. Srivastava*—for Appellant.

Mahabir Prasad, *D. L. Nandkeolyar* and *C. P. Sinha*—for Respondents.

Fazl Ali, J. — The question to be determined in this appeal is whether some 35 acres of land comprising the greater portion of plots Nos. 1 to 39 appertain to Tauzi No. 460/1768 of village Moradpur in the district of Purnea of which the plaintiff is the proprietor or to Tauzi No. 225/1533 which belongs to defendants

1 to 12. The plaintiff purchased Tauzi No. 460/1768 at a sale held for arrears of revenue on 13th January 1923 and on 8th April 1929 he commenced the present suit with a view to have demarcated and recover possession of some 66 acres of land comprising plots Nos. 1 to 39 and plot No. 5397 which according to him appertained to Tauzi No. 460/1768. His case was that the plots in question had been wrongly recorded in the cadastral survey record of rights prepared about 1906 as appertaining to the defendants' tauzi, whereas the case of the defendants was (defendants 1 to 12 being the landlords and defendants 13 and 14 the tenure-holders of the disputed plots) that the record of rights had been correctly prepared and that the plaintiff's suit was barred by limitation.

The learned Subordinate Judge held that the greater portion of plots Nos. 1 to 39 appertained to the plaintiff's tauzi but plot No. 2593 did not. He accordingly decreed the suit in part and now defendant 14, who is recorded in respect of the disputed land as tenure-holder under defendants 1 to 12, the proprietors of Tauzi No. 225/1533, has appealed. Now a number of facts may be taken to have been clearly established in this case. It appears that in 1843 one Rup Puri held about 106 bighas of milik land for which Rs. 53-3-5 was assessed as revenue, and this estate bore Tauzi No. 460 (*vide* Exs. 1, 4 and 5). It appears further that between 1846 and 1849 the lands of Rup Puri were sold more than once for arrears of revenue and ultimately they were purchased by Government for Re. 1 and the Collector was asked to settle them. The condition of the land about this time is described in the following words in Ex. 2, a rubkari of the Settlement Deputy Collector dated 7th June 1853:

> It appeared that as a matter of fact the lands are quite parti (torn) have been washed away by the river Kosi Kalan; and like (?) the (said?) lands thousands of bighas (of lands?) around it are lying fallow (and) have become a jungle (?). On account of such a jungle, this mahal was sold by auction repeatedly (?) consecutively. The auction-purchasers could not manage to pay the rent. It was purchased by the Government and made over to me. While the settlement was not yet made, the said records were returned to the Collectorate. Thereafter on 15th May 1852 they were again (?) made over to this Court. A fresh notice was issued. No one appeared. That is from the beginning of the purchase up to the month (?) of November 1852 (during which ?) a period of more than three years elapsed no one applied for settlement.

The rubkari proceeds to state that in 1853 one Mr. Mackintosh appeared and filed an application for settlement accepting a jama of Rs. 12-9-5 and so a settlement for ten years was concluded with him. It is also stated in the rubkari that the area settled with Mr. Mackintosh was 239 bighas 5 kathas 10 dhurs according to a laggi of four cubits. So far the history of Tauzi No. 460 can be clearly traced but what happened to the estate or to the lands constituting it after 1863 after the term of settlement with Mr. Mackintosh had expired, we do not know. It may however be stated here that on 20th April 1932 an application was made to the Collector on behalf of defendant 14 for ascertaining "in what year and with whom the permanent settlement of Tauzi No. 460/1768 was made" and the answer to this application was given in the following terms:

> On looking into the settlement records of 460/1768 there is not seen any paper described as permanent settlement paper although the decennial settlement papers are found.

The plaintiff does not dispute the correctness of the information supplied by the Collector, but wishes us to assume that the estate 460 must have been permanently settled with some one before the date of the cadastral survey and that the new Tauzi No. 1768 is identical with the old Tauzi No. 460. His ground for asking us to make these assumptions are that unless the land had been permanently settled it would not find a place in Part 1 of the Tauzi Roll; and the numbering of the new estate as 460/1768 by itself suggests that there must be some connexion between 460 and 1768. Now the main question to be considered in this appeal is whether the plaintiff has succeeded in establishing that the entries in the record of rights in respect of Tauzi Nos. 460/1768 and 225/1533 are incorrect. It may be stated here at once that the plaintiff has succeeded in establishing that the greater portion of plots 1 to 39 is identical with some of the lands which were in possession of Rup Puri about the year 1843. Rup Puri's lands are described as Rup Puri milik bearing No. 161 in the revenue survey map (Ex. 12) which was prepared about the year 1846 and Ex. 9 which is a mauzawar register prepared about the same time shows that this was identical with what was then Tauzi No. 460. A commissioner who was

deputed by the trial Court to make a local investigation has upon a comparison of the revenue survey map with the cadastral survey map, been able to locate some of the lands which were in possession of Rup Puri, and he has come to the conclusion that the greater portion of plots 1 to 39 represents those lands. The commissioner's conclusions are also supported by Ex. 15, the cadastral survey map of Tauzi No. 225, in which the lands of that tauzi are described as Tengaria milik and it is noted that the old name for these lands was Rup Puri milik. In my opinion, the commissioner's conclusion cannot be challenged in the face of the documentary evidence which is before us, and it must be held that the plaintiff has succeeded in showing that plots 1 to 39 represent at least a portion of the lands which were in possession of Rup Puri between 1843 and 1846.

It however remains to be considered whether this fact by itself is sufficient to rebut the cadastral survey entries. It is to be remembered that the plaintiff's case is that the cadastral survey entries are wrong both with regard to the land of Tauzi No. 225/1533 and Tauzi No. 460/1768. The remarkable fact however is that none of the persons interested in the two tauzis has ever challenged the correctness of the entries and these persons have been in actual possession for a long time according to the survey entry. Thus we find from Ex. R that on 17th July 1911 the lands of Tauzi No. 460/1768 were sold in execution of a decree and purchased by Lala Deosaran Lal and others. The sale certificate gives an inventory of the property and mentions the very plots which are recorded in the cadastral survey papers as plots appertaining to Tauzi No. 460/1768. The area which is given in the sale certificate is 20·48 acres as recorded in the survey papers and not 66 acres which is stated by the plaintiff to be the area of the lands of Tauzi No. 460/1768.

Turning now to Tauzi No. 225/1533 we find that the cadastral survey entry with regard to this tauzi is strongly supported by an old document, Ex. F, which bears the date 2nd February 1892. On that date one Lal Behari Lal executed a sale-deed in favour of Lala Deosaran Lal in respect of Tengaria milik bearing Tauzi No. 225 and paying a sadar jama of Rs. 17-11-1. It is recited in this document (Ex. F) that the vendor had purchased the vended property at a public auction on 16th September 1880 in Execution Case No. 505 of 1880 of the Court of the Munsif of Purnea and that the said property had been in his possession and occupation since the date of the sale certificate ; and, that his wife, in whose name the property had been purchased, stood recorded in the Government office since that date. Now, it is common ground that the Tengaria milik is identical with Rup Puri milik and indeed plots 1 to 39 have been specifically described as Tengaria milik in the cadastral survey papers. Thus the recitals in Ex. F, the correctness of which there is no reason to doubt, fully support the cadastral survey entry and show that at least since 1880 the disputed lands which stand recorded as appertaining to Tauzi No. 225/1533 have been dealt with as appertaining to Tauzi No. 225. In these circumstances it seems to me that before we can hold the survey entry to be wrong we must have before us the clearest possible evidence in support of the plaintiff's case. But as I have already stated the plaintiff has offered no evidence to show what happened to the lands of Tauzi No. 460 after the settlement with Mr. Mackintosh. We have no direct evidence of the permanent settlement of these lands ; and, even assuming that the land was permanently settled sometime or other after 1863, we do not know when and with whom the permanent settlement was made and what lands were actually settled and when and in what circumstances Tauzi No. 460/1768 was created.

In other words, there is no paper before us to show the boundaries and the area of this particular estate when it became the subject of the last permanent settlement as Tauzi No. 460 or 460/1768. Further, the plaintiff has not placed before us the papers of the decennial settlement which followed the settlement with Mr. Mackintosh, so as to enable us to hold that the identity of the estate or the lands which had in the first instance been settled with Rup Puri was preserved throughout in the subsequent settlements. On the other hand such evidence as we have before us throws great doubt on the plaintiff's case that the boundaries and the area of the estate have remained unaffected throughout. As I have already stated, in 1843 the lands which were in possession of Rup Puri was 106 bighas odd. In certain subsequent papers the area is shown to be 66 acres, whereas

in 1853 the area is found to be about 80 acres. In 1906 when the cadastral survey proceedings were concluded, the area of the lands recorded in Tauzi No. 460/1768 was 20·48 acres and before the plaintiff instituted the present suit, none of the intermediate holders of this tauzi ever came forward to say that the area had been incorrectly recorded. On the other hand, as I have already stated, Ex. R of 1911 states precisely the same area as is to be found in the Record of Rights. How are we then to conclude that the very land or estate which was in possession of Rup Puri was the subject of the last permanent settlement about which, as I have already stated, no evidence, documentary or oral, is forthcoming ? We must also in this connexion remember that the lands being close to the river Kosi must have been subject to violent changes. Indeed from Ex. 2, the rubkari of 1853, it appears that the lands which were in possession of Rup Puri shortly before 1853 had been washed away and thousands of bighas round about these lands were either lying fallow or were overgrown with jungle.

Such being the local conditions it is not inconceivable that in the course of the successive settlements which followed the settlement of these lands with Mr. Mackintosh, mistakes and confusion may have occurred and the boundaries of the estate 460, even though there may have been the intention to keep the estate alive, did not remain unaffected. Thus the estate which was subsequently carved out as Tauzi No. 1768 may in fact not have been identical with the estate which in Rup Puri's time bore Tauzi No. 460. The plaintiff suggests in para. 4 of his plaint that the estate which bears the new No. 1768 is identical with 460 and the suggestion receives some support from the numbering of the new tauzi as 460/1768; but even if we assume that the new tauzi 1768 is in some way or other connected with Tauzi No. 460, the fact remains that we do not know at what point of time the new tauzi was carved out and what were the boundaries of Tauzi No. 460 at that point of time when it was replaced by 1768. Indeed there is no evidence before us to enable us to say with certainty that the estate bearing Tauzi No. 460 which may have been formed at some unknown date after 1863 was identical with the estate bearing Tauzi No. 460 of 1843-46, and from this it follows as a matter of corollary that Tauzi No. 460/1768 has not been proved to be identical with Tauzi No. 460 of the revenue survey period. The plaintiff asks us to assume that Tauzi No. 460 must have remained intact throughout, but there is no justification in law for making this assumption. We are not dealing here with one of those estates which was permanently settled about 1793 or later and has been in existence ever since. We are dealing here with lands which had a chequered history, which were resumed by the Government after the permanent settlement and which have been the subject of a number of successive settlements by the Khas Mahal authorities since 1853.

The same remarks apply more or less to Tauzi No. 225/1533. The plaintiff has endeavoured to identify it with what is described as Debipur milik in the Special Diara map of the district of Bhagalpur and Purnea (Ex. 13) which was prepared in 1917 and one of the documents (Ex. 9) shows that in 1843, Tauzi No. 225 was shown as milik Moradpur bearing No. 150 in the revenue survey map. But beyond this there are no tangible materials before us to enable us to re-construct the history of this estate. On the other hand, as I have already stated, Ex. F, which is a document of 1892, lends considerable support to the cadastral survey entry with regard to the estate. Therefore in the present state of evidence I find some difficulty in holding that the plaintiff has succeeded in showing that the cadastral survey entries are wrong.

So far as the legal position of a purchaser at a revenue sale is concerned, it is now settled by a series of authorities that what passes to such a purchaser in law is the interest of the Crown subject to the payment of the Government assessment and he is remitted to all the rights possessed by the original settlor at the date of the settlement and may take advantage of that position to sweep away or get rid of all the intermediate tenures and encumbrances created by the preceding zamindar since that date : *see* 14 Pat 70;[1] 18 C W N 1281[2] and 31 C W N 965.[3]

1. Sonabati Kumari v. Kirtyanand Singh, A I R 1935 Pat 306=157 I C 433=14 Pat 70.
2. Surja Kanta Acharjya v. Sarat Chandra Roy, A I R 1914 P C 82=25 I C 309=18 C W N 1281 (PC).
3. Narayan Das Khetry v. Jatindra Nath Ray, A I R 1927 P C 135=102 I C 198=54 I A 218 =54 Cal 669=31 C W N 965 (P C).

Thus if the plaintiff could succeed on the question of the identity of his estate and if it had been clearly established that the defendants came into possession of the estate after the last permanent settlement, the plaintiff would have been in a position to eject them successfully, because any adverse possession that may have been exercised by them prior to his purchase would have been of no avail against him, he having brought his suit within twelve years of his purchase. The difficulty, however, which confronts us in this case is that the plaintiff has not been able to show when the estate, of which he has become the owner, was permanently settled on the last occasion; and, as I have already stated, it is clear upon the evidence that the predecessors-in-interest of the defendants have been in possession of the identical lands which are claimed by the plaintiff at least since 1880. If the last permanent settlement of Tauzi No. 460/1768 took place after 1880 it is clear that they cannot be ousted. It is true that the onus of proving that the defendants have been in adverse possession since before the date of the permanent settlement is upon the defendants but the onus of proving that the cadastral survey entries are wrong is upon the plaintiff. The defendants have succeeded in proving that they and their predecessors-in-interest have been in possession of this disputed land, at least since 1880, and if the presumption of continuity of possession can be successfully invoked in their favour, as I think in the circumstances it can be, it is clear that the plaintiff cannot succeed in this case. The plaintiff has in my opinion wholly failed to show that the cadastral survey authorities were not justified in recording the disputed lands as appertaining to the defendants' tauzi. In these circumstances I would allow the appeal and hold that the plaintiff's suit fails and should be dismissed with costs throughout.

Wort, J.—I agree.

B.D./R.K. *Appeal allowed.*

*** A. I. R. 1937 Patna 92**

MOHAMAD NOOR AND MADAN, JJ.

(*Kaviraj*) *Bimala Nanda Tarakatirtha*—Petitioner.

v.

Dhirendra Nath Chandra and *others*—Opposite Parties.

Civil Revn. No. 217 of 1936, Decided on 19th October 1936, from order of Sub-Judge, Dhanbad, D/- 25th April 1935.

*** Civil P. C. (1908), S. 73—Rateable distribution — Application for, prior to date of receiving assets—Execution application dismissed before rateable distribution actually made—Dismissal of execution petition after application for rateable distribution does not affect right of applicant to share in distribution.**

The dismissal of an execution petition, after the application for rateable distribution is made prior to receipt of assets, does not affect the right of applicant to share in distribution. The fact that the party allows their pending execution to be dismissed for default before the actual rateable distribution is actually made is immaterial : *A I R 1915 Cal 16, Rel. on; 4 Mad 383* and *A I R 1935 Rang 135, Disting.* [P 93 C 1]

Sultan Ahmad and *S. N. Bose* — for Petitioner.

P. R. Das and *S. C. Mazumdar* — for Opposite Parties.

Madan, J.—The facts of this case are that in the year 1931 the applicant's father obtained a money decree for the sum of Rs. 36,000, and that on 27th September 1932, villages of the judgment-debtor were sold in execution for the sum of Rs. 60,000 and were purchased by two outside persons. The purchasers deposited one quarter of the purchase money on the sale date and the balance on 2nd November 1932. The sale was set aside on 16th September 1933 on an application filed under O. 21, R. 90, but it was confirmed on appeal on 27th November 1935. At the time of the sale four other decrees were under execution against the same judgment-debtor at the instance of persons who are the opposite party in this case. In August 1932, which was prior to the sale, these persons applied under S. 73, Civil P. C. for rateable distribution of the sale proceeds. The applications of two of the decree-holders, namely opposite party 3 and 4 were not opposed, but in the case of opposite party 1 and 2, objection was raised on the ground that on 27th November 1935, when the assets in the hand of the Court became available for distribution, their execution peti-

tions were no longer pending, having been dismissed for default in August 1935. After the confirmation of the sale the learned Subordinate Judge passed an order allowing rateable distribution in favour of all the persons who had applied, and this application has been filed against that order so far as it relates to opposite party 1 and 2.

Sir Sultan Ahmad for the applicant contended that opposite party 1 and 2 were no longer entitled to rateable distribution on the ground stated above, but this argument appears to be contrary to the wording of S. 73 itself which runs as follows :

> Where assets are held by a Court and more persons than one have, before the receipt of such assets, made application to the Court for the execution of decrees for the payment of money passed against the same judgment-debtor and have not obtained satisfaction thereof, the assets, after deducting the costs of realization, shall be rateably distributed among all such persons.

In this case the opposite party had applied for rateable distribution prior to the dates, when the assets were received by the Court, namely 27th September and 2nd November 1932, and their own applications for execution were pending on that date. They had therefore done what was required of them by the law, and it became the duty of the Court to see that the rateable distribution was effected. The fact that opposite party 1 and 2 allowed their own pending execution to be dismissed for default before the rateable distribution was actually made seems to me to be immaterial. The same point arose in 18 C W N 1311,[1] where it was held that the dismissal of an execution petition after the application for rateable distribution did not affect the right to share in the distribution. In 4 Mad 383[2] and in 13 Rang 514,[3] it was held that in order to entitle a creditor to apply for rateable distribution his own application for execution must be pending and unsatisfied at the time. In both these cases, however, the executions had been struck off prior to the application for rateable distribution, which is not the case here, and it was for this reason that the requirements of S. 73 were held not to have been fulfilled. In the Rangoon case it was pointed out that if it were held otherwise the result would be that a person whose application for execution would otherwise be time-barred under Art. 182, Lim. Act, could still apply for rateable distribution, but, as I have already pointed out, the facts of the present case are different.

It is true that in the Rangoon case, the Calcutta decision cited above was dissented from, but with all respect to the learned Judges who decided that case, I do not find from their judgment that the distinguishing feature of the Calcutta case was brought to their notice, namely that in that case the execution was dismissed after the application for rateable distribution. In my opinion the order passed by the learned Subordinate Judge in this case was correct and there is no reason to interfere. I would therefore dismiss this application with costs. Hearing-fee two gold mohurs to each of the opposite party 1 and 2.

Mohamad Noor, J.—I agree.

P.R./A.L. *Application dismissed.*

1. Byomkesh Chakrabutty v. Hemanta Kumar, A I R 1915 Cal 16=24 I C 83=18 C W N 1311.
2. Tiruchittambala Chetty v. Seshayyangar, (1882) 4 Mad 383.
3. N. M. L. Chettier Firm v. Official Assignee, A I R 1935 Rang 135=158 I C 515=13 Rang 514.

A. I. R. 1937 Patna 93

WORT, J.

Ramjanam Singh — Defendant 2—Appellant.

v.

Ramphal Lal, Plaintiff and *others*, Defendants 1 and 3—Respondents.

Appeal No. 412 of 1934, Decided on 4th November 1936, from appellate decree of Addl. Sub-Judge, Gaya, D/- 28th May 1934.

(a) Bihar Tenancy Act (8 of 1934), S. 163—Rent decree—Method of procedure laid down by Bihar Tenancy Act for purpose of executing rent decree must be followed.

There is a certain method of procedure to be adopted as laid down by Bihar Tenancy Act for the purpose of executing a rent decree as such and parties cannot depart from the procedure so laid down. Hence in executing rent decree simultaneous issue of the sale proclamation and the order of attachment is necessary. [P 94 C 1]

(b) Tenure—Sale in execution of rent decree—Effect is different under Civil Procedure Code and under Bengal Tenancy Act.

The effect of sale of tenure in execution of a rent decree is different under Civil Procedure Code and under the Bengal Tenancy Act : *6 I A 47 (P C), Ref.* [P 94 C 1]

Rajkishore Prasad—for Appellant.

D. L. Nandkeolyar, *Brajkishore Prasad* and *Kedar Nath Varma*—for Respondents.

Judgment.—In this case there was a competition between two purchasers, defendant 2 on the one hand, who purchased the property on a money decree dated 6th April 1932, and the plaintiff-respondent on the other who purchased the property in execution of what has been described in the Court below as a money decree dated 8th August of the same year. In my judgment there is nothing in the point that a charge was created by the kabuliyat, and I have the gravest doubt whether a charge could be so created. The real question is whether in the circumstances the sale arising out of the later execution of August 1932 was in fact the execution of a money decree. The learned Judge in the Court below has come to the conclusion that it was a rent decree, because (but ?) in the circumstances of the case it was not necessary to comply with the provisions of S. 158-B (163 ?) and a simultaneous issue of the sale proclamation and the order of attachment was in his opinion unnecessary. That view in my judgment is incorrect. There is a certain method of procedure to be adopted as laid down by what is now the Bihar Tenancy Act, for the purpose of executing a rent decree as such, and I know of no authority which would entitle the parties to depart from the procedure so laid down. That it is necessary for the parties to comply with the procedure so laid down is of course obvious, as the effect of a sale under the Bengal Tenancy Act and a sale under the Civil Procedure Code are two very different things as pointed out in 6 I A 47.[1]

The facts of that case are not unlike the present one although perhaps somewhat more complicated. I very much doubt in the first place whether this property was governed by the Bengal Tenancy Act, although the learned Judge in the Court below has held that it was, but I do not decide the question on that footing. After a perusal of the trial Court's judgment for the purpose of ascertaining what the facts were and for the reason that I am of the opinion that the learned Judge was wrong in coming to the conclusion that it was not necessary to comply strictly with S. 163, I hold that the view that the Judge held was wrong in law. In those circumstances in my opinion the judgment of the learned Judge in the Court below should be set aside, the judgment of the trial Court reversed and the plaintiff's suit dismissed with costs throughout. Lest there should be any misunderstanding as regards the Rupees 100, which the Court below has allowed to the plaintiff, I observe that the plaintiff had no cause of action against defendant 2 and in any event should not have recovered the amount from him even if he had succeeded in the suit. So far as defendant 1 is concerned, he has been brought to this Court by the appellant (defendant 2). No relief was sought or could be got against him. The appellant therefore, although recovering his costs from the plaintiff-respondent, must pay the costs of this appeal incurred by defendant 1.

K.B./D.S. *Appeal allowed.*

1. Doolar Chand Sahoo v. Chhabeel Chand, (1878) 6 I A 47=3 C L R 561=3 Sar 885 (P C).

A. I. R. 1937 Patna 94

JAMES, J.

Udai Singh and *others*—Defendants—Appellants.

v.

Bhunesharnath Singh and *others*—Plaintiffs—Respondents.

Appeal No. 22 of 1934, Decided on 20th October 1936, from appellate decree of Dist. Judge, Shahabad, D/- 27th July 1933.

Mortgage—Construction — Mortgagees in possession to appropriate produce in lieu of debt—No express or implied promise to pay—Option of redemption remaining with mortgagors—Mortgagees to remain in possession till payment of principal, and if dispossessed they could realise principal in any manner—Mortgage held to be plain usufructuary mortgage and not combination of simple and usufructuary mortgage—Mortgagees held not entitled to decree for money or for sale so long as they remained in possession.

A mortgage bond recited that the mortgagors had given dakhli rehan of the mortgaged property to the mortgagees and that the latter should cultivate the land and appropriate the produce in lieu of their money. The mortgagees were to enjoy possession for three years and unless redemption was made after three years it was not to be made until the subsequent year. There was no promise to pay express or implied. The option of redemption remained with the mortgagors, but so long as the principal was not paid the mortgagees were to remain in possession, and if they were dispossessed they could realise the principal in any manner they liked, and as security for realisation of the money in that event, the land was mortgaged :

Held : that it was a plain usufructuary mortgage of the kind described in S. 58 (a) and (d), T. P. Act, and was not a combination of a simple and a usufructuary mortgage and that there was nothing in the mortgage deed implying promise to repay the money advanced. So long as the mortgagees remained in possession of the mortgaged property, they were entitled neither to a money decree nor to a decree for sale : *24 Cal 677* and *A I R 1930 Pat 152, Rel. on.*[P 95 C 2; P 96 C 1]

B. P. Sinha—for Appellants.

Khurshed Husnain and *D. N. Varma*—for Respondents.

Judgment.—The plaintiffs in 1927 took certain property in usufructuary mortgage from the defendants for Rs. 800. By the terms of their bond, they were as usual entitled to sue for recovery of their mortgage money in the event of disturbance of their possession of the mortgaged property. The suit out of which this appeal arises was instituted for recovery of the mortgage money on the allegation that the plaintiffs had been dispossessed. The trial Court found that this was a simple usufructuary mortgage and that the plaintiffs' possession had not been disturbed. The suit was therefore dismissed. On appeal the District Judge of Shahabad reversed the decision of the trial Court on two grounds: one ground was that the mortgage of the property itself by way of security for the loan converted the mortgage from a usufructuary mortgage into a combination of simple mortgage and a usufructuary mortgage; while the second ground was that the mortgage contained a covenant to repay. He therefore gave a decree for the principal money of the mortgage but no decree for sale. The mortgagors appeal from that decision. Mr. B. P. Sinha, on behalf of the appellants argues that the mortgage is a mere usufructuary mortgage with no covenant for repayment and no special condition which would take it out of the category of usufructuary mortgage. Mr. Khurshed Husnain on behalf of the respondents cites several cases in which the words used in usufructuary mortgages had been held to imply covenants for repayment, or in which it had been implied from the special terms of the clause hypothecating the property as security that the mortgage was a combination of simple mortgage and usufructuary mortgage. The only question for consideration in this case is whether the mortgage bond with which we have to deal is anything other than a mere usufructuary mortgage. The mortgage bond recites that :

We have given in dakhli rehan from the full moon day of Jeth 1334 Fs. to 1337 Fs., and we declare that the said Mahajans should cultivate and get cultivated the said lands and appropriate the produce in lieu of their money. If we fail to pay the principal on the said date, then after the expiry of that date we shall, on making payment of it in Jeth of any year, take back this deed and bring the rehan property into our possession and occupation.

In my judgment the learned District Judge erred in reading into this stipulation for redemption a covenant for repayment of the money advanced. There is nothing here implying a promise to repay the money. The mortgagees are to enjoy possession securely for three years; and stipulations are made that unless redemption is made on the said date of Jeth 1337 it shall not be made until the subsequent Jeth. There is no promise to pay, express or implied; the option of redemption remains with the mortgagors, but so long as the principal is not paid, the mortgagees will remain in possession. There is a further stipulation that if the mortgagees are dispossessed from the mortgaged property, they may realise the principal in any manner they like, and as security for realisation of the money in that event, the land is mortgaged to the Mahajans. A mortgage is defined in the Transfer of Property Act as a transfer of an interest in specific immoveable property for the purpose of securing the payment of money advanced by way of loan; and that general definition is satisfied by what Mr. Khurshed Husnain styles the hypothecation clause; while a usufructuary mortgage is a mortgage in which possession of the mortgaged property is delivered to the mortgagee who is to receive the rents and profits in lieu of interest which has happened in this case.

This is a plain usufructuary mortgage of the kind described in sub-ss. (a) and (d) of S. 58, T. P. Act. It is not a combination of a mortgage described in sub-s. (d) and of the simple mortgage described in sub-s. (b); it is an ordinary usufructuary mortgage of the kind described in sub-s. (d). That being so, the rule in 24 Cal 677[1] will apply, which was followed by this Court in 11 P L T 74.[2] I find nothing in the mortgage with which we are here concerned by which it can be distinguished

1. Luchmeshar Singh v. Dookh Mochan Jha, (1897) 24 Cal 677.
2. Kamal Nayan Pd. v. Ram Nayan Prasad, A I R 1930 Pat 152=120 I C 308=11 P L T 74.

from Luchmeshar Singh's mortgage which was the subject of discussion in the decision of the Calcutta High Court to which I have referred. That being so, since the plaintiffs remain in possession of the mortgaged property, they are entitled neither to a money decree nor a decree for sale; and the decision of the Munsif in this suit was correct. The appeal must be allowed, the decree of the lower appellate Court will be set aside and the decree of the Munsif restored. The appellants are entitled to their costs in this Court and in the lower appellate Court.

R.M./R.K. *Appeal allowed.*

A. I. R. 1937 Patna 96

WORT AND AGARWALA, JJ.

Kameshwar Singh Bahadur—Plaintiff—Appellant.

v.

Shaikh Sakhawat Ali and *others*—Defendants—Respondents.

Appeal No. 86 of 1933, Decided on 4th September 1936, from original decree of Sub-Judge, Bhagalpur, D/- 28th April 1933.

(a) Evidence Act (1872), S. 101—Record of rights—Entry as rent free—Suit for declaration that land was not rent free—Landlord proving that land lies within assessed estate—Onus is shifted to claimant of rent free land to prove land to be rent free.

A landlord brought a suit for declaration that certain lands were not rent free. The entry in record of rights showed that they were rent free. The landlord established that the land was within his zamindari and within the area assessed to revenue:

Held: that the burden of proving that the land was rent free shifted on the tenant: *A I R 1922 P C 272, Rel. on*; *A I R 1923 Pat 340, Disting.* [P 96 C 2; P 97 C 1]

(b) Adverse Possession—Landlord and tenant—Mere non-payment or discontinuance of payment of rent does not create adverse possession.

Mere non-payment of rent or discontinuance of payment of rent does not by itself create adverse possession: *A I R 1922 P C 272* and *40 Cal 173, Rel. on.* [P 98 C 1]

(c) Grant—Presumption—Express grant of rent free land—No identification of property—Presumption of lost grant cannot arise.

Where there was an express rent free grant to the defendants or their predecessors in title but the land could not be identified:

Held: presumption of lost grant could not arise. [P 98 C 2]

Murari Prasad, Bisseswar Prasad, K. P. Upadhaya and *S. P. Srivastava*—for Appellant.

Rajeswari Prasad—for Respondents.

Wort, J.—This is an appeal by the plaintiff arising out of an action in which he claimed a declaration with regard to 102 bighas of land which was recorded in possession of the defendants as belagan. The plaintiff's case is that the land is liable to assessment for rent and claims that a fair and equitable rent should be assessed by the Court. The learned Judge in the Court below has come to the conclusion that the land was rent free as the defendants alleged. The record of rights, as I have already indicated, was in favour of the defendants. The record was finally published in 1930. It would appear that in this village of Magarwara there had been a survey in 1905 of such lands as were not under the river Kosi at the time, but not (as I understand) a complete survey of the whole village at that time. One of the principal questions arising in this appeal is whether, as the defendant-respondents allege, the onus was on the plaintiff. It is contended by the respondents that, as the record of rights was in their favour, it was for the plaintiff to rebut the entry in the record. On the other hand the well-known decision in 2 Pat 38[1] is relied upon by Mr. Murari Prasad on behalf of the plaintiff-appellant. This decision is relied upon for several propositions. This case was explained in a judgment of this Court in 11 P L T 444[2] and was again referred by the learned Chief Justice of this Court and Chatterjee, J. in a later case reported in the same volume. But in my judgment the decision of their Lordships of the Judicial Committee in the first-named case is explicit on the point which comes up before us for determination. Mr. Ameer Ali, delivering the opinion of their Lordships of the Judicial Committee, made this statement:

> Considerable stress has been laid on this presumption on behalf of the respondents. Once, however, the landlord has proved that the land which is sought to be held rent free lies within his regularly assessed estate or mahal, the onus is shifted. In the present case, the lands in dispute lie within the ambit of the estate, which admittedly belongs to the plaintiffs and the pro forma defendants, and for which they pay the revenue assessed in the mauza. In these circumstances it lies upon those who claim to hold the lands free of obligation to pay rent, to show by satisfactory evidence that they have been relieved of this obli-

1. Jagdeo Narain Singh v. Baldeo Singh, A I R 1922 P C 272=71 I C 984=49 I A 399=2 Pat 38 (P C).
2. J. A. Stonewigg v. Kameshwar Narain Singh, A I R 1923 Pat 340=71 I C 1022=11 P L T 444.

gation either by contract or by some old grant recognised by Government.

There can be no dispute in this case that the plaintiff has established that the land in dispute is within his zamindari and is within the area assessed to revenue. There is no evidence with regard to this. But the allegations of the earlier paragraphs of the plaint and the admission contained in the written statement filed by the defendants made it unnecessary for the plaintiff to adduce evidence in this regard, and it must therefore be taken to be established that the land in suit is not only within the zamindari of the plaintiff but also within the lands assessed to revenue. The matter comes quite clearly within the principle laid down by their Lordships of the Privy Council, and in my opinion the case reported in 11 P L T 444[2] does not affect the application of the principle laid down by their Lordships of the Judicial Committee of the Privy Council. I might observe that there is one point of distinction between the case in 11 P L T 444[2] and the one before their Lordships of the Privy Council and the case before us, and that is that in the case decided by Das, J. (as he then was) there was an entry in the record of rights as to the occupancy rights of the defendants and therefore no question could arise with regard to a title adverse to the landlord. In the view I take a very considerable distinction results from that fact. That being the case the question here is whether the defendants have established their right to a rent free grant. The method of proof adopted by the defendants was the production of deeds of title which would show prima facie a rent free grant. Their immediate title was based on a sale deed by Fateh Narain Kumar to Shaikh Ghulam Ali, dated 7th April 1884. But amongst their other deeds of title was an earlier document of 19th July 1812, being a sale deed by one Mt. Sonamani Misrain to Raja Ram Kunwar and another. The defendants also produced two sanads, one dated 1758 and the other dated 1759, and in so far as they come from the possession of the defendants there might be some indication that they were entitled to a rent free grant as they asserted. But in fact we get very little assistance from the two sanads for the reason that the land was not clearly described or defined by boundaries which is the material factor in this case. Coming to the two deeds of 1812 and 1884, we see that 105 bighas of land under the deed of 1812, and described as in mauza Mangarhara, Patti Khorhari, were sold amongst other lands with which we have no concern in this case. When we come to the sale deed of 1884 the lands are described as 'out of 107 bighas of Chakla Rahtha in mauza Mangarwara' and when we come to the boundaries given in the deed the difficulty in this case arises. The evidence in the case, in addition to the deeds to which I have referred, consists of maps, the first being the survey map of 1846, and the second the survey map prepared in 1927 which is on a larger scale. Now, the points arising on the two maps are very simple. From the map of 1846 it will be seen that the lands described in the deed of 1812, that is to say 105 bighas of Khorhari, are immediately south of village Rangpatti. Now, when we come to the deed of 1884, we find that the lands are described as Chakla Rahtha which is very considerably to the west. We find also that the eastern boundary of the 54 bighas of the 107 bighas is described as Rangpatti and that the eastern boundary of the 44 bighas as 'rent paying land in Mangarwara, Patti Rahtha.'

From the survey maps it will be seen that the defendants are now in possession of plots which are numbered from 10 to 215, but whether 215 is the highest number or not is immaterial for the purposes of this case. The most northerly plots are plots 10, 17, 19, 35, 36 and 37. They are to the immediate north of a road which is marked plot 63. This road, if extended to the north, would run to Rahtha Chakla No. 281 (so described in the survey map). In order to make the defendants' case fit in with the survey map (and I should say in this connexion that it is not denied that the defendants are in actual possession of the plots which are marked pink on the copy of the survey map), it will be necessary to place their lands to the east of the lands of which they are in possession. But in the map of 1846 there appears to be a road running south to north to village Rangpatti. It is on this road, that according to the document of 1812 the defendants' lands would lie, as they are described in Khorhari. The road across which the defendants' land lie is the road much further to the west and running, as I have said, to Rahtha Chakla No. 281. It will be seen therefore

that the description given in the two deeds upon which the defendants rely and that of the lands of which they are admittedly in possession do not tally.

The Judge has, with some difficulty, it appears, accepted the contention of the defendants in the Court below, as regards the boundaries given in the deed of 1884. The eastern boundary there given is Rangpatti which if accepted at its face value would be against the defendants as Rangpatti there mentioned was Rangpatti village and not, as the defendant suggested, Tola Rangpatti which was inside the village Mangarwara. Apart from bare statements of witnesses there is no evidence to support the conclusion that the boundary was Tola Rangpatti. On the sale deeds and the maps, the correctness of which is not disputed, the lands which were the subject matter of the sale deeds cannot be the lands of which the defendants are now in possession. What the true explanation of the matter is it is difficult to state. We do know, and it is a notorious fact, that the river Kosi flooded the lands of this village and in course of time they have emerged. Whether the lands of which the defendants are in possession are lands which have emerged from the river Kosi we are left in doubt. That leads me to the question of possession which has also been argued by the defendants. I do not think there can be any serious dispute and indeed the decision to which I have referred at the early part of my observations is a sufficient authority that there can be no question of adverse title by the non-payment of rent. It is true that limitation does run under Art. 131, Lim. Act, but only from the date upon which there has been a demand for rent and a refusal to pay. Their Lordships of the Privy Council in the case to which I have referred, dealt with the matter in this way. They said :

> Again, mere non-payment of rent or discontinuance of payment of rent has not by itself been held in India to create adverse possession. The identical question came for decision before the Calcutta High Court in 40 Cal 173,[3] where Mr. Mookherjee, J. affirmed the proposition in clear terms.

So far as limitation is concerned there can be no doubt that the plaintiff is not barred by limitation in his claim to the assessment of a fair rent. There is no evidence that any demand had been made nor that there was a refusal on the part of the defendants. It is also contended on behalf of the defendant-respondents that from the fact that the defendants are in possession for a considerable time, and no rent has been paid, we might presume a lost grant of rent free lands. I find it difficult to accept that proposition. There is authority, and we have been referred to it in support of the proposition, but I can only go so far as to say that in favourable circumstances it might be held that there was a presumption of a lost grant of rent free lands. But if there is one principle of law which is more clearly established than another it is this: that such a presumption cannot arise where there is an express grant. In this case there was an express rent free grant to the defendants or their predecessor-in-title and in those circumstances they cannot rely upon a presumption of a lost grant, and the only question which can arise is of the identification of the lands. It is an unfortunate case from the point of view of the defendants, but on the case before us they have failed to show that the lands of which they are in possession are the lands which are described in their documents of title. In these circumstances the appeal succeeds and the case must be remanded to the learned Subordinate Judge for assessment of fair and equitable rent. The appeal is allowed with costs throughout.

Agarwala, J.—I agree.

S.C./A.L. *Appeal allowed.*

3. Prasanna Kumar Mookherjee v. Shrikantha Rout, (1913) 40 Cal 173=16 I C 365=17 C W N 132=16 C L J 202.

A. I. R. 1937 Patna 98

VARMA, J.

(*Lala*) *Deo Narain Lal* and *others*—Appellants.

v.

Ram Khelawan Singh and *others*—Respondents.

Appeal No. 68 of 1934, Decided on 9th September 1936, from appellate decree of Sub-Judge, 3rd Court, Patna, D/- 27th June 1934.

Bengal Tenancy Act (8 of 1885), Ch. V—Occupancy raiyats—If occupancy right had not been acquired from before, mere recognition would not confer occupancy right upon raiyat.

The institution of an occupancy right is a creature of statute. Recognition means existence

of something from before. If the occupancy right had not been acquired from before, mere recognition by landlord would not confer occupancy right upon a raiyat : *A I R 1926 P C 79, Rel. on.*

[P 100 C 1]

Baldeo Sahay, J. N. Sahay and *Dyan Chand*—for Appellants.

B. N. Mitter, Dasu Sinha and *L. K. Chaudhury*—for Respondents.

Judgment.—This is an appeal on behalf of the defendants against a judgment of the lower appellate Court decreeing the suit of the plaintiffs which was originally dismissed by the trial Court. The suit was for a declaration of title with regard to khata Nos. 11 and 12 and the prayer was that the plaintiffs should be declared to be occupancy raiyats of those khata numbers and that the entry in the batwara suit that these lands were the bakasht malik should be corrected as it was not binding upon them. There was a large number of defendants consisting chiefly of the landlords of the village. Only two sets of them appeared and contested the suit and the third set did not. The suit was dismissed by the learned Munsif against the contesting defendants, but it was decreed against the non-contesting defendants. The defence was that the lands came into the possession of the sixteen annas landlords as bakasht and that the plaintiffs being co-sharer landlords were put into cultivating possession of the suit lands on the condition of their paying to the other co-sharers their share of the profits. Now the plaintiffs based their claim to be recognised as occupancy raiyats in three different ways: firstly, as heirs of one Hit Lal who left a widow known as Mt. Chhathia after whose death they came to be in possession as her heirs; secondly, they said that there was a settlement with them between the landlords on lines similar to the compromise (Ex. 2) entered into between the 11 annas 9 pies maliks and the present defendants; and, thirdly, that from the conduct of the contesting defendants manifested by a series of rent receipts which are numbered as Ex. 3 and their road cess return which is Ex. 5, it appears that the landlords recognised them as occupancy tenants.

As I have mentioned above, the learned Munsif dismissed the suit entirely. The learned Subordinate Judge has upheld the finding of the Munsif with regard to the first point and has come to the conclusion that the plaintiffs did not come into possession of the lands as heirs of Mt. Chhathia. He has also discarded the story that there was a settlement between the present appellants and the plaintiffs; but he has differed from the learned Munsif on the third point. The learned Munsif had discarded Exs. 3 and 5 as pieces of evidence to be utilised against the contesting defendants; but the lower appellate Court has gone into the matter and has come to the following conclusion; with regard to the receipts, the lower appellate Court says that these receipts purport to have been granted by the contesting defendants and the fact that the defendants did not produce their counterfoil rent receipt books would entitle the Court to draw an inference against them in the sense that they would not be allowed to question the genuineness of the receipts produced by the plaintiffs. He also refers to the fact that some witnesses who could have thrown light on the matter were not examined ; and then he comes to the conclusion that these receipts are genuine. With regard to the road cess return the lower appellate Court very pertinently points out that the plaintiffs were mentioned in a column which is reserved for tenant; but he further observes that if they were to be described otherwise, that is as maliks, they would have been so described just as Gouri Mahton has been described as a malik. From these two items of evidence, Exs. 3 and 5 and after referring to some oral evidence on the point, he comes to the following conclusion:

> I think that the rent receipts (Ex. 3 series) and the road cess return (Ex. 5 series) are the documents which fully prove that these contesting defendants also did recognise these plaintiffs as tenants, though they fought up to the Board of Revenue in the commutation case.

He further finds towards the end of his judgment :

> For all the reasons I have given above, I hold that these contesting landlords also accepted these appellants as raiyats just as the lands of 11 as. and odd share did. Therefore this point must succeed, and the appeal must be allowed with the result that the suit will be decreed, declaring the plaintiffs-appellants' raiyati right in the disputed lands of Chhathia.

Referring to the latter quotation if the finding only was that the contesting landlords accepted these appellants as raiyats, there was not much to say ; but the trouble begins with the second sentence of the quotation. Knowing as we do that the prayer was that the plaintiffs should be declared to be occupancy raiyats with

regard to khata Nos. 11 and 12, the ordering portion of the lower appellate Court's judgment which says that the suit will be decreed, amounts to this: that although his finding does not go beyond this fact that the landlords recognised them as raiyats, by his decreeing the suit he has declared them to be occupancy raiyats. Mr. Baldeo Sahay has urged that the judgment of the lower appellate Court is not sustainable inasmuch as, even if the findings of the lower appellate Court are accepted, they do not justify the declaration that the plaintiffs were occupancy raiyats. The institution of an occupancy right is a creature of statute. Recognition means existence of something from before. If the occupancy right had not been acquired from before, mere recognition would not confer occupancy right upon a raiyat. My attention has been drawn to the various sections of the Bengal Tenancy Act like Ss. 19, 20, 21 and 22, and the general scheme of the enactment to show the various types of tenants that are contemplated by that enactment and the various incidents connected with those tenancies or raiyati rights. Mr. B. N. Mitter appearing on behalf of the plaintiff-respondents has urged that the order of the lower appellate Court decreeing the suit was perfectly in order because if one looks at the receipts one will find that they are more than twelve years old and it must be presumed that the lower appellate Court saw these pieces of documentary evidence before delivering his judgment and therefore his finding means a finding of fact which should not be interfered with in second appeal. I am afraid the lower appellate Court did not consider it important to refer to the age of the receipts and the statement that he must have looked into the age of these documents before coming to his finding goes against the respondents to this extent that although the age of the receipts was staring in the face the lower appellate Court did not act upon it nor even mention the fact in his judgment. All that he did was to base his finding upon the fact that the receipts showed that the plaintiffs were recognised as tenants. Reference has been made to the case in 53 I A 164,[1] in which their Lordships at p. 167 remarked that :

A right of occupancy under the Bengal Tenancy Act, 1885, appears to be a statutory right, and is not conferred by a gift from a proprietor.

That being so, the lower appellate Court having discarded the case of the plaintiffs with regard to the question of heirship and settlement and on the third point having come to this finding alone that the plaintiffs were recognised as tenants by the contesting landlords, the decree based on this finding must be set aside because there is a big gap between the finding that the tenant was recognised as such by the landlord and an order that the tenant should be recognised as an occupancy raiyat. Under these circumstances I would set aside the decree of the lower appellate Court and restore that of the Munsif. The appeal is accordingly allowed with costs. Leave to appeal under the Letters Patent is refused.

B.D./D.S. *Appeal allowed.*

1. Bindeshwari Prasad Singh v. Kesho Prasad Singh, A I R 1926 P C 79=95 I C 1025=53 I A 164=5 Pat 634 (P C).

** A. I. R. 1937 Patna 100
FULL BENCH

COURTNEY-TERRELL, C. J., MOHAMAD NOOR, JAMES, DHAVLE AND VARMA, JJ.

Ghanshyam Das Marwari—Petitioner.

v.

Ragho Sahu and *others* — Opposite Parties.

Civil Revn. No. 155 of 1936, Decided on 8th December 1936, from order of Small Cause Court Judge, Monghyr, D/- 13th January 1936.

*** (a) Promissory Note — Right to sue—Benami payee—Hand-note executed in favour of benamidar—Promisor cannot allege that holder of note is not beneficial owner—Holder of note alone whose name appears on it has right to sue on hand-note—Beneficial owner cannot sue on hand-note.**

Where a hand-note is executed in favour of benamidar, it is not open to the promisor to assert that the holder of the note is not the beneficial owner. Conversely, if a suit is to be based upon the hand-note it must be instituted by the holder whose name appears on the note and not by another person who alleges that the original holder is his benamidar and that he is the beneficial owner : *30 Mad 88* ; *A I R 1928 Pat 24* and *A I R 1931 Cal 387, Rel. on* ; *A I R 1934 Pat 382, Disting.* [P 101 C 2]

**** (b) Promissory Note—Assignment—Endorsement is not only means for transferring negotiable instrument — Transfer of promissory note by means of registered instrument is valid:** *A I R 1934 Pat 382=13 Pat 655=15 P L T 576, Overruled.*

Endorsement is not the only means by which a negotiable instrument can be transferred. Ch. 4, Negotiable Instruments Act, deals with the man-

ner of the negotiation of these instruments. In the ordinary way, under S. 48 of the Act, a hand-note would be negotiated by endorsement and delivery thereof ; a promissory note endorsed in blank or a promissory note to the holder or bearer, is negotiated in simpler fashion. But the Negotiable Instruments Act itself does recognize that negotiable instruments may be transferred and for consideration otherwise than by negotiation (*see* provisions of S. 118 (a) of the Act).

[P 102 C 1, 2]

A transfer of a promissory note by means of a registered instrument is therefore valid ; *28 Mad 544 ; A I R 1915 Mad 1031 ; 16 C W N 666 ; A I R 1921 L B 92* and *A I R 1919 Lah 85, Rel. on ; A I R 1934 Pat 382=13 Pat 655=15 P L T 576*, **Overruled.** [P 102 C 2]

*** (c) Transfer of Property Act (1882), Ss. 130 and 137—Scope—Negotiable instruments — S. 137 merely excludes negotiable instruments from operation of S. 130, which requires transfers thereof by means of written instrument only—S. 137 does not however prohibit their transfer by written instrument and transfer by a registered instrument is valid.**

Section 130 of the Act provides for transfers of actionable claims which include negotiable instruments also by means of written instruments. S. 137 however merely excludes the negotiable instruments from the operation of S. 130. There is nothing in S. 137 which prohibits the transfer of such instruments by means of separate written instruments. The transfer therefore of a pro-note by means of a registered deed is valid.

[P 102 C 2]

S. S. Bose—for Petitioner.

D. C. Varma—for Opposite Parties.

James, J.—Ramadhin Sahu borrowed a sum of money from Sitaram Marwari for which he gave a hand-note. Sitaram Marwari sold the hand-note to Ghanshyam Das Marwari by a registered sale deed. Ghanshyam Das Marwari then sued the debtor for recovery of the value of the hand-note, basing his suit on the hand-note and also on the debt which had been transferred to him with the hand-note by means of the registered instrument. A plea of partial payment was put forward at the trial by the defendant which the Small Cause Court Judge disbelieved ; and he would have decreed the suit except for the fact that he regarded the decision of this Court in 13 Pat 655[1] as prohibiting the transfer of a hand-note or of the debt based on it by any other means than by endorsement and delivery as described in the Negotiable Instruments Act. The case criginally came before a Single Judge who referred it to a Division Bench. The Division Bench, doubting the correctness of part of the decision in 13 Pat 655,[1] asked for a reference to a larger Bench.

In 13 Pat 655[1] the hand-note was executed not in favour of the person who advanced the consideration but in the name of a benamidar. The assignment was made, not by the benamidar whose name appeared upon the note, but by the person who claimed to be the beneficial owner; and although it is to be noted that the benamidar expressly agreed to the assignment, it is also to be noted that in the case before the Bench, he alleged that the debt of which the note was evidence had been discharged. There is a current of decisions to the effect that where a hand-note is executed in favour of a benamidar, it is not open to the defendant to assert that the holder of the note is not the beneficial owner : 30 Mad 88;[2] and conversely that if a suit is to be based on the hand-note it must be instituted by the holder whose name appears on the note, not by another person who alleges that the original holder is his benamidar and that he is the beneficial owner : 9 P L T 238[3] and 58 Cal 752.[4] In the case 13 Pat 655,[1] if the benamidar had endorsed the hand-note to the beneficial owner before transfer, or if the benamidar had himself executed a deed of transfer, the plaintiff's position would have been different. The transfer in that case was actually made not by the person whose name appeared upon the note but by the person who claimed to be the beneficial owner ; but it appears that the rule regarding the manner in which negotiable instruments can be transferred was stated somewhat too broadly in the decision of that case, so that in the present case the learned Small Cause Court Judge considered that he was incapable of acting upon the transfer by a registered instrument which was executed by the original holder. We have to determine whether such a transfer confers upon the transferee the right to sue.

In 28 Mad 544[5] the Acting Chief Justice of the Madras High Court held that

1. Peary Pasi v. Gauri Lal, A I R 1934 Pat 382 =151 I C 694=13 Pat 655=15 P L T 576.
2. Subba Narayan Vathiyar v. Ramaswami Aiyar, (1907) 30 Mad 88 = 16 M L J 508 (F B).
3. Ram Das Sahu v. Chhota Lal Mander, A I R 1928 Pat 24=104 I C 526=9 P L T 238.
4. Harkishore Barna v. Gura Mia Chaudhuri A I R 1931 Cal 387=131 I C 570=58 Cal 752 =35 C W N 53.
5. Muthar Sahib Maraikar v. Kadir Sahib Maraikar, (1905) 28 Mad 544=15 M L J 384.

an assignment of promissory notes by a a registered instrument gave the assignee the right to sue upon them in his own name, though the assignee in such circumstances acquired only the right, title and interest of his assignor, whereas the endorsee would have all the rights of a holder in due course. In 1912, in 38 Mad 297,[6] Sir Arnold White, presiding over a Special Bench of the Madras High Court, held that where a promissory note had been mortgaged to the plaintiffs of that case without endorsement, the transferee was entitled to sue upon the note and was actually the only party entitled to sue. In 16 C W N 666,[7] where a promissory note had been transferred by a registered deed of gift, the transfer was held to be a valid assignment. It has been decided in Burma and in the Punjab that such an assignment could be made in more informal fashion and yet be effective. The Burma Chief Court in 66 I C 501[8] held that a negotiable instrument could be transferred so as to enable the transferee to maintain a suit thereon even without endorsement or a written assignment. In the Punjab it had been held by the Chief Court in 51 I C 250[9] that endorsement was not the only mode by which a negotiable instrument could be transferred; it can be assigned otherwise and the assignee could sue in his own name, the only difference being that the assignee would have only the right, title and interest of the assignor, while the endorsee would have all the rights of a holder in due course, following the decision in 28 Mad 544[5] to which reference has been made.

I do not think that it can be held in view of these authorities that endorsement is the only means by which a negotiable instrument can be transferred. Ch. 4, Negotiable Instruments Act, deals with the manner of the negotiation of these instruments. In the ordinary way, under S. 48 of the Act, a hand-note such as we have before us in the present case would be negotiated by endorsement and delivery thereof; a promissory note endorsed in blank or a promissory note to the holder or bearer is negotiated in simpler fashion. But the Negotiable Instruments Act itself does recognise that negotiable instruments may be transferred and for consideration otherwise than by negotiation, because S. 118 (a) of the Act provides that until the contrary is proved, when a negotiable instrument has been negotiated or transferred, it shall be presumed that it was negotiated or transferred for consideration.

In the case now before us the promissory note was transferred by means of a registered instrument; and we have not to consider the question of whether the transfer by less formal means other than by endorsement would or would not be valid. S. 130 T. P. Act, provides that a transfer of an actionable claim shall be effected only by the execution of an instrument in writing; but S. 137 of the Act provides that nothing in S. 130 shall apply to negotiable instruments. S. 137 of the Act excludes negotiable instruments from the operation of the rule which requires that transfer shall be made by a written instrument, because they are ordinarily transferred by negotiation. Nothing in S. 137 prohibits the transfer of negotiable instruments by means of separate written instruments; but the question of whether in the present instance the transferee was entitled to sue as the holder of the hand-note and also as the assignee of the debt of which the hand-note was evidence does not arise in this case, because he did in fact institute his suit in each of those capacities, and when his claim to recover the amount of the debt was proved he was entitled to succeed. The defendants pleaded part payment; but the finding of the Court was that payment had not been made and that the debt claimed in the plaint was due. The Small Cause Court Judge would have decreed the suit if he had felt that he was able to hold that the mode of transfer employed entitled the plaintiff to sue; and in the circumstances, I would allow this application, set aside the decree of the Small Cause Court Judge and decree the plaintiff's suit with costs throughout: hearing fee three gold mohurs.

Courtney-Terrell, C. J. — I entirely agree. My statement of opinion in 13 Pat 655,[1] to the effect that a transfer of a hand-note could not be made otherwise

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6. Muthukrishnier v. Veeraraghava Iyer, A I R 1915 Mad 1031 = 21 I C 316=38 Mad 297= 25 M L J 356 (F B).
7. Benode Kishore Goswami v. Ashutosh Mukhopadhya, (1912) 16 C W N 666.
8. Palawan v. B. [illegible] u, A I R 1921 L B 92= 66 I C 501=11 L B R 174.
9. Panna Lal Lachhman Das v. Hargopal Khubi Ram, A I R 1919 Lah 85 = 51 I C 250 = 29 P R 1919.

than by endorsement and delivery was not necessary for the decision of the case, and moreover I am now convinced that it was erroneous. I was misled by the wording of S. 48, Negotiable Instruments Act, and did not notice that the transfer of a negotiable instrument is not by that section restricted to the operation of endorsement.

Mohamad Noor, J.—I agree.

Dhavle, J.—I agree.

Varma, J.—I agree.

K.B./A.L. *Application allowed.*

A. I. R. 1937 Patna 103

WORT, J.

Bibi Baratan and *others*—Defendants—Appellants.

v.

Mt. Chandramani Kuer — Plaintiff — Respondent.

Appeal No. 473 of 1934, Decided on 9th November 1936, from appellate decree of Sub-Judge, Gaya, D/- 29th March 1934.

Contribution—Co-owner—Repairs of well by one co-owner with non-gratuitous intention—Other co-owner enjoying benefit thereunder with first co-owner—First co-owner is entitled to recover expenses under S. 70, Contract Act.

A co-owner repairing a well with intention to benefit himself and the other co-owners is entitled to recover expenses from the other co-owner under S. 70, Contract Act, when it is shown that the first co-owner did not intend to do the work gratuitously and that other co-owner enjoyed the benefit thereunder with him: *33 Mad 15, Dissent.; 2 I A 131 (P C), Expl.* [P 103 C 2]

H. R. Kazimi—for Appellants.

Rajkishore Prasad—for Respondent.

Judgment.—This appeal arises out of an action for contribution. The defendants are the appellants although there is a cross-appeal as regards a part of the case. The action related to three wells which according to the plaintiff's case he had restored or put into repairs and he therefore sought to recover the costs or part of the costs for repairs from his joint owner. The learned Judges in the Courts below have granted the plaintiff a decree as regards one of the wells as it has been held that the repairs effected by him benefited the defendants. The only contention advanced on behalf of the defendant-appellants against the decision of the learned Judge in the Court below is that S. 70, Contract Act, does not apply as this section would not apply to cases where persons are jointly interested and that S. 70 refers to those cases where the defendant only benefits and not the plaintiff and the defendant together. Without reading words into S. 70 I cannot uphold the contention. When the plaintiff was doing the repair works, he was not only doing something for himself but, according to the finding of the lower Court, was doing something also for the defendants; and, so long as it is shown that the plaintiff did not intend to do the work gratuitously and that other persons enjoyed the benefit of the work, he is entitled to recover under S. 70 of the Act. For me to follow some of the authorities on this section, particularly the case in 33 Mad 15,[1] would be to read something in the section which does not there appear. The regrettable part of this decision is that although the learned Judges relied upon the decision in 2 I A 131,[2] it is quite clear that their Lordships of the Judicial Committee of the Privy Council there applied the common law rule with regard to this matter which it has been pointed out, and indeed, it is obvious, is very different from the rule laid down in Ss. 69 and 70, Contract Act. Those sections are a great departure from the common law. It is not surprising that the Judicial Committee applied the common law rule as the action out of which the appeal arose commenced four years before the Contract Act in India was passed. There is a cross-appeal by the plaintiff as regards the other two wells, and, although it is admitted that S. 70 does not apply, it is contended that neither S. 70 nor S. 43 applies but S. 69 does. S. 69 provides:

> A person who is interested in the payment of money which another is bound by law to pay, and who therefore pays it, is entitled to be reimbursed by the other.

Now, the facts as found by the Court below are hardly adequate for the purpose of deciding that the learned Judge in the Court below is erroneous in law; and I would hold that the cross-appeal fails on an entirely different ground. It is somewhat technical perhaps to say that it has nowhere been found that the liability of the plaintiff and that of the defendants

1. Yogambal Boyee Ammani Ammal v. Naina Pillai Markayar, (1910) 33 Mad 15=3 I C 110.
2. Ram Tuhul Singh v. Biseswar Lall Sahoo, (1874) 2 I A 131=15 Ben L R 208=23 W R 305=3 Sar 477 (P C).

for the repairs of these wells was joint and several and, until it could be shown that the liabilities were joint and several, it is difficult to contend that the persons for whose benefit (i. e. the tenants) the repairs were to be done could not have sued either one or the other ; and, so long as the tenants could sue either one or the other, it is difficult to say that the defendants themselves were liable to pay or do the repairs. In my judgment both the appeal and the cross-appeal fail and they must be dismissed with costs. Leave to appeal is refused.

K.B./A.L. *Appeal dismissed.*

A. I. R. 1937 Patna 104

VARMA, J,

Deonandan Thakur—Petitioner.

v.

Mt. Hanso Kuer and *others*—Opposite Parties.

Civil Revn. Nos. 93 and 100 of 1936, Decided on 14th September 1936, from order of Dist. Judge, Muzaffarpur, D/- 30th January 1936.

(a) Execution Sale—Setting aside—Advertising sale on certain day but actually holding it one day afterwards does not amount to material irregularity owing to Rr. 14 and 15, Patna High Court General Rules.

A sale was proclaimed to take place on a certain day but actually took place one day afterwards:

Held: that it did not amount to material irregularity in conducting sale under O. 21, R. 90, Civil P. C., owing to the provisions of Rr. 14 and 15, Patna High Court General Rules. [P 105 C 1]

(b) Revision—Court assuming jurisdiction owing to misinterpretation of statute where it had no jurisdiction—High Court can interfere in revision.

Where the Court by a misinterpretation of a statute assumed jurisdiction in respect of a matter over which it would not have had jurisdiction if the statute had been rightly interpreted, the High Court can interfere under S. 115, Civil P. C. [P 105 C 2]

A sale was proclaimed to take place on a certain day but actually took place one day afterwards. Lower Court set aside the sale on the ground of material irregularity :

Held: that as the Judge had misunderstood the legal position with regard to sale, High Court could interfere and set aside the lower Court's order, under S. 115, Civil P. C.: *39 C W N 915, Rel. on.* [P 105 C 1, 2]

S. K. Mitter—for Petitioner.

S. N. Roy—for Opposite Parties.

Order.—These two applications Nos. 93 and 100 of 1936, arise out of two execution cases, Nos. 561 and 560 of 1934 respectively. It appears that some properties were sold in execution of a rent decree and were purchased by the petitioner on 3rd October 1934. The opposite party put in petitions against those sales under O. 21, R. 90 on the ground that the sales were brought about by fraud in publishing and conducting the sales and also on account of certain material irregularities. The first Court dismissed the applications on the ground that the irregularities and the fraud complained of were not established by the opposite party. In fact he went so far as to hold that all these obstructions were being raised by the mortgagee in possession and not by the lady in whose name the property actually stood. The judgment-debtor went in appeal to the District Judge of Muzaffarpur and he has held that inasmuch as the sale was notified to be held on 1st October 1934, but actually the sale was not held till the 3rd October, he seemed to think that the provisions of law were not complied with and therefore the sale should be set aside and the application under O. 21, R. 90 allowed. He also referred to another matter and that was the inadequacy of the price fetched; and from this he infers that if the property had been correctly valued in the sale proclamation, it would have perhaps fetched a better price. Mr. Mitter appearing on behalf of the petitioner, who happens to be the auction-purchaser, urges that the learned District Judge has gone wrong in holding that the holding of a sale on the 3rd October was illegal or that it amounted to material irregularity so as to entitle him to set aside the sale altogether simply because the sale was advertised for the 1st October and it was held on the 3rd October. He has drawn my attention to Rr. 14 and 15, High Court General Rules and Circular Orders, Civil, Vol. 1, Part 1, Ch. 6, dealing with execution of decrees. R. 14 runs as follows :

All property, except property of the nature specified in the proviso to O. 21, R. 43 of the Code, or R. 18 of this Chapter, to be sold at each place of sale shall be entered in lists for each place, the lists of moveable and immoveable properties being distinct. The lists shall be so prepared as to contain in regular order each item of property to be sold in execution of the decrees of each Court severally. Such lists shall be stuck up in the Courts where the sales are to be held, in the case of moveables not less than seven days, and in the case of immoveables not less than 15 days, before the date fixed for the commencement of each set of sales.

Rule 15 runs as follows :

At the stated hour upon each fixed date the sales shall be commenced, and shall be carried on in the order stated in the lists above mentioned. No sale shall continue after sunset; but the sales shall be held from day to day, except when the Court is closed and until the lists are finished: Provided that this rule shall not interfere with the adjournment of any particular sale according to law.

The learned Judge seems to be under the impression that simply because a sale does not take place on the date for which it is advertised, the sale becomes a nullity or the sale becomes illegal. It is best to quote from his judgment and show to what extent he has been influenced in his decision by not referring to the two rules which I have just now quoted. After holding that it was not shown that any fraud had been practised regarding the publication of notices or regarding the proclamation or the conduct of the sale, he proceeds to consider another objection of the lawyer appearing on behalf of the opposite party who was the appellant before him : He says :

But appellant's lawyer contends that there was a material irregularity in the conduct of the sales. The sales were advertised to take place on 1st October 1934, but actually they were not held till 3rd October. It does not appear from the record that any notice was given to the parties or to the public that the sales would be held on that particular day. The lawyer appearing for the auction-purchaser informs me that there are so many sales in the first Munsif's Court that they cannot all be held on one day and they are held de die in diem until they are finished. If there are a large number of sales to be held, it may be impossible to hold them all in one day ; but in that case they should be divided into suitable batches and a day fixed for holding the sales of each batch. Then this arrangement should be notified to the parties and to the general public by making notes on the order sheets of the execution cases. With the aid of a suitable rubber-stamp such orders could be prepared and initialed in a short time. O. 21, R. 69 requires that if any sale is adjourned it must be adjourned to a specified date and hour and the reason for the adjournment must be recorded. It does not appear that the requirements of O. 21, R. 69 have been followed in these two cases.

This is all that he says on the question of adjournment. Evidently the learned Judge is under the impression that once a sale is fixed for one date, it cannot legally be held on the next date unless a specified date and hour is fixed by the Court. He has lost sight of that state of affairs for which Rr. 14 and 15, to which I have already referred, have been specially made. As he has misunderstood the legal position with regard to such sales and on that ground has set aside the sale, I am of opinion that his order should be set aside. The case in 39 C W N 915[1] lays down that where the Court, by a misinterpretation of a statute, assumed jurisdiction in respect of a matter over which it would not have had jurisdiction if the statute had been rightly interpreted, the High Court can interfere under S. 115, Civil P. C. In this view of the matter, I think that this is a matter which is revisable by this Court and I would set aside the order of the learned District Judge. Mr. Rai has urged that the order of the District Judge, worded as it is towards the end of his judgment, shows that the order, if it is left to stand, will not cause any hardship to any party. The auction-purchaser will get his money and the judgment-debtor and everybody will be satisfied ; but the auction-purchaser does not seem to be content with the position. The argument that has been advanced on this point by Mr. Mitter on behalf of the auction-purchaser is that, although the judgment-debtor has deposited the purchase money with the extra 5 per cent that was ordered by the Court, it was not a set of circumstances which would come either under O. 21, R. 89 or R. 90. This is really a matter of mutual understanding between the parties and that should not affect the decision of this case. The result is that the petitions are allowed. There will be no order for costs.

K.B./D.S. *Petitions allowed.*

1. Chandulal Siraogi v. Purna Chandra Paul, (1935) 164 I C 73=39 C W N 915.

A. I. R. 1937 Patna 105

MOHAMAD NOOR AND VARMA, JJ.

Baldeo Das—Defendant—Appellant.

v.

Raghunandan Das and *others* — Plaintiffs—Respondents.

Appeal No. 148 of 1930, Decided on 9th December 1935, from original decree of Sub-Judge, Patna, D/- 29th March 1930.

Hindu Law—Alienation—Widow — Setting aside by reversioner — Reversioner challenging alienations by limited female owner has two remedies — Reversioner can file suit for declaration during lifetime of female that alienation is void against him, within 12 years from date of alienation or he can sue for possession of property by avoiding sale within 12 years from date of death of female.

A reversioner who wants to challenge alienation by a limited female owner has got two courses

open to him. He may during the lifetime of the female, institute a suit for a declaration that the alienation is void against him. Such a suit is governed by Art. 125 Lim. Act, and must be instituted within 12 years of the date of alienation. He may if he likes wait till the female is dead and thereafter sue for recovery of possession of the property by avoiding sale. Such a suit is governed by Art. 141, Lim. Act, and must be instituted within 12 years from date of death of the female. In a suit brought by a person for possession of property alienated by a limited female owner on the ground of surrender of the life estate, a relief for declaration which was barred by limitation under Art. 125, Lim. Act, could not be granted.

[P 107 C 2]

Sunder Lal and *Chaudhury Mathura Prasad*—for Appellant.

K. Husnain, *Baldeva Sahay*, *Syed Ali Khan* and *K. Dayal*—for Respondents.

Mohamad Noor, J. — This is an appeal against a decree of a Subordinate Judge of Patna declaring that a certain deed of sale in respect of some of the properties of one Gopal Lal executed on behalf of his daughter is not binding after the death of the lady upon the plaintiffs who are his reversioners. The facts are shortly these: One Gopal Lal was the adopted son of one Ras Bihari Lal who died leaving by his will all his properties to Gopal Lal subject to the payments of certain annuities to his daughter and to the son of a deceased daughter. By the same will Ras Bihari Lal appointed his second wife Narayani Bibi to be the guardian of Gopal Lal during his minority. When Gopal Lal attained majority there was a litigation between him and Narayani Bibi. The latter disputed that Gopal Lal was an adopted son of Ras Bihari Lal and also questioned the genuineness of the will. Ultimately there was a compromise whereby the status of Gopal Lal as the adopted son of Ras Bihari Lal was accepted by Narayani Bibi and in return Gopal Lal gave her a life mokarrari of three properties at an annual rent of Rs. 3,350. Out of the rent Rs. 3,000 was to be set-off towards the maintenance of Narayani Bibi at the rate of Rs. 250 per month and the balance, i. e. Rs. 350 was payable to Gopal Lal ; Narayani Bibi was made liable for the payment of the Government dues. On the death of Narayani Bibi the properties were to revert to Gopal Lal. These properties were (1) Pindadih alias Brindaban, (2) Kanda Bhadaya, and (3) a house consisting of four kitas situated at Patna. The last two properties are the subject matter of the present litigation.

Gopal Lal died highly indebted, leaving a widow Gulab Kuar and an infant daughter, Raj Mani Bibi (defendant 16). He had in his lifetime made a gift of some of his properties to his wife Gulab Kuar. The parties in the suit are at variance as to who inherited the remaining properties of Gopal Lal. According to the plaintiffs Gulab Kuar succeeded to them as a Hindu widow. The defendants' case, on the other hand, is that she declined to take anything in the estate of her husband and surrendered it in favour of her infant daughter, Raj Mani. The significance of this controversy will be stated later. Whatever may have been the real state of affairs, it is a fact that one Srikishun maternal grandfather of Raj Mani i. e. father of Gulab Kuar, having got himself appointed the guardian of Raj Mani executed on her behalf several deeds of sale in respect of the properties of Gopal Lal purporting to do so in order to pay up his debts. One such deed of sale, dated 9th July 1885, is in dispute in the present suit.

This was in favour of Narayani Bibi in respect of two out of the three properties of which a life mokarrari was given to her by Gopal Lal, these two properties being Kanda Bhadaya and the house at Patna. The sale was of the right of reversion which was vested in Gopal Lal and his heirs. The effect of the sale was that Narayani Bibi became the full owner of these properties instead of being only a life mokarraridar. Later on Narayani Bibi sold Kanda Bhadaya to certain other person. On her death her properties came in possession of Baldeo Das (defendant 15) under her will. The present suit was by the sons of Raj Mani, being the maternal grandsons of Gopal Lal. Their case was that the sale by Srikishun Das was illegal and void, that Gulab Kuar did not surrender her life estate in favour of Raj Mani and that Raj Mani had no right to transfer these properties. They further alleged that both Gulab Kuar and Raj Mani surrendered their respective life estates in the properties of Gopal Lal and thus accelerated the succession of the plaintiffs to the said estate which became vested in them. On this basis they sought the recovery of possession of the two properties, viz. Kanda Bhadaya and the Patna house. Pindadih was sold by Srikishun on behalf of Raj Mani to some other persons who having been dispos-

sessed by the plaintiffs brought a suit for recovery of possession. That suit ended in a compromise and we are not concerned with that property in the present suit which is confined to, as I have said, Kanda Bhadaya and the Patna house. During the pendency of the suit the defendants who were concerned with Kanda Bhadaya, having purchased it from Narayani Bibi, compromised with the plaintiffs. The suit therefore continued in respect of the house only which was claimed by defendant 15 (the appellant) under the will of Narayani Bibi. In the first instance the suit against defendant 15 was decreed ex parte. He was not allowed to file a written statement as he was out of time and was not allowed to cross-examine the plaintiffs' witnesses.

On appeal to this Court (F. A. No. 173 of 1926) the suit was ordered to be reheard. This was done and the learned Subordinate Judge has found that Gulab Kuar did not in fact surrender her husband's estate in favour of Raj Mani and therefore Raj Mani had no right to sell the properties in question, that the sale deed by Srikishun Das, as guardian of Raj Mani, in favour of Narayani Bibi, was void and illegal, and that in fact Narayani Bibi paid no consideration; and further, that the sale was in contravention of an order of the District Judge who had directed that the creditors should be paid in the presence of the Court and this was not done. He, however, found that the plaintiffs' case that Gulab Kuar and Raj Mani Kuar surrendered their respective life-estates in the estate of Gopal Lal, was not established and, therefore, the plaintiffs were not entitled to immediate possession of the properties. On these findings, though he refused to give the plaintiffs a decree for possession, he declared the sale in question to be not binding upon them on the death of Raj Mani. It seems that the learned Subordinate Judge has allowed the sale to stand during the lifetime of Raj Mani on the ground that she, not having questioned it, was bound by it, but the plaintiffs who claimed independently of her, are not. Defendant 15 has preferred this appeal.

In my opinion the appeal must succeed, as on the findings of the learned Subordinate Judge the plaintiffs were not entitled to a declaration as their right to get such a declaration was barred under Art. 125, Limitation Act. The question of limitation was raised before the learned Subordinate Judge who decided it in favour of the plaintiffs. He is obviously in error. A reversioner who wants to challenge alienations by a limited female owner has got two courses open to him. He may during the lifetime of the female institute a suit for a declaration that the alienation is void as against him. Such a suit is governed by Art. 125, Limitation Act, and must be instituted within twelve years of the date of the alienation. He may, if he likes, wait till the female is dead and thereafter sue for recovery of possession of the property by avoiding the sale. Such a suit is governed by Art. 141, Limitation Act, and must be instituted within twelve years from the date of the death of the female. Now the learned Subordinate Judge has rightly said that a reversioner is not bound to bring a declaratory suit during the lifetime of the female. It is so; but if he chooses to bring such a suit it must be within twelve years of the date of the alienation. If no such suit is brought within that period it becomes barred by limitation. The present suit as framed was for recovery of possession and on the face of it was not barred by limitation. It was based on the ground that in consequence of the surrender of the life-estates by Gulab Kuar and Raj Mani Kuar the plaintiffs were entitled to immediate possession. This issue having been decided against the plaintiffs the learned Subordinate Judge was wrong in decreeing a relief of declaration which was barred by limitation. The sale was in 1885 and the suit was instituted in 1924. The plaintiffs themselves did not ask for a declaration as they knew that such a claim was obviously barred. There was, however, a cross-objection by the plaintiffs against the dismissal of their claim for possession. But Mr. Khurshaid Husnain, who appeared on behalf of the plaintiffs, intimated to us that he would not press it. The finding that the plaintiffs were not entitled to possession must therefore stand and on the face of it they are not entitled to a declaration in the present suit, as the relief for declaration was barred by limitation. In view of this it is not necessary for me to give any finding on the other issues involved in the suit. They are left open and will be decided in any subsequent suit which the plaintiffs or any other next reversioner of Gopal Lal may choose to institute for

possession of the property on the death of Raj Mani.

The appeal is therefore allowed and the plaintiffs' suit in respect of the Patna house described in Sch. B of the plaint is dismissed against defendant 15, the appellant. Parties will bear their own costs in the Court below as ordered by the learned Subordinate Judge. As to costs of this Court, the plaintiffs will pay the defendants the amount of the court-fee paid by them and half of the printing costs of the paper-book; hearing fee will be borne by the parties themselves.

Varma, J.—I agree.

K.B./D.S. *Appeal allowed.*

A. I. R. 1937 Patna 108

MOHAMAD NOOR AND SAUNDERS, JJ.

Chhoti Rani Saheba and *others*—Petitioners.

v.

Kumar Brijdeo Narayan Singh and *another*—Opposite Parties.

Civil Revn. No. 23 of 1934, Decided on 5th May 1936, from order of Deputy Magistrate, Sub-Judge, Daltonganj, D/- 11th November 1936.

(a) Bengal Court of Wards Act (9 of 1879), S. 52—Minor under Court of Wards through manager of estate sued by Secretary of State—Board of guardians appointed by Court of Wards as guardian in suit under S. 52 in place of manager—Manager's application to remove Board of Guardians and to appoint a certain person in its place—Resolution of Court of Wards removing Board of Guardians and appointing a certain person not communicated to civil Court until after manager's application—The trial Court removed Board of Guardians on manager's application — Held, the procedure of trial Court was irregular and misconceived and its order was without jurisdiction.

The Secretary of State sued a minor under the Court of Wards through the manager of the estate. The Court of Wards appointed a Board of Guardians as guardian ad litem of the minor defendant in the place of the manager. The manager applied to remove the Board of Guardians and to appoint a certain person in its place. The Court of Wards resolved to remove the Board of Guardians and to appoint the said person in its place, but did not communicate the resolution to civil Court until after the Manager's application was filed. The trial Court removed the Board of Guardians on the manager's application :

Held: the procedure of the trial Court was irregular and misconceived. In the case of a minor under the Court of Wards, the civil Courts have no responsibility of appointing or removing a guardian ad litem. The matter is entirely in the hands of the Court of Wards and the civil Courts have simply to recognise the guardian appointed by it. The civil Court had no power to substitute another as guardian of suit on manager's application, he being stranger to suit, in place of the Board appointed by the Court of Wards.

[P 109 C 1, 2]

(b) Bengal Court of Wards Act (9 of 1879), S. 52—Appointment of guardian—Person having power of appointment of guardian has power of dismissal under ordinary law—Court of Wards appointing guardian for suit under S. 52 has power to dismiss him and appoint another from time to time as occasion arises.

Under ordinary law the authority which has got the power of appointment has got the power of dismissal. If the Court of Wards has been given power by S. 52 of the Act to appoint a person to act as a guardian in place of the manager, it has certainly got the power to appoint another guardian in place of a guardian previously appointed if that procedure becomes essential, when for instance, he subsequently proves himself to be incompetent or untrustworthy. The power of appointing a guardian is a power which from a plain reading of the section can be exercised successively from time to time as occasion arises and the Court of Wards has full power to appoint one guardian in place of another whenever a vacancy occurs from whatever cause. [P 109 C 2; P 110 C 1]

Mahabir Prasad and *A. D. Sinha*—for Petitioners.

S. M. Mullick and *G. N. Mukherji*—for Court of Wards.

Govt. Advocate—for Secy. of State.

Mohamad Noor, J.—The facts leading up to this application are these : The proprietor of the Chainpore Estate in the district of Palamau is a minor under the Court of Wards. The Secretary of State for India in Council has instituted a suit against him for a declaration of the rights of Government in the minerals of the Chainpore Estate. We are informed that the Bengal Coal Company is also a defendant in the suit. As the Court of Wards is a department of the Government, a question arose as to the advisability of the defence by it of a suit instituted by another department of the Government. We are told that under some instructions of the Government of India the Court of Wards under S. 52, Court of Wards Act, appointed a Board of Guardians which became the guardians ad litem of the minor defendant under the provisions of that section and the names of the members of the Board of Guardians were substituted for the name of the manager who under S. 51, Court of Wards Act was made the guardian ad litem of the defendant. It is said that the Court of Wards became dissatisfied with the manner in which the

members of the Board were conducting the defence of the suit.

It, therefore, in pursuance of some further instructions from the Government of India passed on 17th August 1935, a resolution sanctioning the appointment of Mr. Girindra Nath Mukherji, an advocate of this Court, as guardian ad litem of the minor in place of the Board of Guardians. On 14th August 1935, three days before the resolution of the Court of Wards an application was made by the manager of the estate of the ward asking the learned Subordinate Judge before whom the suit is pending to remove the Board from the guardianship of the minor defendant, and substitute in its place the name of Mr. G. N. Mukherji as his guardian ad litem. Objections against the adoption of this course was raised by the members of the Board who were till then acting as guardians ad litem. The order on the application of the manager was passed on 11th November 1935, and it purports to remove the Board of Guardians and substitute in their place the name of Mr. G. N. Mukherji. The members of the Board have moved this Court against this order. There is no doubt that the procedure adopted in the Court below was entirely irregular and misconceived. When a defendant in a suit is a ward of Court, the civil Court has absolutely no power of appointing a guardian ad litem for him or removing a guardian who has been acting for him. S. 51, Court of Wards Act, runs thus :

> In every suit brought by or against any ward he shall be therein described as a ward of Court; and the manager of such ward's property, or if there is no manager, the Collector of the district in which the greater part of such property is situated, or any other Collector whom the Court of Wards may appoint in that behalf, shall be named as next friend or guardian for the suit, and shall in such suit represent such ward, and no other person shall be ordered to sue or be sued as next friend or be named as guardian for the suit by any civil Court in which such suit may be pending.

It is obvious that the power of the civil Court to appoint a guardian ad litem to defend the suit of a minor provided in O. 32 has no application when the minor happens to be a ward of Court and in that order of the Code it has been clearly laid down that it has no application in the case of a minor whose estate is under the Court of Wards. Now, in this case the Secretary of State for India in Council sued the defendant through the guardianship of the Manager of the Court of Wards as required by S. 51, Court of Wards Act. S. 52 authorizes the Court of Wards, if it so likes, to direct that instead of the manager of the estate acting as the guardian ad litem of the minor the guardian shall be such person whom the Court of Wards may appoint in that behalf, and when this appointment is made and communicated to the civil Court it is the duty of that Court to substitute the name of the man so appointed in place of the name of the manager. In this case the Board of Guardians appointed by the Court of Wards was substituted for the manager on the latter's application. Now, by the resolution of the Court of Wards, above referred to, the members of the Board have been removed and in their place Mr. G. N. Mukherji has been appointed guardian ad litem. The proper procedure in such a case was to communicate the new appointment to the civil Court which under the provisions of S. 52 was bound to substitute the name of Mr. G. N. Mukherji in place of the names of the members of the Board of Guardians. This was not done and the learned Subordinate Judge has removed the Board of Guardians on the application of the manager who was no party to the suit and who applied for the removal of the members of the Board before the resolution of the Court of Wards. In the case of a minor under the Court of Wards the civil Courts have no responsibility of appointing or removing a guardian. The matter is entirely in the hands of the Court of Wards and the civil Courts have simply to recognize the guardian appointed by it.

It has however been contended by Mr. Mahabir Prasad on behalf of the petitioners that once the Court of Wards has appointed a guardian in place of the manager, its power is exhausted and no further appointment can be made. He has laid stress upon S. 52 itself and has contended that the civil Court has to substitute the name of the guardian appointed by the Court of Wards in place of the name of the manager, but there is power in the civil Court to substitute the name of one guardian appointed by the Court of Wards in place of another guardian appointed by it and then removed. The Court of Wards has no power to remove the guardian whom it has once appointed. I am unable to accept this contention. Apart from the question that under the General Clauses Act and under ordinary law the authority which has got

the power of appointment has got the power of dismissal, if the Court of Wards has been given power by S. 52 of the Act to appoint a person to act as a guardian in place of the manager, it has certainly got the power to appoint another guardian in place of a guardian previously appointed if that procedure becomes essential. I cannot conceive that the legislature could have intended that a guardian once appointed by the Court of Wards, however incompetent or untrustworthy he subsequently proves himself to be, cannot be removed by it and in all circumstances should be allowed to continue to act for the ward. The power of appointing a guardian in place of the manager is a power which, in my opinion, from a plain reading of the section, can be exercised successively from time to time as occasion arises and the Court of Wards has, in my opinion, full power to appoint one guardian in place of another whenever a vacancy occurs from whatever cause, and once such an appointment has been made and communicated to the civil Court, it is the duty of that Court to substitute the name of the newly appointed guardian in place of one who has been acting as such under a previous appointment by the Court of Wards. Therefore, so far as the power of the Court of Wards to remove the Board of Guardians and to appoint Mr. G. N. Mukherji is concerned, I am clearly of opinion that it had such power and on the communication of such appointment the civil Court is bound to recognize it and to make necessary substitution.

The proceeding, however, before the learned Subordinate Judge, as I have already said, has been irregular. The application was made by the manager for the removal of the Board of Guardians and for the appointment of Mr. G. N. Mukherji in his place. This the Manager of the Court of Wards had no power to ask nor had the Court any power to entertain the application. It is true that since the application was made by the manager on 14th August 1935, a copy of the resolution of the Court of Wards was received by the Court and is on the record of the case; but the order passed shows that the learned Subordinate Judge was removing the Board of Guardians on his own authority on the grounds urged by the manager though he has referred to the resolution of the Court of Wards. He has, in my opinion, unnecessarily given reasons justifying the removal of the members of the Board and making a fresh appointment. The order of the learned Subordinate Judge, as it appears to be based upon his own powers of removal which he had not, is therefore set aside as being without jurisdiction. He is directed to act under S. 52, Court of Wards Act, on the resolution of the Court of Wards and under the mandatory provision of that section and not, under his own power, order the substitution of the name of Mr. G. N. Mukherji in place of the members of the Board. There will be no order for costs.

Saunders, J.—I agree.

W.D./A.L. *Order set aside.*

A. I. R. 1937 Patna 110

ROWLAND, J.

Abdul Manir—Petitioner.

v.

Kadir Khan and *others* — Opposite parties.

Criminal Revn. No. 432 of 1936, Decided on 1st September 1936, from order of Magistrate, First Class, Bhagalpur, D/- 27th January 1936.

(a) Criminal Trial — Acquittal — Private parties—Revision to High Court by private party against order of acquittal—Powers of High Court in revision—High Court can interfere where there has been failure of justice due to some error in matter of principle—No hard and fast rule is or can be laid down.

The High Court has ample powers in revision and the widest possible discretion, but the interference with the order of acquittal by the High Court in revision is reserved for exceptional circumstances and for cases in which there appears to have been a failure of justice due to some error in a matter of principle. No hard and fast rule however can be laid down. [P 112 C 1]

Where the trying Magistrate failed to appreciate the questions of fact which he had to determine in order to adjudicate on the plea of right of private defence and acquitted the accused, and the brother of the complainant who died during the trial, made an application for revision of the order of acquittal to High Court:

Held: that the Magistrate having failed to appreciate the question of fact which he had to determine in order to adjudicate on the plea of private defence, there was no proper trial of the question and so there should be a re-trial.

[P 112 C 1]

(b) Criminal Trial—Acquittal—Refusal by District Magistrate to make a reference on order of acquittal—Order of High Court allowing complainant's revision application does not imply that District Magistrate should have made reference — He is under no obligation to refer a case unless

he is clearly of opinion that public interest demands interference by High Court.

Where the District Magistrate or Sessions Judge merely differs from the first Court's appreciation of facts or where he suspects an error of law, then unless the error of law is manifest, unless the case involves a matter of principle and unless there has been a serious failure of justice, unless in short he is clearly of opinion that the public interest demands that there should be intervention by the High Court, he is not under obligation to refer the case. The High Court has ample powers in revision and the widest possible discretion; and if the High Court eventually allows such an application it is not thereby implied that the District Magistrate or Sessions Judge ought to have made a reference : *A I R 1931 Cal 619 Rel. on.* [P 112 C 1, 2]

M. Yasin Yunus—for Petitioner.

Khurshaid Husnain and *H. R. Kazimi* —for Opposite Parties.

Order.—This is an application to revise a judgment and order of acquittal by a Magistrate of the First Class. The proceedings were instituted on a complaint by Shaikh Abdul Hamid alleging that the accused persons had assaulted him in consequence of a dispute regarding fruits of a toddy palm which Hamid claimed to to be in his exclusive possession, while the accused claimed that it was the joint property of Hamid and his brothers. The complainant died on 26th September 1935, the trial at that date being still pending. The question having then arisen whether the accused should be charged under S. 304, I. P. C. (the original complaint was under S. 323) the District Magistrate transferred the case from the Second Class Magistrate before whom it was pending to the file of the Sub-divisional Officer, Sadr, who framed a charge under S. 325, I. P. C. against five persons, namely, Abdul Halim, Sharafat Khan, Kadir Khan, Mahfuz Khan and Shaikh Ismail. A charge was not framed under S. 304, because the medical evidence did not establish that the injuries inflicted on Abdul Hamid had been the cause of death. The Magistrate acquitted all the accused on the 27th January 1936, thinking that the exclusive possession of Hamid over the tree was not established ; that those accused who assaulted him might have had a right of private defence ; and that they should get the benefit of the doubt. Thereafter Abdul Manir, brother of the deceased complainant, moved the District Magistrate to direct a commitment to the Court of Session on a charge under S. 304, I. P. C. The District Magistrate considered this and two possible alternatives : to move the Government to appeal under S. 417, or to refer the case to the High Court in revision. In the end he has declined to do either of these things.

Accordingly the petitioner Abdul Manir has moved this Court. I have obtained much help from the District Magistrate's careful examination of the case. It clears those points which may be said to be beyond contest or not fit to be raised in revision or settled by the findings arrived at and brings out in relief the point, and there is only one point, on which the petitioner can hope to succeed in revision. I entirely agree with the District Magistrate that to order a commitment under S. 304, I. P. C., cannot be contemplated. The District Magistrate's examination of the evidence further shows that as regards Ismail and Mahfuz, whose presence at the place of occurrence the trial Court considered doubtful, there is no reason to interfere as they would be ordinarily entitled to the benefit of the doubt as to their presence. The District Magistrate's order also clearly exposes the error into which the trying Magistrate fell. This consisted in thinking that because the exclusive possession of Abdul Hamid over the fruits of the trees was not clearly established the accused whose claim was that Hamid's brother, Abdul Alla, was jointly entitled to the fruits with Hamid, were entitled to set up the right of private defence as authorizing them to beat Hamid and to be given the benefit of a doubt as to whether the right of private defence existed or not. As the District Magistrate rightly points out, under S. 105, Evidence Act, when a question arises whether an accused person is entitled to the benefit of any of the general exceptions in the Indian Penal Code the burden of proof is on him and the Court is to presume the absence of circumstances bringing him within any of those exceptions; that is to say, it was for the accused to prove that Abdul Hamid had not exclusive possession of the palm tree; to prove that Hamid was not acting in exercise of a bona fide claim of right but was committing a criminal offence of one of the descriptions mentioned in S. 97 secondly of the Penal Code, that is to say, theft, robbery, mischief, or criminal trespass; to prove that the accused were defending their property against such an offence; and lastly, to prove that they did not exceed the right of private defence.

Even assuming that all the earlier points were answered in favour of the accused (and the questions raised have not been examined at all), the last point certainly required very careful consideration in view of the fact that Hamid had no fewer than thirteen injuries, while on the other side one person was injured and that was Sharafat who had two injuries only. Mr. Khursaid Husnain for the opposite party has drawn my attention to certain cases in which reference is made to the general practice of not interfering in revision with orders of acquittal. Such an interference by the High Court is reserved for exceptional circumstances and for cases in which there appears to have been a failure of justice due to some error in a matter of principle, but no hard and fast rule has been laid down in any of the decisions or in my opinion can be laid down. In the present case the trying Magistrate has failed to appreciate the questions of fact which he had to determine in order to adjudicate on the plea of right of private defence and therefore there has been no proper trial of these questions. That being so, there should be a re-trial of Halim, Sharafat and Kadir and the order acquitting these three accused is set aside. As regards the other accused I do not think that any interference is called for.

In allowing this application I wish expressly to negative any suggestion that allowing the application implies that the District Magistrate erred in refusing to make a reference. I entirely agree with the following observations of Rankin, J. in 58 Cal 1081,[1] in which he deprecates the making of unnecessary references:

> Even if it should appear from the judgment of the Magistrate that there is an error of law, ... references should not be made unless it appears that the error of law is of such a character as to call for interference by a higher authority.

Where the District Magistrate or Sessions Judge merely differs from the first Court's appreciation of facts, or where he suspects an error of law, then, unless the error of law is manifest, unless the case involves a matter of principle, and unless there has been a serious failure of justice, unless in short he is clearly of opinion that the public interest demands that there should be intervention by the High Court, he is under no obligation to refer the case. Where the only interests affected are those of private parties he will more often do better by leaving the party aggrieved to pursue his remedy by an application to the High Court. The High Court has ample powers in revision and the widest possible discretion, and if the High Court eventually allows such an application it is not thereby implied that the District Magistrate or Sessions Judge ought to have made a reference. In the present instance the District Magistrate, observing an error of law but being doubtful whether it called for the High Court's interference, rightly abstained from making a reference and left it to the party to move this Court. I would commend his example to others.

S.C./A.L. *Order accordingly.*

1. Fakir Chand Mondal v. Madar Mondal, A I R 1931 Cal 619=1931 Cr C 803=134 I C 915=32 Cr L J 1237=58 Cal 1081.

A. I. R. 1937 Patna 112

VARMA, J.

Imamuddin Khan—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. No. 244 of 1936, Decided on 29th June 1936, against order of Sub-divisional Magistrate, Muzaffarpur, D/- 6th April 1936.

Penal Code (1860), S. 411—Accused found in possession of stolen property (polar lamp of Municipality) 2½ years after theft—No presumption under S. 114, Evidence Act, arises—Accused running away when asked as to how he got possession held not sufficient for conviction.

The stolen property (a 'polar' lamp belonging to the Municipality) was found in possession of the accused after two and a half years of the theft :

Held : that no presumption could arise against him under S. 114, Evidence Act. [P 113 C 1]

Held also : that the conduct of the accused in running away on being asked as to how he came to be in possession of the property was not sufficient to convict him because often an innocent man when suddenly confronted with such a situation is apt to place as much distance between the stolen property and himself as possible. [P 113 C 2]

S. K. Mitra—for Petitioner.

Asst. Govt. Advocate—for the Crown.

Order. — The petitioner Imamuddin Khan has been convicted by a Magistrate exercising Second Class powers, under S. 411, I. P. C., and sentenced to four months' rigorous imprisonment and to a fine of Rs. 50, in default to one month's further rigorous imprisonment. He was

tried along with one Gati Koiri who has been acquitted by the trial Court.

The case for the prosecution is that a 'polar' light belonging to the Hajipur Municipality was stolen away from its post on 24th June 1933 and an information was lodged at the thana. The police not finding any clue submitted a final report "true." On 20th December 1935, about two and a half years after the theft Imamuddin brought a 'polar' light (Ex. 1) to the shop of one Bhaiyalal who is a municipal light contractor for repairs. It appears that Bhaiyalal and his brother Matadin at once recognized it as the missing municipal lamp which was stolen on 24th June 1933. When questioned by Bhaiyalal and Matadin the petitioner said that it was given to him by some one for repairs and then started to run away. He was arrested and brought before the Municipal Vice-Chairman. After the usual investigation a charge-sheet was submitted against Imamuddin and also against one Gati Koiri from whom Imamuddin alleged to have received the lamp for repairs.

The Courts below were of opinion that the identity of the stolen lamp was established inasmuch as it was identified by people who had occasion to handle the particular lamp and there was no reason why their story should be doubted. The appellate Court has not accepted the evidence of the witnesses examined by the petitioner to prove that he was a repairer of lamps and that the particular lamp was given to him by one Gati Koeri. The lower appellate Court remarks that if the petitioner was himself a repairer of lamps there was no necessity for him to bring the lamp to P. W. 1 for repairs. The learned Sub-divisional Magistrate has also relied upon the fact that when asked as to how it came to be in possession of the petitioner he started to run away.

Conceding for the time being that the identity of the lamp is established, we have to see whether on the materials mentioned by the Courts below it is safe to convict the petitioner under S. 411. The lamp in question is found in the possession of the petitioner after two and half years of the theft. So, naturally, no presumption can arise against him under S. 114, Evidence Act. If the petitioner knew that it was stolen property one would not expect him to take it to the very person who was likely to identify it. He carries on business at Mirchagarh within Lalganj police station of the District of Muzaffarpur. It is not the prosecution case that from Mirchagarh the petitioner came to Hajipur to steal the lamp. He is a cycle repairer according to his own statement. It may be that some one knowing that he used to carry on repairs entrusted him with the repair of this lamp and instead of admitting his inability to repair the lamp the petitioner took it to P. W. 1 in the hope of getting it repaired. As regards the other material on which the conviction has been based, that is the conduct of the petitioner when asked as to how he came to be in possession of the lamp, in my opinion, that also does not carry the matter much further against him, because often an innocent man when suddenly confronted with a situation like the present one is apt to place as much distance between the stolen property and himself as possible. Even as to the identity of the lamp it appears that the witnesses relied upon the presence of some new bolts and nuts in it said to have been supplied in consequence of certain repairs done to it; but these distinctive features were not described before the Police Officer, Mr. Brahmdeo Narayan Singh, who investigated the case. In this state of the evidence, I am of opinion that there are reasonable doubts if the petitioner had the lamp in his possession knowing it to be stolen.

Under the circumstances I set aside the conviction and sentence passed upon the petitioner and direct that he be discharged from bail and set at liberty.

R.W./K.S. *Conviction set aside.*

*** * A. I. R. 1937 Patna 113**

FULL BENCH

COURTNEY-TERRELL, C. J., MOHAMAD NOOR, JAMES, DHAVLE AND VARMA, JJ.

Bhagwat Narain Singh and *another*—Judgment-debtors—Appellants.

v.

Srinivas— Decree-holder—Respondent.

Appeal No. 354 of 1935, Decided on 10th December 1936, from order of Sub-Judge, Patna, D/- 25th November 1935.

*** * (a) Execution Sale—Confirmation of—Decree-holder purchasing property in auction sale—Decree-holder and judgment-debtor**

jointly filing application that judgment-debtor paid certain amount to decree-holder and agreed to pay remaining amount by a certain date and in default sale would stand confirmed — Sale confirmed on judgment-debtor's default—Procedure agreed to be substituted though outside scope of O. 21, R. 89, Civil P. C., was in essence one under O. 21, R. 89, though not exactly in the form required and order confirming sale was therefore appealable—Order confirming sale even if not appealable was one that could be interfered within revision—Time being essence of contract sale held automatically confirmed on expiry of agreed date.

A decree-holder himself purchased judgment-debtor's property in execution sale. On day of sale the decree-holder auction-purchaser and the judgment-debtor jointly filed an application to the effect that the latter had paid Rs. 500 to the former towards part satisfaction of the decree and that the parties had agreed that if the remaining decretal amount be paid by the 10th November next, the sale would be set aside and auction-purchaser would forgo the 5 per cent compensation which he was entitled to. In case of default in payment as provided by the date fixed, the sale would stand confirmed. The Court was closed on the 10th November and it re-opened on 13th November. The judgment-debtor failed to deposit on 13th, but he applied on the 14th to make deposit a day later. On account of default the Court confirmed the sale. On appeal:

Held: that though there was an application within thirty days of the sale, the deposit was not made and was not to be made within the prescribed time but was to be made under the agreement of the parties on a later day fixed by them. Therefore the proceeding was outside the scope of O. 21, R. 89 and the Court, in allowing the parties to substitute a procedure in lieu of one prescribed by law, was acting under its inherent power and the order passed in such proceeding was not appealable. [P 115 C 2]

Though the parties agreed to substitute an agreed procedure for the procedure prescribed by law, the procedure nevertheless was in essence though not exactly in form under O. 21, R. 89 of the Code. The application filed on the date of the sale jointly by the parties could be treated as an application for setting aside the sale under O. 21, R. 89, and the compensation instead of being deposited in Court was to be forgone by the auction-purchaser and a portion of the decretal amount was paid to the decree-holder out of Court and the balance was to be deposited not within the time prescribed by law but some time later. The order confirming the sale was therefore one under O. 21, R. 89 and was therefore appealable: *40 C W N 1402*; *Henry Peter Pisani* v. *Her Majesty's Attorney-General*, *(1874) 5 P C 516* and *2 I A 219*, *(P C)*, *Rel. on.* [P 115 C 2; P 116 C 1]

Held also: that even if no appeal lay from such order, it could be interfered with in revision. [P 116 C 1]

Held further: that the time fixed by the parties being of the essence of contract, on expiry of the date, the sale was automatically confirmed. [P 116 C 2]

(b) Practice—Procedure—Parties can agree to adopt a procedure other than one prescribed, unless it gives jurisdiction to Court which it does not possess—Such departure does not deprive parties of right of appeal.

Where a Court has general jurisdiction, the parties to a proceeding can by agreement adopt a different procedure quite contrary to the ordinary *cursus curiae* and the Court is bound to give effect to such an agreement. The departure from an ordinary procedure is permissible unless there is an attempt to give the Court jurisdiction which it does not possess or something occurs which is such a violent strain upon its procedure that it puts it entirely out of its course, so that a Court of appeal cannot properly review the decision. Such a departure has never been held to deprive either of the parties of the right of appeal: *40 C W N 1402*; *Henry Peter Pisani* v. *Her Majesty's Attorney-General*, *(1874) 5 P C 516* and *2 I A 219* (*P C*), *Rel. on.* [P 116 C 1]

Sultan Ahmad, *Mahabir Prasad* and *Chowdhury Mathura Prasad*—for Appellants.

P. R. Das, *Baldeo Sahay* and *Chandreshwar Pd. Sinha*—for Respondent.

Mohamad Noor, J.—This appeal is against an order of the Subordinate Judge of Patna confirming a sale held in execution of a decree on 13th September 1935, at which the decree-holder had himself purchased the property sold. The facts are these: On the very day when the property was sold the decree-holder auction-purchaser and the judgment-debtors jointly filed an application to the effect that the latter had paid Rs. 500 to the former towards satisfaction of the decree and that the parties had agreed that if the remaining decretal amount be paid by the 10th of November next the sale would be set aside and the auction-purchaser would forgo the five per cent compensation which he was entitled to. In case of default in the payment as provided by the date fixed the sale would stand confirmed. The Court was closed on the 10th of November and re-opened on the 13th. It may be conceded, and in fact has not been disputed, that a deposit of the decretal amount in Court on the 13th of November would have been within the terms of the agreement. The money was not, however, deposited even on that date. Some explanations were offered on behalf of the judgment-debtors for this default, but they were not pressed either before the lower Court or before this Court. On the next day, that is on the 14th of November, the judgment-debtors applied to the Court for a chalan to deposit the amount. There was for some reason or other which is not necessary to investigate some delay in

passing the chalan by the Court and it was not made over to the judgment-debtors till 20th November 1935, on which date the money was deposited in Court. The delay in depositing the money between the 14th of November when the chalan was applied for and 20th November when the money was actually deposited is immaterial, as on behalf of the judgment-debtors the case has been argued on the assumption that there was a default on their behalf at least on 13th November when the Court re-opened and on which date the money could have been deposited. The deposit on 20th November was accepted at the risk of the judgment-debtors and when the matter was taken up by the Court it held that the deposit was not within the terms of the agreement, and that it had no power to extend the time of payment as agreed to between the parties and accept the deposit beyond the time so fixed. It confirmed the sale. It is against this order that the present appeal has been preferred. It was contended on behalf of the decree-holder auction-purchaser that no appeal lay as the proceedings before the learned Subordinate Judge were outside the scope of the Code of Civil Procedure and there is no appeal unless it has specifically been provided. At most it might be said that the Court in allowing the parties to substitute an agreement in place of their legal rights was acting under its inherent powers. If this be the case, orders passed in such a proceeding are not open to appeal.

As to the merits of the appeal; Sir Sultan Ahmad has contended that the agreement between the parties, which was filed in Court on 13th September 1935, immediately after the sale, should be treated as a pure contract between the parties and should be dealt with as such. It was therefore for the Court to decide whether the time fixed for payment was of the essence of the contract. He contended that under the circumstances of the case the Court should have held that the payment though actually made on 20th November was in effect on 14th November (the delay between the 14th and the 20th being due to the acts of the officers of the Court) and the Court should have also held that time was not the essence of the contract and that the payment made on 14th November was substantial compliance with the agreement between the parties, and the decree-holder auction-purchaser could not avoid it and the sale ought to have been set aside by virtue of that agreement. The case was originally heard by a Division Bench of this Court, but considering the important issues raised, it asked that the case should be heard by a larger Bench.

The first question to be considered is whether the order of the learned Subordinate Judge, dated 25th November 1935, confirming the sale, is appealable. Now the proceeding before him may be looked upon from two points of view. On the one hand, it may be said that it was outside the scope of the Code. Once a sale has been held it can be set aside only on applications made either under O. 21, R. 89 or R. 90 or R. 91. There is no question of there being any application under R. 90 or R. 91, and strictly speaking there was no application under R. 89 also. That rule contemplates an application for setting aside a sale within 30 days of it as prescribed in Art. 166, Lim. Act. If such an application be made within the time and the decretal amount and compensation be deposited in Court within 30 days of the sale, the sale has to be set aside. In this case though there was an application within 30 days of the sale, the deposit was not made and was not to be made within the prescribed time but was to be made under the agreement of the parties on a later date fixed by them. Therefore the proceeding was outside the scope of O. 21, R. 89 and the Court in allowing the parties to substitute a procedure in lieu of one prescribed by law was acting under its inherent power and the order passed in such a proceeding is not appealable. On the other hand, as was pointed out by Mitter, J. in 40 C W N 1402,[1] where a Court has general jurisdiction, the parties to a proceeding can by agreement adopt a different procedure quite contrary to the ordinary *cursus curiae* and the Court is bound to give effect to such an agreement. His Lordship referred to two decisions of the Privy Council in which this principle was laid down. They are (1874) 5 P C 516[2] and 2 I A 219=15 Beng L R 383.[3] In the former case it was held that :

1. Banga Chandra Mozumdar v. Nand Kumar Mozumdar, (1936) 40 C W N 1402.
2. Henry Peter Pisani v. Her Majesty's Attorney-General, (1874) 5 P C 516=30 L T 729=22 W R 900.
3. Sadasiva Pillai v. Ramalinga Pillai, (1899) 15 Beng L R 383=2 I A 219=24 W R 193=3 Sar 519 (P C).

> The departure from an ordinary procedure is permissible unless there is an attempt to give the Court jurisdiction which it does not possess or something occurs which is such a violent strain upon its procedure that it puts it entirely out of its course, so that a Court of appeal cannot properly review the decision. Such a departure has never been held to deprive either of the parties of the right of appeal.

In this case though it may be said that the parties agreed to substitute an agreed procedure prescribed by law, the procedure nevertheless was in essence though not exactly in form under O. 21. The setting aside of a sale under O. 21, R. 89 requires (1) an application, and (2) a deposit of the compensation and decretal amount. In this case the application filed on the date of the sale jointly by the parties may be treated as an application for setting aside the sale under O. 21, R. 89 and the compensation, instead of being deposited in Court, was to be forgone by the auction-purchaser and a portion of the decretal amount, namely, Rs. 500, was paid to the decree-holder out of Court and the balance was to be deposited not within the time prescribed by law but some time later. Now in a case in which there is an application for setting aside a sale, but its requirements are not complied with within time, it is clear that the sale cannot be set aside, but nevertheless the proceeding is under the order and the rule and an order passed even on a barred application or on an application in which the deposit is not made according to law, is an order under O. 21, R. 89. Take for instance a case in which there is an application under R. 89 but the judgment-debtor, instead of depositing the compensation and the decretal amount in Court pays them to the auction-purchaser and the decree-holder out of Court and the sale is set aside. It is obvious that the order in essence is one under O. 21, R. 89. In our opinion the order of the learned Subordinate Judge is appealable.

In view however of our decision on the main issue it is not necessary to pursue this point further. Even if there be no appeal and if we would have come to the conclusion that the order of the learned Subordinate Judge was wrong, this was clearly a case of not exercising jurisdiction, namely, of setting aside the sale, or, at any rate, a case of exercising jurisdiction with material irregularity, and it would have been open to us to interfere. The main contention of the appellant in this case is that the agreement between the parties as evidenced by the joint application filed on the date of the sale, should be treated purely as a contract and the Court should decide whether or not the time for payment fixed was of the essence of the contract. Mr. Das on behalf of the respondent has however contended that what the parties did was to substitute for 30 days (the time fixed by the statute) another period and as the time of payment fixed by the statute cannot be extended, so the date fixed by the parties, which takes the place of the period fixed by the statute, cannot be extended. We have come to the conclusion that it is not necessary for us to decide this wider question of the general power of the Court under such circumstances, as assuming for the sake of argument that the Court had power to examine whether or not the time fixed by the parties was of the essence of the contract the question remains whether in this particular case the time was or was not of the essence of the contract. S. 55, Contract Act, enacts:

> When a party to a contract promises to do a certain thing at or before a specified time, or certain things at or before specified times, and fails to do any such thing at or before the specified time, the contract, or so much of it as has not been performed, becomes voidable at the option of the promisee if the intention of the parties was that time should be of the essence of the contract. If it was not the intention of the parties that time should be of the essence of the contract, the contract does not become voidable by the failure to do such thing at or before the specified time; but the promisee is entitled to compensation from the promisor for any loss occasioned to him by such failure.

In order to decide whether in this particular case time was of the essence of the contract we must look to the contract itself. The words are that in case the judgment-debtor fails to pay up the decretal amount within the time specified the sale would stand confirmed. No particular order was necessary. The wording of the contract, in our opinion, clearly shows that the parties meant that the benefit which was to accrue to the judgment-debtors would be lost to them if the payment was not made within the specified time; or, in other words, the time was of the essence of the contract. The effect of the contract was that on the expiry of 10th November, the last date fixed for the payment of the decretal amount, the sale automatically became confirmed. Even if it be conceded that on account of the Court being closed on that and on two subsequent days the payment could have been made by 13th

November, even then the sale stood confirmed on the expiry of that date, no order of the Court being necessary. There was nothing left which could be set aside after that date. It is true that the Court, when the joint application was filed on 13th September 1936, ordered the case to be put up for confirmation on 15th November, but this is immaterial as the Court fixed this date for its own convenience in order to finally dispose of the case on a consideration of what happened on the date fixed by the parties. In that view of the matter the appeal fails and is dismissed with costs.

Courtney-Terrell, C. J. — I entirely agree.

James, J.—I agree.

Dhavle, J.—I agree.

Varma, J.—I agree.

K.B./A.L. *Appeal dismissed.*

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* * A. I. R. 1937 Patna 117

FULL BENCH

FAZL ALI, MOHAMAD NOOR, JAMES, DHAVLE AND VARMA, JJ.

Pokhan Dusadh — Defendant—Appellant.

v.

Mt. Manoa — Plaintiff and *another* — Defendant—Respondents.

Appeal No. 1324 of 1933, Decided on 18th December 1936, from appellate decree of Special Sub-Judge, Ranchi, D/- 11th September 1933.

*** * (a) Hindu Law of Inheritance (Amendment) Act (1929), S. 2 — Applicability — For application of Act material date is date when succession opens and not date of death of Hindu male — Succession opens on death of limited heir left behind by Hindu male, and in case no such heir is left succession opens immediately—Act applies only if date when succession opens falls after Act comes in force and not otherwise — Act has no retrospective effect.**

When a Hindu owner of an estate dies before the Act came into force, the question whether the Act will affect the succession to his estate or not will depend on whether he has left any female heir such as widow, daughter, etc., or he had died without leaving any such heir. In the former case it is only after the death of the limited owner that the succession opens, that is to say, the reversionary heir is entitled to enter into the possession of the estate. If however the owner dies without leaving any female heir, the succession opens immediately on his death, and if he dies before the passing of the Act, the Act will have no application. The only date which is material is the date when the succession opens or when the question of succession to the estate arises. If such a question arises before the Act came into force the succession will be governed by the Hindu law as it stood before the Act. If the question arises after the Act, it will apply. The Act applies even to the case of a person who dies before it came into force, if his widow or any other limited owner who inherited his estate is alive at the time of its enforcement. [P 119 C 1]

The Act therefore being applicable only when succession opens on the passing of the Act, the Act cannot be said to be and therefore is not retrospective in effect : *A I R 1936 Lah 124* ; *A I R 1936 All 507* ; *A I R 1933 All 152* ; *A I R 1936 Lah 139* ; *A I R 1932 Lah 361* and *A I R 1934 Pat 324, Rel. on* ; *A I R 1934 Mad 138* and *A I R 1933 Lah 777, Dissent.* [P 121 C 1, 2]

(b) Hindu Law of Inheritance (Amendment) Act (1929), S. 1 (2)—Act applies even to property which cannot be disposed of by will.

The Act of 1929 applies even to property which cannot be disposed of by will as the words "not disposed of by will" which occur at the end of S. 1 (2) are comprehensive enough to cover such a case. [P 119 C 2]

(c) Hindu Law of Inheritance (Amendment) Act (1929) — Preamble — Interpretation — Words "the Hindu male dying intestate" mean the Hindu male who has died or may die intestate.

The words "dying intestate" which qualify the preceding words "Hindu male" are merely descriptive and limit the operation of the Act to the estate of those Hindu males only who answer the description. It is true that the participle in the expression "dying intestate" is in the present tense ; but that is the present tense of logic and the expression connotes the intestacy of the deceased owner without any reference to whether the death occurs before or after the Act comes into force. "The Hindu male dying intestate" simply means the Hindu male who has died or may die intestate. [P 120 C 1]

*** (d) Chota Nagpur Tenancy Act (6 of 1908), S. 139 (5)—Jurisdiction of civil Court —Section bars civil Court from entertaining suit regarding matter cognizable by Deputy Commissioner by way of application — Civil Court is not barred from entertaining a suit for declaration of title to and consequent recovery of possession of tenancy.**

Section 139 (5) only bars the civil Court from entertaining a suit regarding a matter cognizable by the Deputy Commissioner by way of application and that, so far as recovery of possession of a tenancy is concerned ; by no provision does it bar the civil Court from entertaining a suit for a declaration of title to and consequent recovery of possession of a tenancy : *A I R 1933 Pat 539, Rel. on.* [P 122 C 1]

K. P. Jayaswal and *Anand Prasad* — for Appellant.

B. C. De and *S. N. Banerjee*—for Respondents.

Fazl Ali, J.—This appeal arises out of a suit instituted by the plaintiff-respondent to recover possession of a holding which admittedly belonged to one Ghaman Teli of mauza Duari. Ghaman Teli died sometime before 1929, and was succeeded by his widow Mt. Runia who died in July

1929. By this time the Hindu Law of Inheritance (Amendment Act), 2 of 1929, which includes a sister in the category of reversioners to the estate of a Hindu male came into force and accordingly the plaintiff who is a sister of Ghaman Teli claiming to be an heir of her deceased brother applied to the landlord for mutation of her name. The landlord however refused to register her name and so she applied under S. 23-A, Chota Nagpur Tenancy Act, to the Sub-divisional Officer of Chatra for mutation which was allowed sometime in July 1930. Meanwhile the landlord had settled the land with defendant 1 and the plaintiff's case is that defendant 1 dispossessed her from the holding and she was therefore compelled to institute the present suit. The plaintiff's suit was decreed by the trial Court and defendant 1 having unsuccessfully appealed to the Court to which the appeal lay in the first instance has now preferred this second appeal.

The main contention which has been put forward on behalf of defendant 1, the appellant in this case, is that the Hindu Law of Inheritance (Amendment) Act has no application to this case as Ghaman Teli died before the passing of that Act. The question which thus arises for our consideration is whether the Act applies only to those cases where the Hindu owner dies after the passing of the Act or it also applies where such a person dies before the Act came into force, but owing to the estate being in the hands of a female heir (a limited owner under the law) the succession does not open until the death of the latter. In other words what we have to decide is whether the material date for the application of the Act is the date of the death of the Hindu owner or the date when the succession opens. The point is not a new one and has been the subject matter of much discussion in recent times. In 1933 a Division Bench of the Madras High Court held that Act 2 of 1929 does not apply to cases of Hindu males who died intestate before its coming into force and that in determining the order of succession to the estate of such a person the Hindu law as it stood before the Act would apply: *see* 57 Mad 718.[1] The same view was taken by a single Judge of the Lahore High Court in A I R 1933 Lah 777.[2] This last decision was however reversed on appeal under the Letters Patent [A I R 1936 Lah 139, Ref. 7 below] and the decision of the Madras High Court to which I have referred has been recently overruled by a Full Bench[3] : (1936) Pat W N 154 (*Notes*). The High Courts of Madras, Lahore and Allahabad are now agreed that the Act in question applies even to the case of a person who dies before it came into force, if his widow or any other limited owner who inherited his estate is alive at the time of its enforcement: *see* A I R 1936 Lah 124[4]; A I R 1936 All 507[5]; A I R 1933 All 152[6]; A I R 1936 Lah 139[7] and 13 Lah 178.[8] This is also the view which was expressed in this Court by Courtney-Terrell, C. J. sitting singly after a very thorough examination of the question in all its aspects : *see* 15 P L T 707.[9] As however notwithstanding these decisions the question has been raised persistently in this Court it becomes necessary to examine it once more.

The object of the new Act was in the words of its preamble "to alter the order in which certain heirs of a Hindu male dying intestate are entitled to succeed to his estate." S. 2 which was enacted to carry out this object provides that a son's daughter, daughter's daughter, sister and sister's son shall in the order so specified be entitled to rank in the order of succession next after a father's father and before a father's brother. The effect of this enactment is best understood if we look at the matter as follows: Let us suppose that before the Act came into force there was available to us a complete list of reversionary heirs to a Hindu male which was compiled according to the law as it then stood. The effect of the Act is simply to substitute a revised list with certain additions and alterations. As before the

1. Krishna Chettiar v. Manikammal, A I R 1934 Mad 138=147 I C 1139=57 Mad 718=66 M L J 70.

2. Mt. Janki v. Mt. Sattan, A I R 1933 Lah 777 =146 I C 511=34 P L R 964.
3. Lakshmi Ammal v. Anantharama Ayyangar, Appeal No. 443 of 1930, D/- 13-10-1936 (F B).
4. Sm. Shakuntala Devi v. Kaushalya Devi, A I R 1936 Lah 124=162 I C 718=17 Lah 356=38 P L R 673.
5. Mt. Rajpali Kuer v. Surju Rai, A I R 1936 All 507=163 I C 756=1936 A L J 659 (F B).
6. Bandhan Singh v. Mt. Daulata Kuer, A I R 1933 All 152=138 I C 389=1932 A L J 384.
7. Mt. Sattan v. Janki, A I R 1936 Lah 139= 163 I C 480=38 P L R 765.
8. Shib Das v. Nand Lal, A I R 1932 Lah 361 =138 I C 291=13 Lah 178=33 P L R 423.
9. Chulhan Barai v. Mt. Akli Baraini, A I R 1934 Pat 324=150 I C 1039=15 P L T 707.

Act we would have had to refer to the list only when the question of succession had to be determined, so after the passing of the Act also it will not be necessary to refer to the revised list substituted by the Act until we are asked to decide who should succeed to the estate of the deceased owner. The Act itself makes no reference to the date of death of the Hindu male and I do not see why the operation of the Act should depend upon that date. The only date which is material is the date when the succession opens or when the question of succession to the estate arises. If such a question arose before the Act came into force the succession would be governed by the Hindu law as it stood before the Act. If the question arises after the Act, it will apply. Therefore when the Hindu owner of an estate died before the Act came into force the question whether the Act would affect the succession to his estate or not would depend on whether he has left any female heir, such as widow, daughter, etc., or he has died without leaving any such heir. In the former case it is only after the death of the limited owner that the succession opens, that is to say, the reversionary heir is entitled to enter into possession of the estate. If, however, the owner has died without leaving any female heir, the succession opens immediately on his death, and if he died before the passing of the Act the Act will have no application.

The reason why the date of the death of the last male owner is not material in such a case is that the question as to who would be entitled to succeed to his estate as a reversioner cannot be determined until the death of the female heir left by him whenever he dies leaving such an heir. At first by a fiction of law the husband's life was assumed to continue in the existence of his widow, but latterly the same rule has been extended to the case of the other female heirs with the result that it is only after the death of the limited owner that the succession opens and the estate goes to the next heir of the last male owner and not to the next heir of the limited owner. That being so during the lifetime of a limited owner no one can say with certainty as to which of the persons who may be the heirs of the last male holder of an estate at the time of his death will be entitled to succeed to the estate when the succession opens. They may or may not be alive at the date when the succession opens or the whole situation may be altered by the coming into being of a new heir who was not in existence when the last owner died. It follows from this that the estate does not vest in any particular reversioner upon the death of the owner when he leaves behind a limited heir and the reversionary right remains a mere possibility or *spes successionis*. This position has been made perfectly clear by their Lordships of the Privy Council in a number of decisions and for the purpose of this case it will be sufficient to quote the following passage only from their pronouncement in 39 Mad 634[10] :

> The law as to the situation of the reversionary heirs is also in substance quite clear ; there is, as stated, no vesting at the date of the husband's death, (the case before their Lordships was one where the limited heir was the widow of the last holder) and it follows that the questions of who is the nearest reversionary heir or what is the class of reversionary heirs fall to be settled at the date of the expiry of the ownership for life or lives ..... Even where the Courts have proceeded, prior to the opening of the succession, to give any declaration, that has been done for special reasons only .... and—to use the language of Sir Arthur Wilson, it is made clear that " whenever the succession opens by the death of the widow, the present decision will have settled nothing as to who should succeed.

Therefore, the only criterion to be applied in determining whether the Act is applicable to a particular case is to inquire when the succession opened and whether the conditions laid down in the Act for its application have been fulfilled. The preamble of the Act makes it clear that it applies where the person to be succeeded has died intestate and S. 1, sub-s. (2) expressly says that :

> It applies only to the person who but for the passing of the Act would have been subject to the law of Mitakshara in respect of the provisions enacted in the Act and that it applies to such persons in respect only of the property of the males not held in co-parcenary and not disposed of by will.

A question may arise as to whether the Act applies to such property as cannot be disposed of by will. In my opinion, the words " not disposed of by will " which occur at the end of the sub-section are comprehensive enough to cover such a case. Thus as far as I can see there is nothing in the Act which makes the date of the death of the last male holder a condition precedent to its application and as I have already explained the question of

10. Janaki Ammal v. Narayansami Aiyer, A I R 1916 P C 117=37 I C 161=43 I A 207=39 Mad 634 (P C).

the applicability of the Act will arise only when the succession opens and not before it. There are four main grounds on which this view has been criticised in 57 Mad 718,[1] (in which the opposite view has been propounded with great clarity) and these may be summarized as follows : (1) That the words "dying intestate" used in the preamble connote a person whose death is to occur and not one who had already died. (2) That the changes made by the Select Committee in the original bill indicate that it was intended to affect only the estate of the person who has died since the passing of the Act. (3) That the Act cannot have retrospective operation because it contains no express provision to this effect and because it will be contrary to principle to give it a retrospective effect. (4) That to hold that the Act affects the estate of a person who died before the Act would be to frustrate his presumed intentions because if he had known that the law was to be changed, he might have preferred to dispose of his property by means of a will.

The first objection admits of a simple answer. It implies that the words "Hindu male dying intestate" mean a Hindu male who will hereafter die intestate. It appears to me, however, that the words in question were never intended to convey this meaning. The words "dying intestate" which qualify the preceding words "Hindu male" are merely descriptive and limit the operation of the Act to the estate of those Hindu males only who answer the description. It is true that the participle in the expression "dying intestate" is in the present tense ; but that is the present tense of logic and the expression connotes the intestacy of the deceased owner without any reference to whether the death occurs before or after the Act comes into force. "The Hindu male dying intestate" simply means the Hindu male who has died or may die intestate. As to the changes made by the Select Committee they appear to me to be more or less irrelevant because we have to interpret the Act as it stands. But in point of fact the changes made by the Committee do not point to the conclusion which is sought to be drawn. In sub-cl. (2) of Cl. (1) of the original Bill the latter portion reads as follows :

> But it applies only in the case of the property of Hindus not being held in coparcenary and not having been disposed of by the will, *to which the succession opens after 31st July 1928.*

The Select Committee omitted the words which I have underlined [*italicised above*] and explained the omission by saying :

> We are also of opinion that it is unnecessary either to assign retrospective effect to the provisions of the Bill or to defer the coming into operation thereof, and we have therefore omitted reference to the date on which the succession opens.

Now, the Act received the assent of the Governor-General in Council on 21st February 1929, and if the passage which has been omitted by the select committee had been retained, the effect would have been that the Act would have operated retrospectively so as to apply to cases in which succession opened between 31st July 1928 and 21st February 1929. The Select Committee, however, thought that it was not necessary to assign retrospective effect to the provisions of the Act only for such a short period and it decided to let the Act come into force on the day it would have come into operation in the ordinary course. The passage, however, which has been quoted above is significant, because it shows that what the framers of the Bill as well as the Select Committee had in view was not the date of the death of the last male owner but the date when the succession opens. The third objection appears to me to be based on a misconception. As Sir Courtney-Terrell, C. J., has pointed out in 14 P L T 707,[9] on the language of the statute as it stands, no question of its retrospective operation arises. It has been said that the question of retrospective operation arises in the sense that the change of law introduced in this Act affects also the estates of persons who have died intestate before the Act. This fact standing by itself does not make the Act retrospective in its operation. As I have already stated, the critical date is the date when the succession opens and the Act would have had retrospective application only if it was applied to cases where succession opened before the passing of the Act. For instance, it would have had retrospective application if the original Bill (which proposed to make the Act applicable to cases in which succession opened after 31st July 1928) had not been amended by the Select Committee. The question as to when an Act would have retrospective operation is dealt with

elaborately in (1894) 1 Q B 725.[11] In that case Lopes, L. J. observed :

It is a well recognised principle in the construction of statutes that they operate only on cases and facts which come into existence after the statute was passed unless a retrospective effect is clearly intended and that this principle of construction is especially applicable when the enactment to which a retrospective effect is sought to be given would prejudicially affect the vested rights or the legal character of past transaction.

Now, in the first place, there is no room for the application of these principles to the present case, because, as I have already stated, the Act was never intended to operate retrospectively in the proper sense of the term; and secondly, to hold that the Act would affect the estate of persons who have died before the passing of the Act will not in any way prejudicially affect any vested rights. Learned counsel for the appellant conceded that when a Hindu male dies leaving a female heir his estate does not vest at once in the next reversioner. He contended, however, that such a reversioner has at least the right to demand that the estate be kept free from waste and danger during its enjoyment by the widow or the owner for life. This right, however, has in some cases been conceded even to one who is not necessarily the nearest reversioner. Again as was pointed out by the Privy Council in 39 Mad 634[10] such a right is exercised by a reversioner only in a representative capacity. To hold therefore that the Act may in certain cases apply to the estates of persons who died before the passing of the Act cannot prejudicially affect any rights which the reversioner possesses only in a representative capacity. The fourth objection is one on which learned counsel for the appellant laid most stress in this Court and it may be set out once more in the words used by the Judges of the Madras High Court in 57 Mad 718[1] :

At p. 186 of Maxwell's book, it is observed that a fundamental rule of English law is that no statute shall be construed to have retrospective operation unless such a construction appears very clearly in the terms of the Act or arises by necessary and distinct implication. At p. 187, the learned author observes that a testator is presumed to have in view the state of the law when he made his will. If it be so, we can reasonably presume that a person competent to make a will is satisfied with the state of the law regarding the order of succession to his estate among his heirs, if he prefers to die intestate without making a will. If he wishes to prefer a remoter to a nearer heir he will certainly have recourse to the making of a will. If he does not make a will, it may be because he wishes that his property should devolve according to the existing law of succession. The policy of the legislature is not to make a subsequent enactment operative against the estate of such a man and thus frustrate his presumed intentions, unless for special and weighty reasons such a retrospective operation is found to be necessary. If Act 2 of 1929 is given such a retrospective operation, it would be frustrating the intentions of the last male owner who preferred to die intestate before the passing of this Act. Such an anomaly will not arise if this Act should be held to apply only prospectively.

The point to be considered is whether we can legitimately draw any presumption as to the intention of a person who has died intestate. I venture to point out respectfully that if it is permissible to say that a man did not leave a will, because he was satisfied with the state of the law regarding the order of succession to his estate, it is equally permissible to say that his intention might have been to let the law take its course and that he was not thinking of any particular heir at all. It being impossible to predicate as to who would succeed to the estate until the succession opens, it is difficult to say that a person who dies intestate had contemplated at the time of his death that he would be succeeded by any particular person or persons. There will be still less justification for presuming that if he had known that a change was going to be effected in the existing law he would have disposed of his property by means of a will. That being so, there is no question of frustrating the presumed intention of a person to whose estate the Act applies, and as already stated to hold that the Act applies only when succession opens is not to give it a retrospective effect and therefore the principles bearing upon the question as to when a Statute shall be construed to have retrospective operation have no relevancy. The conclusion therefore which I have unhesitatingly arrived at is that the view put forward by Courtney-Terrell, C. J. in 15 P L T 707,[9] which now prevails in the other High Courts, is the correct view and should prevail in this Court.

The only other question which is raised in this appeal is that S. 139 (5), Chota Nagpur Tenancy Act, bars the jurisdiction of the civil Court to try the suit. The question however has been fully considered by the Munsif and the decision of the Munsif does not appear to have been seriously questioned before the learned Subordinate Judge. Besides the question which

11. Bourke v. Nutt, (1894) 1 Q B 725=63 L J Q B 497=9 R 395=70 L T 639=1 Manson 172=42 W R 388.

has been raised here was raised in many cases in this Court and has been exhaustively dealt with recently by a Division Bench of this Court in 14 P L T 657.[12] It was held in that case that S. 139 (5) only bars the civil Court from entertaining a suit regarding a matter cognizable by the Deputy Commissioner by way of application and that, so far as recovery of possession of a tenancy is concerned, by no

provision did it bar the civil Court from entertaining a suit for a declaration of title to and consequent recovery of possession of a tenancy nor interfere with the period of limitation prescribed for such a suit.

This represents the settled view of this Court and there is no doubt therefore that the civil Court was competent to try the present suit. Indeed having regard to the pleadings of the parties no decree for recovery of possession could be passed without properly deciding the plaintiff's title. It is clear that the question as to whether the plaintiff is entitled to avail herself of the provisions of Act 2 of 1929 is one which could not be decided in a summary proceeding for possession in a Revenue Court. In my opinion therefore the decree of the Court below should be affirmed and the appeal dismissed with costs.

Mohamad Noor, J.—I agree.

James, J.—I agree.

Dhavle, J.—I agree.

Varma, J.—I agree.

K.B./A.L. *Appeal dismissed.*

12. Shiva Prasad Singh v. Bhuban Mahato, A I R 1933 Pat 539=148 I C 1093=14 P L T 657=12 Pat 802.

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* A. I. R. 1937 Patna 122

COURTNEY-TERRELL, C. J.

In the matter of *Pandit Girindra Mohan Mishra* — Applicant.

Criminal Misc. No. 60 of 1936, Decided on 2nd November 1936,

*** Bar Councils Act (1926), S. 15 (b)—Rules under — Permission to allow Advocate of one High Court to appear in another High Court—Permission cannot be claimed as of right but depends upon discretion of Chief Justice — Good reasons such as Advocate's familarity with the case, or likelihood of the case raising some new question of principle or jurisdiction must be shown — Mere high position of litigant or his being accused for contempt of Court is not good reason—No question of reciprocity between the two High Courts.**

The permission for an advocate of one High Court to appear and plead in another High Court cannot be granted as of right. The matter is at the judicial discretion of the Chief Justice of the High Court in which permission is sought to appear. Good reasons must be shown in order to obtain the permission. Some of these reasons are that the Advocate for whom the permission to appear is sought has from the very beginning in the lower Court made a complete study of the case and is familiar with details. Another reason is that the litigant has his normal residence and carries on business in another province and habitually consults a lawyer of that other province who is familiar with his business. A third reason is that the case is of great magnitude and is likely to raise some new and important question of principle and of jurisdiction. In such cases, no question of reciprocity between the two High Courts is involved. [P 122 C 2; P 123 C 1; P 124 C 1]

Where the manager of the Darbhanga Estate was proceeded against for contempt of Court and he asked for permission of the Chief Justice to allow an advocate of the Bombay High Court to appear:

Held: that the position of the accused was no good reason, and the mere fact that the proceedings were in respect of contempt of Court was not sufficient for the granting of the permission. [P 123 C 2; P 124 C 1]

Order.—This is an application by one Pandit Girindra Mohan Mishra who is said to be the Manager of the Darbhanga estate, a very important and wealthy estate in this province, for permission that he may be represented by a very eminent advocate of the Bombay High Court in certain proceedings pending before this Court in which he is said to be charged with the offence of contempt of Court. The Rule made under the Bar Councils Act governing the appearance in this High Court of advocates of another High Court is almost identical with the following rule of the Bombay High Court :

An Advocate of any other High Court in British India whose name is not entered on the Roll of Advocates of this High Court, may with the permission of the Honourable the Chief Justice appear and plead in any particular case or cases in this High Court on the Appellate Side provided an Advocate of this High Court is also instructed to appear with such first mentioned Advocate; save as aforesaid no such Advocate shall practise in this High Court on the Appellate Side.

As I understand this Rule the provision that the appearance of stranger Advocates is not permitted save with the permission of the Chief Justice means that the Chief Justice is to use judicial discretion, that is to say good reason must be shown for the exercise of the discretion and that the permission is not to be granted on mere application. It has pleased the legislature to provide that each province shall have its own High Court with its own Bar and that the right of Advocate of any particular Bar to appear in other High Courts does not exist as a matter of right. Much the same institution prevails at the Bar

in England where the different circuits have each their own Bar, although the appearance of a stranger Barrister on a circuit of which he is not a member is there possible if the advocate is paid a special fee to secure his presence and that fee is a public matter known to everybody. In other words in both countries the principle seems to be the same that the policy is that within a given jurisdiction a local Bar shall normally carry on the legal practice before the Court in question. As to the wisdom of this policy I am not called upon to pronounce any opinion. Had the legislature thought it advisable that an advocate of any Court in India should be entitled as of right to appear in a stranger Court, the legislature could easily have made such provision, but the fact that the legislature has specifically provided that the permission of the Chief Justice is indispensable and as it cannot be pretended that the permission of the Chief Justice must of necessity be granted as a matter of course on an application, I deem it my duty to apply my mind to the circumstances of the application and to see whether good reasons have been shown in any particular case.

In many cases which have come before me such reasons have been shown. Sometimes the reason is that the advocate for whom permission is sought to appear has from the very beginning in the lower Court made a complete study of the case and is familiar with its details. That is one class of reason which may be successfully presented, or it may appear that the litigant has his normal residence and carries on his normal business in another province and habitually consults a lawyer of that other province who is familiar with his business; and in such circumstances again it is reasonable that the advocate should appear in this Court. A third circumstance may be the great magnitude of a case, the fact that it raises some extremely new and important question of principle and of the jurisdiction of the Court in which case again it may be right and proper that one of the more distinguished advocates in India should be admitted to argue the case. As an illustration of the last class of case may be cited one of contempt of Court proceedings against a certain newspaper which came before me some years ago. In those proceedings a very important question of jurisdiction was raised which necessitated the hearing of the case by a Special Bench of five Judges and justified me in granting permission to three distinguished gentlemen from other Bars.

I now turn to what are alleged to be the special circumstances of the particular case in point. On the first occasion on which this application was made it was presented by one of the learned advocates of this Court of whom there were not less than four who had been up to that time instructed on behalf of the litigant. All of those gentlemen were thoroughly qualified and, if I may be permitted to say, very well selected from the ranks of the Bar available in this Court. The proceedings which are pending, in so far as they have been presented before me do not seem to raise any novel and important point of jurisdiction. Indeed the reasons which are now presented have been summarised in a fresh petition in the following form : "(a) The position of the accused as the acting Chief Manager of the Darbhanga estate." That is no good reason at all. To concede that the mere personality of the applicant was a special reason would lead to manifest injustice : "(b) The nature of the proceeding." There have been plenty of contempt of Court proceedings before this Court, and I do not think that the Bench is under the need of special assistance which is not within the competence of the present members of the Bar which is available in this province; "(c) The stigma that is likely to be cast upon him and consequently upon the Darbhanga estate itself in case the accused is convicted."

I have not yet been informed of the precise nature of the contempt alleged, but in the proceedings which seem to have been taken against this individual, who is the applicant before me, the merits of the case which will have to be discussed will necessarily be his own merits in relation to those proceedings. The fact that he is in an important and distinguished employ seems to me to be of no importance whatever. It does not add to the difficulty of the decision which may be required, nor to the matter of the discussion which will take place in the proceedings. As to the stigma which is to be cast upon him, the stigma is no greater and no less than what would necessarily follow in the case of any responsible person found guilty of contempt of Court, and to say that the

mere fact that the proceedings are in respect of contempt carries the case no further. Lastly there is put the natural anxiety in the circumstances on the part of the accused to be defended by an advocate of eminent position of all India reputation.

No doubt every litigant desires the best legal advice that his purse enables him to obtain. I feel perfectly confident that the Bar which is available here is quite competent to deal with any such matters as may arise, they not being of any special or novel character so far as I am at present aware. I must now refer to a letter, which has been exhibited to this petition, from the eminent advocate in question, to one of the learned gentlemen already instructed in the case. This letter clearly indicates that he is under an entire misapprehension as to the reasons which guided me in the first instance to refuse the application. There is no question of reciprocity involved in this matter at all. It must be freely conceded that the Chief Justice of the Bombay High Court will apply precisely the same principles, and there is no question here of discrimination against the Bar of a Court on the ground that our Bar does not receive reciprocal treatment from that Court. I think it very necessary that this point should be drawn to the attention of this learned gentleman because possibly the Chief Justice of the Bombay High Court, if the matter should be called to his attention, may be under a similar misapprehension. There is no question of reciprocity involved and I hope and expect that in cases which may come before the Bombay High Court of a similar nature the same principles which I have been at pains to explain will be applied in the Bombay High Court and that if a similar application should be made before the Chief Justice there with similar lack of reasonable support that he also would refuse the application. The application is therefore rejected.

S.C./D.S. *Application rejected.*

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* A. I. R. 1937 Patna 124

COURTNEY-TERRELL, C. J. AND JAMES, J.

Emperor

v.

Pandit Girindra Mohan Mishra — Opposite Party.

Criminal Misc. No. 60 of 1936, Decided on 3rd December 1936.

*** Contempt — Undertaking given by two adjoining estate holders to Governor that they would not alter or add to embankments on the edge of their estates—Breach having occurred in embankment of one estate people repaired it but it increased in length—Complaint made by other estate holder to District Magistrate who was also collector — Complaint rejected by District Magistrate—Letter by manager of complaining estate to collector stating that rejection had emboldened people of other estate to make breach —Letter, held, did not amount to contempt.**

A river ran between two estates and both the estates had built an embankment of its edge facing each other across the river. There occurred a breach on the embankment of one estate. Some tenants of that estate whose lands were injured owing to flooding of water repaired the breach but in doing so they could not find the original line being under water, and constructed a semi-circular embankment thereby increasing its length. Previous to this incident both the estate owners had given an undertaking to the Governor of the Province that they would not add to or alter the embankments without taking permission of the Government. Thus after the breach was repaired the proprietor of other estate made a complaint to the District Magistrate who was also a Collector for the breach of the undertaking. The District Magistrate rejected the complaint. Thereupon the complainant wrote a letter to the Collector stating that order of the Collector on the complaint made by him and Collector's view of the case had emboldened the people of other estate:

Held: that there was nothing in the statement which would tend to lessen the authority or to bring it into contempt and that there was no judicial matter before the Magistrate as there was merely a rejection of complaint, he having refused to summon the accused. [P 126 C 2; P 127 C 1]

Govt. Advocate—for the Crown.

K. B. Dutta, S. Sinha, P. C. Manuk, Murari Prasad, L. K. Jha, R. Misra and *Mrs. D. Lal*—for Opposite Party.

Order.—We have here to deal with a letter of reference by the District Magistrate of Bhagalpur complaining of an alleged contempt of his Court by one Pandit Girindra Mohan Mishra, Acting Chief Manager of the Darbhanga Raj. The letter of reference was in the ordinary course of affairs placed before a Single Judge of this Court and notice was issued thereupon. The opposite party is here to defend himself against the allegation that he has committed any contempt and the support of the motion has been undertaken by the Government Advocate on behalf of the District Magistrate. One does not know what the course of proceedings actually is, but I think if the matter had been placed by the authorities in the hands of the legal advisers of the Government for advice the motion contained in the letter of reference

would never have been pressed. The idea that there is anything in the action of the present complaint which constitutes a contempt of Court is entirely misconceived. The circumstances are as follows:

North of the river Ganges there are two big estates which are called the Darbhanga Raj and the Banaili Raj. Between the two there runs a depression which is a river in normal times. On the edge of the Banaili Raj there is an embankment and there is a similar embankment on the edge of the Darbhanga Raj. The two embankments face each other across the river. There has been in the past a considerable amount of litigation between the proprietors of the two estates because of the flooding of the country on the one side or the other and each side has attributed this flooding to the conduct of the other party. Sometime ago there was a notification issued under S. 6, Bengal Embankment Act, by which the people in the neighbourhood of this system of embankments were forbidden from erecting any new embankment or adding to any existing embankment or obstructing or diverting any water course without the consent of the Collector. Sir John Whitty (the then Governor of the Province) went to the neighbourhood and endeavoured to bring about some sort of reconciliation between the opposing litigants so that the disputes might be brought to an end, and it would appear that both sides gave him an undertaking that they would not add to the embankments or alter them in any way without going to the Collector and getting the permission of the Government. Now, on the Banaili embankment there occurred a breach and it would appear that water in the rainy season poured through this breach, filled the water course between the lands of the two estates, and it seems that the proprietor of the Darbhanga Raj began to fear damage to the estate property apprehending possibly that the water would overflow the water course and the embankment on his side and so do damage. Thereupon some tenants of the Banaili estate, whose land on the Banaili side had been repeatedly injured by the fact that flooding had taken place, set to work on their own account to repair this breach in the Banaili embankment.

It would seem that there was some difficulty in merely re-establishing the old line of the embankment because the channel at the mouth of the breach into the water course was of a depth which did not permit of the repair of the breach by merely restoring the old line of the embankment. They therefore on the landward side constructed a curved semicircular embankment from one end of the breach to the other, the convex side of the curve being towards the Banaili line. The result of that was, that as far as linear measurements are concerned the length of the line of the embankment was somewhat increased. On 8th June 1936 the proprietor of the Darbhanga Raj made a petition to the District Magistrate who is also the Collector complaining of this action by the Banaili people.

Thereupon the District Magistrate started, in the ordinary course of his duty, a file to deal with this complaint and in the order sheet there eventually appeared an entry that the petition of complaint by the Darbhanga Raj was defective for two reasons: in the first place the specific complaint was not before the Court to be examined on oath and it being a matter that required preliminary examination of complainant the Court could not proceed to take action to have the alleged offenders prosecuted in that state of affairs; further, the District Magistrate expressed the opinion that upon the facts, even if they were true as disclosed, the alleged behaviour of the Banaili people did not constitute an offence under S. 76, Bengal Embankment Act, because the method of dealing with the breach of the Banaili people was not in any sense the creation of a new embankment nor was it an addition to an existing embankment, and that it was merely a repair. With the accuracy of that view we are not concerned but, at any rate, the order concludes with the statement that there is no complaint which can properly be investigated and therefore no action would be taken. That order was passed on 8th July of the same year. In order to remedy the defect in their procedure on 27th July the Darbhanga people filed a regular complaint, the formal complainant being a person who appears to have been one of their own tenants, and that tenant was formally examined on oath.

Now on 11th August, while this new complaint was pending, Mr. Daunt, who was the Manager of the Banaili Raj, wrote a letter to the Collector and sent a copy of that letter to the Manager of the

Darbhanga Raj. In the letter he referred to the undertaking which had been given by both parties to the then Governor that no alteration would be made in the embankment system and he pointed out that there had been very great delay by the Government in passing any orders upon the matter of the embankments generally by which the difficulties of the parties might possibly have been solved. He referred to the facts that the tenants of the Banaili Raj in the neighbourhood of the embankment had been long labouring under great feeling of exasperation because as year after year went by and the gap in the Banaili embankment was not repaired their lands were continuously flooded. He stated that he himself had the utmost personal sympathy with these unfortunate tenants and that unknown to him and without his connivance it was a fact that the tenants had repaired a breach in the Banaili embankment. He further said, referring to the undertaking which had been given by his principals, that the time was rapidly approaching when he must withdraw from that undertaking in justice to the tenants of the Raj whose land was being destroyed. In so addressing his letter to the Collector and in sending a copy to the Darbhanga Manager, Mr. Daunt was obviously doing nothing improper in dealing with an undertaking given by his principals to the Governor.

He was obviously right in addressing the Executive Officer (the Collector) on the spot and putting such grievances as he had before that officer. Now the Manager of the Darbhanga Raj having received the copy of Mr. Daunt's letter also wrote a letter to the Collector and sent a copy of it to Mr. Daunt. In this letter there appeared the observations which are alleged by the Collector to be a contempt of his magisterial Court. The Manager of the Darbhanga Raj referred to the disputes generally and complained that the repair in the breach of the Dumaria Bandh was according to his view a breach of the undertaking given to the Government, and he did not impute to Mr. Daunt any personal participation in the matter but obviously attributed to Mr. Daunt and to his principals the blame for the alleged wrongful breach of the undertaking. He also dealt with some contentions that had been raised in Mr. Daunt's letter that the people of Darbhanga had themselves been guilty of certain breaches, and accused the General Manager of a determination to break the undertaking and that statement was not without some justification inasmuch as Mr. Daunt had expressly stated to the Collector that he did propose not to abide by the undertaking unless the grievances of the Banaili people were speedily removed. There was then a reference to the proceedings which had been taken by the Darbhanga people and had been dismissed by the District Magistrate on the grounds which we have just stated. Now the passage which is the subject of this complaint runs as follows :

> The repairs that were made by the Banaili people were actually on a new alignment increasing the length of the Bund and the Banaili people have been evidently emboldened by the view that you have taken in the case and the orders that were passed by you.

It is contended on behalf of the Collector that this is in some way a contempt of the authority of the Collector in his capacity as District Magistrate when he had on the 8th of July dismissed the complaint of the Darbhanga people. There are however several obvious answers to the contention. The letter complained of, speaking of it generally, is a letter addressed to the Collector who was the proper person to deal with any alleged breach of an undertaking given to the Governor (Sir John Whitty). The decision by the Collector as a Magistrate was a relevant point to mention in dealing with a supposed threat of a breach of undertaking. There is nothing in the observation which would tend to lessen the authority of the Court or to bring the authority of the District Magistrate's Court into contempt. Moreover, the observations referred to a decision by the Magistrate in which he had refused to take any action at all, that is to say, he having refused to act on a complaint before him and having refused to summon the accused there was no judicial matter before the Magistrate at all and the action of the Magistrate was a mere rejection of the complaint. To urge that the passage quoted or the rest of the letter is minatory in character is simply ridiculous. There is nothing therefore in the nature of a criticism of a judicial decision, and even if there had been such a criticism there is nothing of a kind to bring the Magistrate's Court into contempt or to diminish its authority. It frequently happens in this Court that a Judge sitting on the Bench is informed with respect to

a former order that he has passed that the other side has been emboldened by that former order to do something injurious to the complaining party, but nobody would think of the observation of the advocate in stating that a party had been emboldened by an earlier decision as intended to be a contemptuous reference to the Judge who was addressed and had made the earlier order. Indeed it seems that there is nothing whatever to be said in support of the allegation that this action on the part of the Acting Chief Manager of the Darbhanga Raj constitutes a contempt in any way.

We have been asked by Mr. K. B. Dutt (appearing with many other learned members of the Bar) on behalf of the opposite party to award costs and in our opinion this is a case in which costs should properly be awarded. The Collector himself in this case is obviously not personally responsible for the costs although the order in form must be against him. It would have been wiser, we think, before the decision had been taken by whoever responsible for it to support the letter of reference, that the matter should have been presented to the proper legal advisers of Government for opinion. That may or may not have been done, but it is difficult to believe that any lawyer can have advised the pressing of this motion. The fact that the learned Government Advocate has been instructed to appear on behalf of the Collector entitles the opposite party to costs, although having regard to the simplicity of the case it might easily have been left to the most recently admitted member of the profession to conduct the argument on his behalf. We therefore reject the letter of reference awarding ten gold mohurs as costs to the opposite party.

S.C./D.S. *Reference rejected.*

A. I. R. 1937 Patna 127

DHAVLE, J.

Maharajadhiraj Sir Kameshwar Singh of Darbhanga—Plaintiff—Appellant.

v.

Hem Nath Jha and *others*—Defendants—Respondents.

Second Appeals Nos. 867 and 959 to 961 of 1933, Decided on 4th May 1936, from decision of Addl. Dist. Judge, Bhagalpore, D/- 8th April 1933.

(a) Bengal Tenancy Act (8 of 1885), S. 50—Record of Rights showing fixed rate status—Variation in rent of settled and after-acquired lands—Presumption of fixed rate status not affected.

Nature of interest acquired by a tenant in land adjoining to land settled with him by his landlord depends on the circumstances and is not necessarily of the same kind as his interest in the latter. The presumption arising from the entry in record of rights that a tenant is a fixed rate tenant is not affected merely because there are variations in rents of the originally settled land and lands acquired after: *A I R 1923 Cal 365*; *A I R 1915 Cal 106* and *A I R 1926 Cal 710*, *Ref.*; *A I R 1919 Pat 307*, *Expl.*

[P 129 C 1, 2]

(b) Bengal Tenancy Act (1885), S. 104-H (4) — Scope — Suit by landlord to increase rent on ground that entries in record of rights were incorrect—Failure to make out case of increase — Finding of Court that entries were incorrect—Court has no power to reduce rent settled by settlement authorities.

Where in a suit by landlord claiming that entries in record of rights were incorrect and the tenant was liable to increased rent, the landlord failed to make out a case for increase and the Court, upon such failure, and finding that the entries were incorrect, reduced the rents settled by the settlement authorities:

Held: that S. 104-H (4) did not empower the Court, on landlord's failure to make out his case for an increase, to reduce the rents settled by settlement authorities. [P 130 C 1, 2]

Rameshwar Misra, *S. P. Srivastava* (in S. A. No. 867) and *S. C. Mazumdar* (in S. A. Nos. 959 to 961)—for Appellants.

P. B. Ganguly (in S. A. Nos. 959 to 961)—for Respondents.

Judgment.—These are appeals by the plaintiff-landlords. S. A. No. 867 of 1933 arises out of title Suit No. 363/31 brought by the landlord in respect of an entry in the Kosi diara record of rights that the defendant was a malguzar "istimrari mukarrari" with an area of 17.79 acres and a fixed rent of Rs. 7-0-7½ pies, besides 37 acres of land, the rent of which could be enhanced in accordance with the law and was aferwards assessed by the Settlement Officer under S. 112, Ben. Ten. Act, at a figure which made up a total of Rs. 8. The plaintiff asked for a declaration that the defendant was not entitled to fixity of rent but had a kaimi as opposed to an istimrari mukarrari status and for settling a fair rent to be comprised in the Settlement Rent Roll prepared under S. 104-A to S. 104-F of Ben. Ten. Act.

The other three appeals arise out of three suits brought by another landlord in respect of similar entries sharah-manai-

yan in respect however not of tenure-holders but of tenants recorded as raiyats who according to the plaintiffs were occupancy raiyats only. The prayers were that the holdings be determined to be kaimi and not sharah muaiyan, that the khatians be amended accordingly, and that such other relief as may be deemed proper by the Court be given to the plaintiff. As the learned Munsif pointed out, there was no prayer for a settlement of fair rent in these suits but the learned District Judge on appeal has treated them like Suit No. 363 of 1931 as suits under S. 104-H, Ben. Ten. Act; the suits were all instituted within the period prescribed by sub-s. (2), S. 104-H, and the prayer for general relief would in the circumstances include settlement of a fair rent. And in all the four appeals the learned Judge has reduced the rent settled by the Assistant Settlement Officer for the extra areas to strictly proportionate figures. The trial Court dismissed title Suit No. 363 of 1931 and two out of the three suits brought by the other landlord on the ground that the fixed rent status shown in the record of rights was correct. The only exception was title Suit No. 142 of 1931, in which there had been an addition of area after 1322 fasli and there were two bonds in which the raiyat has described himself as kaimi, an expression which the learned Munsif took to mean the status not of a raiyat at fixed rates but of an occupancy raiyat. The lower appellate Court has differed from the trial Court as regards the status of the defendant in title Suit No. 142. The result is that before me all the suits stand on much the same footing, though S. A. No. 867 refers to what is recorded as a tenure (and not an occupancy holding) and has been argued separately from the other three appeals.

Mr. Rameshwar Misra who appears for the appellant in S. A. No. 867 has urged that the lower Courts have not properly construed a hastbud for 1285 fasli and a hastbud wasilbaki for 1307 fasli produced by him and have thus arrived at the wrong conclusion that the status of the tenure-holder is istimrari mukarrari. I can see no error of construction in connexion with these documents. So far as they show different areas and different rents, it has to be remembered that the appellant's case, which is set out in para. 3 of his plaint, contained no suggestion that apart from the extra area assessed by the Assistant Settlement Officer, there had been any variations in the area or rent of the tenancy such as it was sought by means of these old papers to make out. There was also no evidence which the lower Courts could accept that the tenancy was created in 1285 fasli and no proof that realizations were ever made at the rates shown in Exs. 1 and 1 (a). It is therefore impossible to interfere with the finding that the defendant had an istimrari mukarrari interest in respect of the bulk of the area of the tenure. Upon this Mr. Rameshwar Misra urged that on that footing the lower appellate Court should have left the rent settled alone instead of reducing the rent for the excess area of 37 acres to a proportional amount. In the other three appeals Mr. Subal Chandra Mazumdar who appears for the landlord-appellant did not question the finding of the lower appellate Court that the holdings of the defendants are Sharah muaiyan, though this is found in the memoranda of appeal, but urged that as the defendant did not say that the rent settled was wrong or unjust, the reduction of the rents for the excess area to a proportionate amount was not an issue in the case and was beyond the jurisdiction of the Court. This is thus the only point that remains for decision in these four second appeals.

The learned District Judge considered the matter elaborately and apparently regarded it as a contradiction in terms that a fixed rate tenure or holding should comprise, besides an area held at a fixed rent or at a fixed rate of rent, an area carrying a rent which was liable to enhancement in accordance with the law. He pointed out that the Settlement Officer had not described any holding or tenure as partly of one status and partly of another. On a construction of Ss. 50 (1) and 52, Tenancy Act, the learned Judge came to the conclusion that unless the rent assessed on the excess area is proportionate to the area, the entry in the Record of Rights that the rent for the excess area is liable to enhancement in accordance with the law would destroy the fixed rate status of the defendants in future, that in other words decrees upholding the defendants' status as tenure holders or raiyats at fixed rates of rent would be automatically rendered nullities if the rent for the excess areas is not correct, that is to say, not proportionate

to the areas, and in this view, even though he held against the plaintiffs that they had failed to show that the tenants belonged to a class different from that to which they had been shown in the record of rights to belong, he reduced the rents proportionately to the extra areas. It seems to me that the argument adopted by the lower appellate Court is unsound.

Turning first to S. 50 (1), it is true that a holding or tenure will remain at what the Act compendiously calls "fixed rates": *see* for example Ss. 4 (a), 18 and 102 (b), if whenever its rent is changed, the change is proportionate to the area, because in that case the rate remains unchanged. But the concluding words of the provision "except on the ground of an alteration in the area of the tenure or holding" only show when "the rent *or rate of rent* may be increased" and in view of the words that I have underlined [*italicised*], cannot be taken to mean that the increase in the rent must be proportionate to the increase in the area; they clearly include an increase in the rate of rent as well. S. 52 of the Act provides that every tenant shall be liable to pay additional rent for all land proved by measurement to be in excess of the area for which rent has been previously paid by him. It is true that the section is general in its terms and does not deal specifically with tenancies coming within S. 50 of the Act, but the general rule for assessment of excess area found in sub-s. (3) of the section does not seem to be inapplicable to what may conveniently be called fixed rate tenancies in assessing rent under S. 112 of the Act, for the sub-section prohibits rent which is unfair or inequitable, and S. 112, especially when read with S. 104, does much the same by providing positively for the settlement of fair and equitable rents. Rents which have not been changed from the time of the Permanent Settlement would generally be found to be very low in these days, and if the rents for excess areas are to be proportionate they would, again speaking generally, be very low, while the rent settlement under Ss. 112, 104 and 104-J is to be a settlement of fair and equitable rents for tenants of every class.

The nature of the interest acquired by a tenant in land adjoining the land settled with him by his landlord depends on the circumstances and is not necessarily of the same kind as his interest in the latter. As an extreme example of this, I may refer to the holder of a rent free holding who is entitled to possession of all land forming an accretion thereto but is not entitled to hold the same rent free : *see* 18 C W N 1206.[1] The rule adopted by the learned District Judge would give fixed rate tenants not only a fixed rate interest in the excess lands but also an interest at the same rate as the lands originally constituting the tenancy; and the learned District Judge has adopted this rule because he thinks that in view of S. 115, Bengal Tenancy Act, the tenants will in future be deprived of their fixed rate status merely by the entries regarding the rents as they stand in the record of rights at present. This shows a not uncommon misunderstanding of S. 115 which, when it provides that the presumption under S. 50 shall not apply to a tenancy after the particulars mentioned in S. 102, Cl. (b), have been recorded, does not mean that if the entry in the record of rights regarding the tenants sharahmuaiyan status is challenged, they will not be at liberty to support that entry by falling back upon S. 50. This was clearly explained in 27 C W N 936.[2] The entries as they stand, showing the bulk of the land as sharahmuaiyan, and the excess as otherwise, will therefore not defeat themselves. The record of rights will carry a statutory presumption of correctness, and, if it be assailed, the tenants could always fall back on S. 50 in support of the entries in that record. The learned District Judge also thought that the Court must consider the rent of an individual holding or tenure as one indivisible whole, and he observed that it was

> clearly on this principle, that it has been held that in a case where the rent of the holding was paid partly in cash and partly as produce rent in (sic) S. 50 (1), Tenancy Act, would not apply, even though the cash rent also had remained unchanged for more than 20 years and no presumption under S. 50 (2), Ben. Ten. Act, could be raised in that case.

It is not quite clear which case the learned District Judge had in mind but if, as has been suggested at the bar, that case was 51 I C 302,[3] it is to be observed that what was held there was that the pre-

1. Rajendra Nath Roy v. Nandlal Guha, A I R 1915 Cal 106=26 I C 977=18 C W N 1206=19 C L J 595.
2. Dwarka Nath v. Rash Behari, A I R 1923 Cal 365=76 I C 401=27 C W N 936.
3. Lal Muhammad Khan v. Krishna Dayal Gir, A I R 1919 Pat 307=51 I C 302.

sumption under S. 50 (2) could not prevail in a case where it was admitted that the area of the holding included a portion which had been commuted to nakdi at some time previous to the last 20 years but since the Permanent Settlement, and the tenant could not identify the plots for which the sharahmuaiyan status was claimed on the basis of payment of a fixed rate of rent for the entire holding for 20 years. This will afford no ground for the view that a tenant may not have a fixed rate tenancy combined with an area the rent of which may be enhanced from time to time in accordance with the law. Such a view is in fact negatived by 92 I C 107[4] in which questions of fair rent and enhancement of rent arose under S. 105, Tenancy Act and it was found that there was an old tenancy with a definite rent which had been held for more than 20 years at a uniform rent and additional rent was added for an additional area and in recent times the rent of the old tenancy was paid along with the additional rent for the added area. The learned Judges of the Calcutta High Court held that the addition of new area and rent made no difference in the position as regards the old area and the old rent, but that the presumption under S. 50 (2), could not apply to the new land.

As regards the status of such tenants it would undoubtedly be unjust to the tenants to leave out the fixed rate or the sharahmuaiyan element from the description. The tenancies are predominantly of that character and the addition of small areas which the tenants are not entitled to hold at fixed rates does not affect that status. The grievance of the landlords in the present cases really was that sharahmuaiyan (or istimrari mukarrari) status was given to the tenants in respect of the old areas, and as regards this the lower Courts have concurrently found that the grievance is not made out. S. 104-H, Tenancy Act, is a special provision of the law entitling the civil Court to interfere with the fair rents that the Revenue Authorities are to settle under Ss. 104 to 104-J. It empowers any person aggrieved by an entry of a rent settled in Settlement Rent Roll etc., to institute a suit in the civil Court within six months from the final publication of the Record of Rights etc., on any of the grounds stated in subs. 3 and on no others. The ground taken in the present cases was ground (e) viz., that the tenant belongs to a class different from that to which he is shown in the Record of Rights as belonging. This ground has failed. The Record of Rights does not really show the tenants as holding at fixed rates in respect of the excess areas, nor is that the grievance of the plaintiffs. It need hardly be pointed out that it was also not the grievance of the plaintiffs that the rents settled by the Settlement Authorities in respect of the excess areas were more than proportionate to the areas. Their grievance lay in the circumstance that the tenants were shown as tenants at fixed rates at all and that the rents for the old areas were accordingly treated as fixed rents. This grievance failing, authority and principle alike required that the suits should have been dismissed.

The learned District Judge considered that the words of Cl. 4, S. 104-H, empowered him, on the finding that the entries of rent settled were "incorrect" to settle fair rents. But Cl. (4) will only apply to suits that have been properly brought under the section. When in the suits now in question, the plaintiffs failed to make out the ground taken, viz., ground (e) in Cl. (3) one would have thought that that would be the end of the matter. Even apart from the erroneous construction that the learned District Judge has put upon Cl. (4), S. 104-H, it is clear that the plaintiffs having come to Court for a present or future increase of the rent, it was not open to the Court, on the plaintiffs' failure to make out their case for an increase, to reduce the rents settled by the Settlement Authorities for the excess areas and reduce them on the finding (which as I have shown) that they were "incorrect." In my opinion, the trial Court took a just view of this matter. The tenants are primarily istimrarimukarrari or sharahmuaiyan tenants but they are not entitled (nor do they claim to be entitled) to hold the excess areas on the same terms as their old holdings. The entries of status in the Record of Rights are substantially correct and the suits should all have been dismissed. The appeals must therefore be allowed, and the suits of the plaintiffs dismissed with costs in all the Courts, except in S. A. No. 867 in which the respondents did not appear in the lower appellate Court

4. Hem Chandra Sen v. Girish Chandra Saha, A I R 1926 Cal 710=92 I C 107.

and will therefore get their costs in this Court and the trial Court only.

S.C./D.S. *Appeal allowed.*

A. I. R. 1937 Patna 131

MOHAMAD NOOR, J.

Ishar Singh and *others*—Petitioners.

v.

Shama Dusadh and *others*—Opposite Parties.

Criminal Misc. Cases Nos. 19 and 20 of 1936, Decided on 2nd July 1936.

(a) Criminal Trial — Transfer — Evidence under S. 255-A, Criminal P. C. irregularly recorded by Court—Transfer application by accused — Prior conviction trifling—Irregularly recorded evidence held should be expunged—Transfer held not necessary.

While the accused was under trial, the Court recorded evidence under S. 255-A, Criminal P. C., with irregularity. This created apprehensions in the mind of accused and he applied under S. 526, Criminal P. C., for transfer of his case to another Magistrate :

Held : even if the case was transferred to another Magistrate, it was too much to expect that the Magistrate to whom the case would be sent would not know that evidence of previous conviction was recorded. Transfer, therefore, would be of no benefit to the accused. The previous conviction being of a very trifling nature, the evidence of it was not likely to influence the judgment of the Magistrate. The best course was to expunge the evidence irregularly recorded and not to transfer case. [P 132 C 2 ; P 133 C 1]

(b) Criminal Trial—Defence witness—Accused filing list of witnesses late—Court not giving facility of calling certain witness in anxiety of finishing case—Accused applying for transfer — Court should not act in a manner as to raise fear of bias in mind of accused—He should be a little more indulgent.

The Magistrate, in the anxiety of finishing the case should not act in such a manner which may raise a fear in the mind of any accused that he had already made up his mind. He should be a little more indulgent. [P 133 C 1]

An accused filed the list of witnesses late. In the anxiety of finishing the case the Magistrate did not give him facility of calling a certain witness. The accused filed an application for transfer :

Held : Court should give a facility to the accused of calling his witness. [P 133 C 1]

(c) Criminal Trial — Adjournment costs—Power to order accused to pay costs to complainant should not be exercised so as to prevent accused from properly defending himself.

Though criminal Courts are empowered to order an accused, if he asks for adjournment to pay costs to the complainant, this power should not be exercised in such a manner as to place obstacles in the way of the accused properly defending himself. [P 133 C 2]

(d) Criminal Trial — Transfer — Accused called upon to submit list of witnesses before cross-examination of all prosecution witnesses—Irregularity held not sufficient for transfer.

An accused was called upon to submit the list of his witnesses before the cross-examination of all the prosecution witnesses. Accused filed a petition for transfer :

Held : that this irregularity was not a sufficient ground to transfer the case. [P 133 C 2]

(e) Criminal Trial—Transfer—Stay of proceedings—Magistrate, being informed that High Court admitted transfer applications did not stay proceedings on ground that affidavit did not show such order—When High Court admits transfer application, stay order is invariably made—If not expressly made, it is to be presumed.

When High Court admits an application for transfer, invariably there is an order for stay of proceedings. Even if the order is not expressly made it is implied, because it will be meaningless to issue a rule and send for the record and then allow the proceedings in the lower Court to continue. [P 134 C 1]

During a trial Magistrate was informed that High Court had admitted an application for transfer. But he did not stay the proceedings on the ground that the affidavit did not show that any stay order was passed :

Held : that the case should be stayed in the lower Court. [P 134 C 1]

Baldeva Sahay — for Petitioners.

B. P. Sinha — for Opposite Parties.

Order. — On the complaint of one Muhammad Naseer the petitioners Ishar Singh and two others are being tried in two cases before the Sub-Deputy Magistrate of Nawadah, one under S. 379, I. P. C., and the other under S. 325, I. P. C. Originally there was one case, but the learned Magistrate separated the trial of the two offences. The prosecution evidence in both the cases was closed and some defence witnesses were examined. Thereafter certain incidents happened on which the petitioners have applied to this Court for the transfer of the cases to some other Court. In order to appreciate the grounds on which the transfer is sought, it is necessary to state some facts of the cases separately. Criminal Misc. Case No. 20 of 1936 arises out of the case under S. 379 and Criminal Misc. Case No. 19 arises out of the case under S. 325, I. P. C.

Criminal Misc. Case No. 20 of 1936

In this case seven prosecution witnesses were examined on 14th March 1936, and they were cross-examined and discharged on 26th March 1936. The learned Magistrate fixed 14th April 1936 for examination of the defence witnesses. It appears that the accused made delay in filing the list of defence witnesses which they did on 8th April 1936. One of the witnesses namely Janki Rasik, was to be summoned from Ajodhya and a dasti summons was issued against him, that is to say summons was made over to the accused to serve it upon the witness.

On the 14th April the accused were examined under S. 342, Criminal P. C., and three defence witnesses were examined and discharged. The accused wanted adjournment on the ground that Janki Rasik was not present. The Magistrate allowed Rs. 10 costs to the complainant and then again issued dasti summons against the witness at the risk of the accused and fixed the 20th April for his examination. On the 20th the witness again did not appear, and it is noted in the order sheet that accused did not wish to examine any more witnesses. Thereafter the 25th April was fixed for argument. On that date the Court Sub-Inspector applied that a charge under S. 75, I. P. C., be framed against one of the accused, Isri Singh. This was done and explained to the accused who did not admit the alleged previous conviction. The 22nd April was fixed for examination of witnesses to prove the alleged conviction. On that day the learned Magistrate examined one witness to prove the previous conviction and thereafter the accused filed an application for adjournment in order to enable them to move this Court for transfer of the case. This was refused, but later on, on a second application presented on the 24th April 1936, the learned Magistrate granted the adjournment and the application for transfer was filed in this Court.

It is contended on behalf of the petitioners that the procedure adopted by the learned Magistrate has created a reasonable apprehension in their minds that they would not get justice from the learned Magistrate. I do not however think so. In fact Mr. Baldeva Sahay, when he obtained this rule from me indicated that, if the petitioners be given an opportunity to examine Janki Rasik and the irregularity about the recording of the evidence of the previous conviction at that stage be rectified, he would not strongly press for the transfer of the case. That some irregularity was committed in this case has been conceded by the learned Government Pleader who could not do otherwise. The most important irregularity is that the learned Magistrate examined a witness to prove the alleged previous conviction of Isri Singh before his conviction. The learned Magistrate in his order of adjournment has asked this Court to give a clear finding whether the procedure adopted by him was wrong. He has also referred to the inconvenience which will be caused in case the provision of S. 255-A of the Code be strictly complied with. I entirely agree with him that the procedure prescribed in the section is inconvenient, though not impossible to follow. I see no advantage of it in cases tried by a Magistrate under the procedure laid down for the trial of warrant cases. What however the section says is clear. It means that the Magistrate should first write out a judgment of conviction without passing sentence. Then, if the accused had denied previous conviction, he should proceed to take evidence to prove it.

This is the procedure in case an accused is tried by the Court of Session either with the aid of assessors or by jury. Prior to the amendment of 1923 this procedure was not prescribed for Magisterial trials, but the procedure has been deliberately laid down and has to be followed, though I agree with the learned Magistrate, as I have said, in holding that no advantage is to be gained by this procedure. There is good reason for keeping back the evidence of the previous conviction from the jury or assessors who are not trained Judges and are likely to be prejudiced if the evidence of previous conviction be given before the actual guilt of the accused has been established. But this danger does not exist in trials by Magistrates alone. It must however be borne in mind that the Courts are not legislators; they have to carry out loyally the direction of the legislature. They can only interpret it. We can only express our opinions about the reasonableness of a particular provision of law and point out the difficulty in administering it. But as long as the law remains as it is, it is the duty of the Court to obey it explicitly. In this particular case, however, I am sure the learned Magistrate has not committed this irregularity intentionally. Perhaps his attention was not drawn to the wording of the section, otherwise he would not have examined the witness at this stage.

Now the mischief has been done, the question arises, what should now be done? The learned Government Pleader has suggested that I should order the evidence to be expunged and to direct that the witness should be examined again after the conviction of the accused if conviction there be at all. This will be worse than useless. The evidence cannot be obliterated from the mind of the learned Magistrate.

Even if I transfer the case to another Magistrate, it is too much to expect that the Magistrate to whom the case will be sent will not know that evidence of previous conviction was recorded. Transfer therefore will be of no benefit to the accused. On the other hand I am absolutely certain that the learned Magistrate has not been and could not have been in any way prejudiced by the evidence of the previous conviction recorded, particularly when the alleged previous sentence was a fine of Rs. 10 under S. 380, I. P. C. said to have been passed 13 years ago in 1923. If the accused Ishri Singh is the man who is referred to in the extract produced in this case the offence committed by him must have been of a very trifling nature or perhaps of a technical nature. Such an old conviction and the trifling fine cannot reasonably be used even for the purpose of S. 75, I. P. C. Much less is it likely to influence the mind of the learned Magistrate in order to convict the accused in the present case. However, the evidence has been irregularly recorded, and I think the best course will be to order it to be expunged and that the charge under S. 75, I. P. C., be cancelled altogether, as it is of no practical value.

The next ground on which the learned advocate for the petitioners asks me to transfer the case is that the learned Magistrate did not give him facility of calling his defence witnesses and ordered the accused to pay costs to the complainant. Here again I am sure the course which the learned Magistrate adopted was not due to any bias in his mind and the accused themselves are to a large extent responsible for the situation which has arisen. They filed the list of witnesses late and the learned Magistrate was anxious to finish the case. I however, think that he ought to have been a little more indulgent. It is always desirable that in his anxiety to dispose of a case the Magistrate should not act in a manner which may raise a fear in the mind of the accused that he has already made up his mind. It is true that the petitioners delayed in filing their list of defence witnesses, but the list was accepted which included the name of Janki Rasik, and it is clear that the learned Magistrate did not consider that the witness was being summoned in order to cause delay in the trial of the case. He ought therefore to have seen that the witness attended the Court. He ordered him to be summoned but gave dasti summons to the accused. I am not sure whether the accused willingly accepted it or whether he had no option in the matter. Ordinarily it is the duty of the Court to summon defence witnesses unless it finds that the accused is summoning them for the purpose of vexation or delay.

I do not find anything in the order of the Magistrate to suggest that the accused wanted Janki Rasik for causing delay. When the witness did not appear on 14th April the learned Magistrate again directed a summons to be issued dasti at the risk of the accused and ordered Rs. 10 to be paid to the complainant. It would have been much better if the learned Magistrate had secured the attendance of Janki Rasik without saddling the accused with costs. I do not think the accused were very much responsible for his non-appearance. No doubt the criminal Courts are empowered to order an accused, if he asks for adjournment, to pay costs to the complainant, but this power should not be exercised in such a manner as to place obstacle in the way of the accused properly defending himself. However, this was the exercise of judicial discretion of the learned Magistrate and does not show any bias. I am satisfied that he will try the case without the least prejudice in his mind.

Now when the case was taken up on 20th April 1936, the witness Janki Rasik was not present, but the accused expressed a desire that they did not want to examine any more witness. I am not quite sure whether the accused in fact did not want to examine the witness. The summons was issued dasti and at the risk of the accused. It would have been futile on their part to ask for further time. I think facilities should be given to the accused to examine him.

Criminal Misc. Case No. 19 of 1936

This is a case connected with the case under S. 379, I. P. C., and an application for its transfer was filed because of the orders passed in that case. There has been no irregularity in it except perhaps the fact that the accused were called upon to submit their list of defence witnesses before the cross-examination of all the prosecution witnesses was finished. Strictly speaking the accused cannot be called upon to enter into his defence until all the prosecution witnesses have been

exhausted, and till then under the law the Magistrate cannot ask the accused to file the list of his defence witnesses. Much grievance cannot however be made of it. I however understood from Mr. Baldeva Sahay, when he obtained the rule from me, that his clients wanted to examine Janki Rasik in this case also. I think this should be allowed. But before I pass orders I have to make one or two observations. The learned Magistrate has invited this Court to express its opinion whether an application for adjournment under S. 526 is entertainable after the defence witnesses have been examined but before the close of the argument. I do not think I am called upon to decide this point in this case as it does not arise; any expression of my opinion will be purely *obiter dictum*. It may however be said with some justification that if the defence argument has not concluded, the defence case has not been closed. I am not prepared to say that there cannot be a case in which the accused cannot justly say that the Court became prejudiced during the hearing of the argument.

There is one matter more, and it is this. I find from the order-sheet of the learned Magistrate, dated 21st May 1936, that he was informed that this Court had admitted the application for transfer but did not stay the case as the affidavit did not show that any stay order was passed. Now, when this Court admits an application for transfer invariably there is an order of stay of proceedings. Even if the order is not expressly made it is implied, because it will be meaningless to issue a rule and send for the record and then allow the proceedings in the lower Court to continue. The result is that the applications for transfer are rejected. The charge under S. 75, I. P. C., and the evidence recorded in support of it will be expunged from the record. The trial of the two cases shall proceed from the stage to which they have reached. The accused, if they ask for a process to compel the attendance of Janki Rasik, either in one case or in both the cases, such process will be issued by the Court and steps will be taken to compel his attendance if the accused so desires. And, after the hearing of the defence witnesses and the arguments of parties, the learned Magistrate will dispose of the case according to law.

M.D./R.K. *Applications rejected.*

A. I. R. 1937 Patna 134

MOHAMAD NOOR AND MADAN, JJ.

(*Firm*) *Baijnath Rameshwar Lal*—Appellant.

v.

Atal Prasad Kumar and *others* —Respondents.

Appeal No. 297 of 1935, Decided on 9th October 1936, from original order of Dist. Judge, Bhagalpur, D/- 1st July 1935.

(a) Provincial Insolvency Act (1920), S. 6—Act of insolvency—Inadequacy or otherwise of consideration is no element.

The question of inadequacy or otherwise of the consideration is not an element of the transfer which constitutes an act of insolvency; it can only properly arise after and if order of adjudication is made and proceedings for annulling the transfer are taken at the instance of the receiver or the creditors. [P 135 C 1; P 136 C 1]

(b) Provincial Insolvency Act (1920), Ss. 6 and 54—"Intent to defeat or delay creditors" or "give preference to a creditor" can only be determined from surrounding circumstances.

"Intent to defeat or delay the creditors" or having a view to "give preference to a creditor" are mental acts and can only be determined if one looks into the surrounding circumstances. If a man who is in serious pecuniary difficulties, his debts surpassing his assets, transfers a considerable portion of his properties or transfers properties in favour of some of his creditors having made no provision for the payment of debts due to others, a Court may come to the conclusion that the transfers were made with intent to defeat or delay the creditors or with a view to give preference to a particular creditor. [P 136 C 1]

S. N. Bose, *K. P. Sukul*, *A. N. Biswas* and *N. G. Bandopadhya*—for Appellant.

Manohar Lal and *N. K. Prasad II* —for Respondents.

Mohamad Noor, J.—This is an appeal against an order of the District Judge of Bhagalpur dismissing an insolvency petition of the appellant, one of the creditors of the respondents who are ten in number and are members of the same family. The learned District Judge has refused to pass the order of adjudication. The ground on which the petition was pressed before the learned District Judge was that the respondents have made some transfer of their properties for inadequate consideration with a view to defeat or delay the creditors. The respondents objected to their being adjudged insolvents, denied the allegation of the petitioner and contended that they were not members of a joint family but were separate. The learned District Judge examined the transactions relied on by the petitioner, and has held

that they were bona fide transfers for sufficient consideration. The petitioner has preferred this appeal. In my opinion the proceeding in the lower Court was not conducted according to the provisions of law which govern this case. Neither of the parties, nor unfortunately the learned District Judge, realised the correct position. S. 7, Provincial Insolvency Act, authorizes either the debtor or any of his creditors under some restrictions to apply for an order of adjudication. S. 9 places restrictions upon the creditor when he applies for such an order. They are three:

(1) That the debt due to the creditor or to the creditors, if there are more than one, should be not less than Rs. 500; (2) that the debt be a liquidated sum payable either immediately or at some certain future time; and (3) that the act of insolvency on which the petition is grounded was comitted within three months of the presentation of the petition.

Acts of insolvency are described in S. 6 of the Act. Cls. (b) and (c) of that section, which are relevant for the purposes of the present appeal, are these :

(b) If in British India or elsewhere, he (the debtor) makes any transfer of his property, or any part thereof with intent to defeat or delay his creditors; (c) if in Brisish India or elsewhere he (the debtor) makes any transfer of his property, or any part thereof, which would, under this or any other enactment for the time being in force, be void as a fraudulent preference if he were adjudged an insolvent.

It will be noticed that these two subsections refer to any transfer. The question of inadequacy or otherwise of the consideration is not an element of the transfer which constitutes an act of insolvency. It seems that perhaps the parties and the learned District Judge had in their minds S. 53, Insolvency Act, which makes certain transfers made within two years of the presentation of the petition for adjudication voidable as against the receiver and liable to be annulled by the Court. In that case inadequacy of consideration or the bona fide nature of the transaction are matters which have to be gone into; but for the purpose of adjudication whether the case comes under Cl. (b) or Cl. (c) it is not necessary that the transfers should be for inadequate consideration. If a man who is heavily in debt begins to dispose of his properties with intent to defeat or delay his creditors, or being unable to pay his debts, transfers them to one or more of his creditors with a view to give him or them fraudulent preference, he commits acts of insolvency, though he may have transferred the properties for a very adequate consideration or for consideration much higher than the value of the properties. In order to find out what preference is liable to be held fraudulent if the debtor is adjudged insolvent, one has to examine the provisions of S. 54, Provincial Insolvency Act, which runs thus :

Every transfer of property..... in favour of any creditor, with a view of giving that creditor a preference over the other creditors, shall, if such person is adjudged insolvent on a petition presented within three months after the date thereof, be deemed fraudulent and void as against the receiver, and shall be annulled by the Court.

This provision is subject to the right of some third party who in good faith and for valuable consideration has acquired a title in the property so transferred from the creditor to whom the transfer was made. Therefore in order to make Cl. (b), S. 6, applicable it has only to be shown that the debtor transferred his properties with intent to defeat or delay his creditors and in order to make Cl. (c) applicable it has to be shown (1) that there was a transfer of property in favour of a creditor or creditors ; (2) that the debtor was unable to pay his debts when he made the transfer ; (3) that the transfer was with a view to give a creditor or creditors preference ; and (4) that the transfer was within three months of the date of the presentation of the petition. In this case two or perhaps three transfers were in favour of the creditors and all of them were within three months of the date of the presentation of the petition. They are these (1) : sale deed in favour of Ambica Prasad Chaudhary dated 21st December 1932 ; (2) sale deed dated 20th January 1933 in favour of Shibnath Marwari ; and (3) perpetual lease dated 21st February 1933 in favour of Chhabu Mandar. We are told that there were certain usufructuary mortgages in favour of other creditors executed within three months of the presentation of the petition ; but they do not seem to have been examined by the learned District Judge because the petitioners, under a wrong impression that inadequacy of consideration is an essential factor to be gone into in order to determine whether a transfer comes within the mischief of S. 54, did not press them for his consideration.

Now if these transactions are admitted, and three of them, which I have enumerated above, were admittedly in favour of the creditor, the only questions which

arose for the consideration of the learned District Judge were : (1) whether at the time of these transactions the opposite party respondents were or were not in a position to pay their debts ; and (2) whether these transfers were with a view to give preference to those creditors. Now "intent to defeat or delay the creditors" or having a "view to give preference to a creditor" are, as has been pointed out by the learned advocate appearing on behalf of the respondents, mental acts and can only be determined if one looks into the surrounding circumstances. If a man who is in serious pecuniary difficulties, his debts surpassing his assets, transfers a considerable portion of his properties or transfers properties in favour of some of the creditors having made no provision for the payment of debts due to others, perhaps a Court may come to the conclusion that the transfers were made with intent to defeat or delay the creditors or with a view to give preference to a particular creditor.

Unfortunately, as I have said, this case was not approached with due regard to the law on the subject and the most important facts necessary for its determination were left out of consideration altogether, namely, the financial condition of the debtors and their ability or otherwise to pay their debts when the transfers complained of were made. The other consideration, namely, the transfers being for inadequate consideration, as I have already pointed out, can properly arise after and if the order of adjudication is made and proceedings for annulling the transfer are taken at the instance of the receiver or the creditors. As important facts necessary for deciding whether an order of adjudication should or should not be made have not been determined by the Court below, the only course left open to us is to remand the case for a rehearing. The points to be decided will be : (1) whether or not at the time of the transfers the respondents were able to pay their debts, (2) whether they were transfers with intent to defeat or delay the creditors, and (3) whether the transfers made in favour of the creditors within three months of the date of the presentation of the petition were with a view to give them preference. After determining these points the learned District Judge will dispose of the case according to law. The parties will be at liberty to adduce additional evidence bearing on the points indicated above.

The findings of the learned District Judge about the bona fide nature of the transfers and the adequacy of their consideration are set aside. These matters will be gone into if and when proceedings are taken after an order of adjudication. One thing more, and it is this. The petitioner alleged that the opposite parties were members of a joint Hindu family. It was stated by the respondents that they were separate. The debts are said to be joint. The question of their being joint or separate is not therefore of any material importance ; but as difficulties may arise in future, a clear finding in this respect should be arrived at before the passing of an order of adjudication, if such order be passed. The case is remanded for rehearing on the aforesaid lines. As the situation has arisen on account of the fault of the parties themselves, I would direct that they bear their own costs in this Court.

Madan, J.—I agree.

V.B.B./D.S. *Case remanded.*

A. I. R. 1937 Patna 135

MOHAMAD NOOR AND MADAN, JJ.

Mt. Champa Debi—Appellant.

v.

Ram Chandra Marwari and *others* —Respondents.

Appeal No. 132 of 1936, Decided on 13th October 1936, from appellate order of Dist. Judge, Manbhum Singhbhum, D/- 8th May 1936.

(a) Civil P. C. (1908), O. 21, R. 99 — Objection to delivery of possession—Order of executing Court is not appealable— If lower appellate Court entertains appeal High Court can interfere under appellate or revisional jurisdiction.

The legislature has specifically provided that in cases where delivery of possession is obstructed on behalf of a third party, any order passed by the executing Court shall be final subject to the result of the suit provided for. [P 137 C 1]

Therefore, if a lower appellate Court entertains an appeal on such order, it acts without jurisdiction and High Court has power to interfere either under appellate or revisional jurisdiction. [P 137 C 1]

(b) Second appeal— Lower appellate Court entertaining appeal against unappealable order—Second appeal lies (*Obiter*).

Obiter.—If a lower appellate Court entertains an appeal against orders on which no appeal lies, there is second appeal to the High Court. [P 137 C 1]

Bhuneshwar Sinha—for Appellant.

S. N. Dutt and *J. M. Ghose* — for Respondents.

Mohamad Noor, J. — The respondents in this case purchased a house in execution of a mortgage decree. When they took out delivery of possession there was obstruction on behalf of the appellant Mt. Champa Debi on the ground that a portion of the property of which delivery of possession was sought was not included in the mortgage and belonged to her. The objection of the appellant prevailed before the executing Court. The respondents appealed to the District Judge of Manbhum who set aside the order of the first Court and ordered delivery of possession to issue. The objector has preferred this appeal and the only ground urged is that no appeal lay to the learned District Judge.

It has been conceded on behalf of the respondents that no appeal lay to the District Judge. But he contends that no appeal against the order of the District Judge lies to this Court. It is not necessary to decide this question though there are decisions to the effect that if a lower appellate Court entertains an appeal in cases in which no appeal lies there is a second appeal to this Court. The learned advocate for the respondents however contended that those are the cases in which the lower appellate Court entertains appeals against decrees, but that does not apply to cases of appeals against orders. I do not see any distinction between the two. Be that as it may, the order of the learned District Judge entertaining the appeal was without jurisdiction. This is a clear case for revision. We have power to interfere either under our appellate jurisdiction or under our revisional jurisdiction. The learned advocate for the respondents contended that we should not exercise our revisional jurisdiction inasmuch as the order of the learned District Judge is correct. In our opinion we should not enter into the merits of the case in which questions of facts are involved. The legislature has specifically provided that in cases where delivery of possession is obstructed on behalf of a third party, any order passed by the executing Court shall be final subject to the result of the suit provided for. In the circumstances I would set aside the order of the learned District Judge and restore that of the learned Subordinate Judge. As the appellant did not raise this question in the lower appellate Court, she is not entitled to any costs.

Madan, J.—I agree.

S.C./D.S. *Order set aside.*

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* A. I. R. 1937 Patna 137

SPECIAL BENCH

COURTNEY-TERRELL, C. J., MOHAMAD NOOR AND JAMES, JJ.

In the matter of *D., a Mukhtear of Gaya.*

Civil Ref. No. 1 of 1936, Decided on 3rd December 1936.

*** Legal Practitioners' Act (1879), S. 13—Misconduct—Mukhtear accepting mukhtearnamah for withdrawing clients' money without making inquiries as to its genuineness—Conduct amounts to negligence.**

A Mukhtear when accepting mukhtearnamah for withdrawing clients' money is bound to make proper inquiries as to whether the mukhtearnamah is genuine even though prima facie there are no facts to arouse his suspicion. So if he does not take this precaution, which the Court has laid down in the public interest, his conduct amounts to negligence. [P 138 C 2]

B. N. Rai and *Sarjoo Prasad*—for Mukhtear.

Govt. Advocate—for the Crown.

Courtney-Terrell, C. J. — In this case we have to deal with the conduct of a Mukhtear, *D.* practising at Gaya. There was a Chamar family whose holdings had been sold under a decree of the Court. After satisfying the decree-holder's claim there remained a sum of Rs. 2,000 odd which was in the normal course of affairs to be paid over to the judgment-debtors. Throughout the litigation the Chamar's family acted through its karta, one Bhitan, and had been represented by a pleader who has since retired from the profession. The Mukhtear *D.* was acquainted with the pleader and in fact resided in the same house with him at all times material to this inquiry and seems to have had ample opportunity for acquainting himself with the circumstances of the family and the circumstances of the litigation which had given rise to the sale. On 18th January 1935, the karta of the family, Bhitan, accompanied by two other members of the family, named respectively Chowthi and Pachan, went to the pleader and offered to him a mukhtearnamah for the purpose of withdrawing the money which was the surplus proceeds that

remained in Court. The mukhtearnamah which was given to the mukhtear was signed by Bhitan and it was also signed by Ramautar and Tulshi by the pen of Tulshi and it bore the thumb impressions of Chowthi and Pachan who had accompanied Bhitan, the karta, to the mukhtear: it also bore the thumb impression of the sixth member of the family whose name is Munshi. As a matter of fact it has since transpired that the thumb impression of Munshi and the signatures of Ramautar and Tulshi by the pen of Tulshi were in fact false. The mukhtear accepted this vakalatnamah. The falseness of one of the thumb impressions and the signatures of the three men who did not accompany Bhitan has since become manifest. The money has in fact not been withdrawn because, by reason of circumstances which are not really necessary to detail the mukhtear was soon made aware of the defect in the mukhtearnamah. The substance of the complaint against the mukhtear is the acceptance of this mukhtearnamah without due inquiry. No damage has in fact been done to anybody because the defect in the mukhtearnamah has since been discovered.

Now the rules of the High Court are very strict and they are the more strict in the case of mukhtearnamahs and vakalatnamahs for the purpose of withdrawing money. As has often been laid down by this Court the responsibility for the genuineness of the authorization of mukhtears or vakils as the case may be are of a wholesome character and for the protection of the public. There conceivably may be a certain temptation present to the mind of a mukhtear, not to be too particular in the case of a mukhtearnamah for the withdrawal of money because if he makes himself unpleasant to his clients by an acute inquiry his clients may possibly dispense with his services and engage somebody else and in any case the mukhtear runs the risk that he may not actually withdraw the money and may lose the standard remuneration for his services. It is by reason of this possibility—this possible temptation—that the rules are made particularly strict. It is perfectly clear that in this case, as has been pointed out by the learned advocate on his behalf, that the mukhtear had no fact before him and no circumstances which would normally have aroused any suspicion. He was acting undoubtedly on the instructions of the karta; he was supported by two members of the family and the earlier litigation had been carried out on behalf of the family through the karta. But the fact that there was nothing to arouse his suspicion does not absolve him from the duty in cases of this kind to make a thorough inquiry and that notwithstanding any possible disadvantage to himself. It is perfectly clear that the mukhtear has done nothing in respect of which this Court should make any reflection upon his character. His conduct has been honest throughout, but he certainly has neglected the precaution which the Court has laid down in the public interest. In the circumstances we see no reason to do more than to warn the mukhtear and the profession generally of the acute importance of making inquiries to see that their mukhtearnamahs are in order even in circumstances where prima facie there are no facts to arouse their suspicion. We do not see fit to make any further order in the matter.

Mohamad Noor, J.—I agree.

James, J.—I agree.

S.C./D.S. *Order accordingly.*

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* A. I. R. 1937 Patna 138

SPECIAL BENCH

COURTNEY-TERRELL, C. J., MOHAMAD NOOR AND JAMES, JJ.

In re *R., a Mukhtear of Chapra.*

Civil Ref. No. 2 of 1936, Decided on 3rd December 1936.

*** Legal Practitioners' Act (1879), S. 13—Identification — Mukhtear practising professional identification — Court's duty in receiving documents signed by professional identifiers—Such identification should not be accepted—Such mukhtear should be removed from roll of mukhtears.**

The Courts and all officers who have to receive documents on which signatures are identified should remember that they are not bound to accept the identification merely because the nature of the identifier's profession entitles him to perform identifications. It is very easy for any officer in that position to become acquainted with the fact that such and such mukhtear, whose name he frequently sees on papers of identification, has really no other business, and in those circumstances the presumption is that he is merely a professional identifier whose identification should not be accepted. [P 139 C 2]

A mukhtear who practises professional business of identification should be removed from the roll of mukhtears. [P 139 C 2]

Jaleshwar Prasad and *Phulan Prasad Varma* — for Mukhtear.

Govt. Advocate — for the Crown.

Courtney-Terrell, C. J. — We have before us the case of one *R.*, a mukhtear practising at Chapra and aged about 70 years. The evidence very clearly discloses the fact that although he is certainly qualified to practise as mukhtear, his practice in fact consists of identification. He does not take his seat in the mukhtearkhana of the Court; he sits under a *bar* tree and does nothing else. The case which has led to the discovery of his real occupation was one in which he purported to identify the signature of one Ramnandan on three documents. One Basdeo Singh was placed on trial in the criminal Court for complicity in the false identification of Ramnandan Singh and *R.* Mukhtear, gave evidence in the course of that trial as to the particular incident in question. He explained it thus : He said that the accused man Basdeo Singh had come to him and asked him to identify the signature of Ramnandan. That as Ramnandan was a well known person he thereupon signed the identification of what purported to be Ramnandan's signature on the documents presented to him. He stated that the accused person Basdeo Singh had informed him that Ramnandan was on his way to him (the mukhtear) and that he would come before him for the actual process of identification and while waiting for the appearance of Ramnandan he, the mukhtear, turned to other work, and while his attention was distracted from the matter Basdeo Singh took up the papers which he had already signed purporting to identify Ramnandan and disappeared, that is to say, the mukhtear threw all the blame on the individual Basdeo Singh who was being tried. The criminal Court acquitted Basdeo Singh of complicity in this false identification. The mukhtear was cross-examined in the course of his evidence and a number of cases were put to him in which he had purported to make identifications and in which it was very clear that the identification was falsely made. Indeed in one particular case, the case of the individual whom he had purported to identify on a former occasion and who was shown to him in Court, he had to admit that he could not say whether that was the individual he had identified.

There is no doubt that in course of time there has come into existence a class of mukhtears usually aged men who have no real practice as mukhtears but who earn a precarious living by making identifications which they are prepared to perform at a fee of a few annas as in the case of this particular man, and it is not expedient in the public interest that that profession of professional indentifiers should be allowed to continue. It is of no avail to plead any excuse that the mukhtear is an aged person who could not otherwise maintain life, for that very excuse might be made for any aged person accused of some thoroughly wrongful act. The Courts and all officers who have to receive documents on which signatures are identified should remember that they are not bound to accept the identification merely because the nature of the identifier's profession entitles him to perform identifications. It is very easy for any officer in that position to become acquainted with the fact that such and such mukhtear whose name he frequently sees on papers of identification has really no other business, and in those circumstances the presumption is that he is merely a professional identifier whose identification should not be accepted. If the Courts and the officers engaged therein are careful to bear this principle in mind this undesirable type of practitioner will very soon disappear. There is no possible excuse for the individual whose case we are considering and his name must be removed from the roll of mukhtears.

Mohamad Noor, J.—I agree.

James, J.—I agree.

K.B./A.L. *Order accordingly.*

A. I. R. 1937 Patna 139

AGARWALA, J.

Singheshwar Prasad and *another*—Petitioners.

v.

Sakhichand and *others* — Opposite Parties.

Criminal Revn. No. 7 of 1936, Decided on 19th October 1936, from decision of Dist. Judge, Bhagalpur, D/- 22nd August 1936.

Criminal P. C. (1898), S. 476—Discretion—Suit dismissed on finding that receipts filed by plaintiff were forged — Appeal against decree by plaintiff—Application by defendants for prosecution of plaintiff for forgery —Appeal by defendants against order dismissing their application—Appellate Court

sending back record for re-consideration on ground that appeal against decree was already pending—Order held proper as discretion lay with original Court.

The plaintiff's suit was dimissed by the Court on finding that the receipts filed by him were forged. Plaintiff filed an appeal against this decree. Defendants in the meanwhile filed an application to the original Court for prosecution of plaintiff. The application was dimissed and an appeal was filed against the order. The appellate Court dismissed the defendants' appeal and sent back the record to original Court for re-consideration on ground that an appeal was already pending against the decree of the original Court. On revision :

Held : that the order of the appellate Court was proper as the discretion of staying criminal proceedings, during civil proceedings, in which same facts were at issue, lay with the original Court. [P 140 C 1, 2]

B. C. De, *K. N. Lal* and *R. J. Bahadur* —for Petitioners.

P. C. Manuk and *G. P. Das*—for Opposite Parties.

Order.—The facts out of which this application has arisen were as follows : The petitioners were plaintiffs in title Suit No. 29 of 1932 in the Court of the Subordinate Judge of Bhagalpur. In the course of the hearing of that suit they produced certain rent receipts for the purpose of proving their case. The Subordinate Judge found the rent receipts to be forged and dismissed the plaintiffs' suit. Against the decision of the Subordinate Judge an Appeal No. 46 of 1936, is pending in this Court. The defendants in the suit applied to the Subordinate Judge for prosecution of the petitioners in respect of the forged documents. In view of the fact that an appeal was pending in this Court from the decision in the suit, the Subordinate Judge considered that the time was inappropriate for initiating a prosecution. He, therefore, rejected the application, at the same time giving the applicants leave to renew their prayer for prosecution after the disposal of the appeal in this Court. Against that order the defendants in the suit preferred an appeal to the District Judge who might himself, if he had thought fit, have made a complaint against the plaintiffs in the suit. The learned District Judge, however, has not made a complaint, but has ordered the case to go back to the Subordinate Judge for re-consideration.

It is against this order of the District Judge that the present application has been made. The rule that has been issued raises the difficult question of the expediency of staying criminal prosecution pending disposal of civil litigation in which the same question or questions of fact are in issue. On the one hand is the danger that evidence at present available may not be obtainable by the time the first appeal is disposed of. On the other hand, if the prosecution is launched at once, the plaintiffs may find that the criminal Court finds them guilty of forgery, while this Court in first appeal may conceivably find that the documents are not forged. In these circumstances what has to be considered is what step is best calculated to serve the ends of justice without prejudicing either party. For this reason I do not propose to interfere with the order of the District Judge, but to point out how the matter may be considered in the manner best calculated to assist the cause of justice. When the record goes back to the Subordinate Judge he will have to consider whether it is in the interests of justice that a prosecution should be lodged. That is a matter which neither he nor the District Judge has yet decided. If the Subordinate Judge does decide to make a complaint, the Magistrate to whom the complaint is sent or to whom the case may be transferred, will have to exercise the discretion vested in him by sub-s. 3 of S. 476, that is to say, he will have to decide whether it is expedient that the prosecution should be stayed pending the disposal of the first appeal in this Court. In case the Subordinate Judge does make a complaint it will be as well for the Magistrate dealing with it to bear in mind that S. 476 (3) confers upon him the power to adjourn the case at any stage. In the event of the prosecution being launched, therefore, the Magistrate will have to consider whether it should be adjourned till the disposal of the appeal and will also have to decide at what stage it should be adjourned, that is to say, whether it will be expedient to adjourn it before taking the evidence or after. I do not propose to interfere with the discretion of the Magistrate at this stage. The rule is discharged. It is desirable that the hearing of the First Appeal No. 46 should be expedited in case the Subordinate Judge decides to make a complaint.

K.B./A.L. *Rule discharged.*

A. I. R. 1937 Patna 141

COURTNEY-TERRELL, C. J. AND DHAVLE, J.

Nokhelal Jha and *others*—Plaintiffs—Appellants.

v.

Srimati Rajeshwari Kumari and *others* Defendants—Respondents.

Appeal No. 410 of 1933, Decided on 5th August 1936, from appellate decree of Addl. Sub-Judge, Monghyr, D/- 12th August 1932.

(a) Court-fees Act (1870), S. 7, Cl. (iv) (c) and Cl. (v) (a)—Suit for possession upon declaration or determination that certain alienations are not binding—Proper Court-fee is under S. 7, Cl. (iv) (c).

In a suit for possession of property upon a declaration or determination that the title of the plaintiff to the suit is not affected by certain alienation made by the de facto guardian of a Hindu minor, the court-fee to be paid is under S. 7, Cl. (iv) (c) and not under S. 7, Cl. (v) (a) because no relief can be obtained until the alienation is set aside: *A I R 1922 All 358, Disting.*; *A I R 1922 Pat 615, Rel. on*; *A I R 1926 Mad 457, Ref.* [P 142 C 1]

(b) Hindu Law—Alienations by de facto guardian for legal necessity are binding on minors—There is no difference between Dayabhaga and Mitakshara Schools.

Under the Hindu law de facto guardian of a minor can validly sell the property of the minor to a third person for legal necessity. But under the general law a de facto guardian, being a person who assumes guardianship without any authority, has no legal power to sell the minor's property, though he may take upon himself important responsibilities in relation to it. However under Hindu law the right of a bona fide incumbrancer who has taken from a de facto manager a charge on lands created honestly for the purpose of saving the estate or for the benefit of the estate, is not (provided the circumstances would support the charge had it emanated from a de facto and de jure manager) affected by the want of union of the de facto with the de jure title. No doubt, under Dayabhaga School, a member of a joint Dayabhaga family has a defined share in the property jointly possessed by the family; while the Mitakshara co-parcener has only an undivided interest in the property which is jointly owned; but Dayabhaga families require managers no less than Mitakshara families and alienations made stand on the same footing as those of Mitakshara School: *8 M I A 393 (P C)*; *26 Cal 820*; *14 Beng L R 21* and *9 C W N 839*, *Rel. on.* [P 142 C 2; P 143 C 1]

S. M. Mullick, *S. N. Bose* and *D. C. Varma* — for Appellants.

A. B. Mukherji and *N. K. Prasad II*— for Respondents.

Dhavle, J.—In this appeal we have first to deal with the question of the court-fee on the plaint and the memorandum of appeal in the lower appellate Court. The suit was for recovery of possession of certain shares in two tauzis "on determination of the plaintiffs' title," and the cause of action was stated in para. 17 of the plaint to have arisen on 19th July 1921, "when the kabala was executed by defendants sixth party in favour of defendant third party" as well as when defendant fourth party purchased the share at auction sale, and on 27th June 1928, when defendants sixth party executed the kabala in favour of the plaintiffs, besides Asarh 30, 1335, when the first and second party defendants did not let the plaintiffs take possession of the shares in dispute. Para. 6 of the plaint states that the kabala of 1921 covered the entire properties, and we have it from para. 7 that in that kabala defendant 12, the eldest of the three sons of Singhesar, figured as the guardian of his two younger brothers, the defendants sixth party. In para. 9 of the plaint it is stated that in a certain suit relating to the share of Jamuna, brother of Singhesar, it was held that the transfer of the property of the minors was not legal "so long as it was not done through a natural or certificated guardian." On the plaint itself, therefore, it is clear that the suit of the plaintiffs-appellants was framed as a suit for recovery of possession upon a declaration or "determination" that their title was not affected by the kabala of 1921.

This was the view taken by the Taxing Officer of this Court; but his jurisdiction being confined to the question of court-fees on the memorandum of the appeal to this Court, the question of the proper court-fees in the lower Courts has come before us. It has been contended on behalf of the appellants that they could claim possession without any declaration as regards the kabala of 1921, and the decision of Piggott, J. in 44 All 629[1] is cited in support of the contention. In so far as the learned Judge held that in a suit, where a member of a joint Hindu family seeks to avoid the effect of a private sale of ancestral property executed by other members of the family the plaintiff is not bound to ask for the cancellation of the sale deed, the decision is distinguishable; for in the present case we are dealing with an alienation by a

1. Rup Narain v. Bishwa Nath Singh, A I R 1922 All 358=68 I C 265=44 All 629=20 A L J 587.

de facto guardian of Hindu minors which under the Hindu law cannot be treated as void *per se*: 49 Mad 768.[2] Piggott, J., moreover, found that the plaint before him had been so worded that it fell within the purview of S. 7 (iv) (c) of the Court-fees Act and held that the plaintiff would have to stamp the plaint accordingly unless permitted by the Court at the hearing of the appeal by the defendant to amend the plaint. The law which is well settled in this Court may be stated in the words of the late Chief Justice who delivered the decision of the Full Bench (Coutts, J. dissenting) in 2 Pat 125[3]:

> Further, where the plaintiff claims relief to which he is not entitled until some decree or alienation of property which stands in his way has been avoided or until his legal character or title, which has been called in question, has been declared by a decree of the Court, it has generally been held that such a suit comes under Cl. (iv) (c) of the section even though the declaration which it is necessary for him to obtain before further relief can be granted has not been in terms asked for in the plaint.

The plaintiffs in the present case were obviously advised that they were not entitled to relief until the alienation of 1921, which stood in their way was avoided, and they ought, therefore, to have paid court-fees not under Cl. (v) (a) but under Cl. (iv) (c), S. 7 of the Act. The deficit has already been calculated, and Mr. Mullick for the appellants who undertook to file the deficit in a week if we decided against him on this point will now carry out his undertaking. The plaintiffs who are the appellants before us failed in both the lower Courts. Their title was based on a kabala of June 1928, from the two younger sons of Singhesar, one of the five sons of Jaimangal Singh. The title of the contesting defendants rests ultimately on a sale deed executed in favour of Etwari Mian, defendant third party, on 23rd July 1919 (and not on 19th July 1921, as wrongly stated in the plaint) by the adult members of the family of Jaimangal including Jogesh, the eldest son of Singhesar, who acted for himself and as guardian of his two minor brothers (the plaintiffs' vendors in 1928). The question was whether the title of these younger brothers had passed under the sale deed of July 1919. The plaintiffs' case was that Jaimangal was governed by the Dayabhaga School of law; the contesting defendants on the contrary said that he was subject to the Mitakshara. The trial Court held that it was the Dayabhaga that applied to Jaimangal and his family and there has been no further dispute on this point. The lower Courts have held that the title of the two younger sons of Singhesar was validly conveyed by the kabala of July 1919, though they were minors at the time, for in their view, Jogesh was the de facto guardian of his infant brothers and the sale was for necessities of the joint family binding on them. Mr. Mullick who appears for the appellants has argued that the lower Court has erroneously proceeded as if the sale of July 1919, was a sale by the manager of a joint Mitakshara family. He has also contended that the position is not improved by calling Jogesh, the de facto guardian of his younger brothers in 1919. This latter contention was examined in such cases as 49 Mad 768[2] already referred to and 57 Bom 40[4] where it was held that under the Hindu law a de facto guardian of a minor can validly sell the property of the minor to a third person for legal necessity. Under the general law of course a de facto guardian, being a person who assumes guardianship without any authority, has no legal power to sell the minor's property, though he may take upon himself important responsibilities in relation to it. But under the Hindu law, as Knight Bruce, L. J. said in 6 M I A 393[5]:

> The right of a bona fide incumbrancer who has taken from a de facto manager a charge on lands created honestly, for the purpose of saving the estate or for the benefit of the estate, is not (provided the circumstances would support the charge had it emanated from a de facto and de jure manager) affected by the want of union of the de facto with de jure title.

In 26 Cal 820[6] which, incidentally, was a Dayabhaga case, it was held that there was no distinction between mortgages and sales in respect of the powers of de facto managers under the Hindu law. Mr. Mullick's first contention that

2. Vemulapallai Seetharamanna v. Maganti Appiah, A I R 1926 Mad 457=92 I C 827=50 M L J 689=49 Mad 768.
3. Ram Sumran Prasad v. Govind Das, A I R 1922 Pat 615=68 I C 700=3 P L T 704=2 Pat 125 (F B).
4. Tulsidas v. Raisingji, A I R 1933 Bom 15=141 I C 17=57 Bom 40=34 Bom L R 1483 (F B).
5. Hunoomanpersaud Panday v. Babooee Munraj Koonweree, (1854) 6 M I A 393=18 W R 81 (*n*)=2 Suther 29=1 Sar 552 (P C).
6. Mohanund Mondul v. Nafur Mondul, (1899) 26 Cal 820=3 C W N 770.

the power of the manager in a Dayabhaga family to deal with the shares of minors in proper cases differs from that of the manager of a Mitakshara family is also not well founded. It is true that a member of a joint Dayabhaga family has a defined share in the property jointly possessed by the family, while the Mitakshara co-parcener has only an undivided interest in the property which is jointly owned. But Dayabhaga families require managers no less than Mitakshara families. In 14 Beng L R 21,[7] their Lordships dealt with a Dayabhaga family

> as continuing to be a joint family, so that the son, who was acting as a manager for it, and was indicated by the deceased as the person who should manage, had the authority which is given by the Hindu law to sell or mortgage the property in order to pay off debts binding on the family.

The point was expressly considered with reference to the Dayabhaga law in 9 C W N 839,[8] where Ghose and Holmwood, JJ. came to the conclusion that :

> There is really no difference between the Mitakshara School of law and the Bengal School of law so far as this particular matter is concerned, viz., the liability of a joint family when the debt is contracted by the managing members thereof for joint family purposes.

This decision was referred to, in a very recent case to which our attention has been drawn by the learned advocate for the respondents. 60 Cal 1197[9] which incidentally shows one usual difference between the Dayabhaga and the Mitakshara in the governance of joint families, the plurality of managing members—it being held that on a mortgage by two managing members of a joint family, for a debt due by the famliy, all the members of such a family were liable. That Jogesh was the de facto guardian of his younger brothers and did not merely act *ad hoc* on the occasion of the sale deed of July 1919 is abundantly established by the numerous transactions, both before and after the sale deed in question, in which he participated both on his own account and as guardian of the plaintiffs' vendors, and by the absence of any evidence that the natural guardian, the mother, ever acted for the minors. Mr. Mullick has referred to two or three transactions which related to the needs not of the joint family as a whole but of one individual member of the joint family, Bhagwat (one of Jaimangal's sons); but out of the total of Rs. 12,000 raised by the sale deed of 1919 it is only a very small portion that relates to Bhagwat. On one sudharana Rs. 325 was raised partly for household expenses and partly for the education of Bhagwat's sister's son. Another mortgage partly covered a previous chithi for Rs. 550 for meeting the expenses of Bhagwat's mother and yet another mortgage for Rs. 150 was executed for the sradh expenses of Bhagwat's mother. Even in Dayabhaga joint families, however, there must be certain amount of give and take in the matter of the normal expenses of living, unless accounts are kept crediting each member with the income of his defined share and debiting him with expenditure actually incurred on his account.

How far this last was done in the family we are dealing with does not appear; the sixteenth document put in evidence, apart from the sale deed in question, would suggest that the adult members were dealing with the family properties much in the same way as a Mitakshara family. Bhagwat's share was, moreover, greater than that of the appellant's vendors, and it is not definitely shown how many months there were to feed against his individual accounts. The sale cannot further be set aside in part, and must be regarded as a whole in the light of the fact that the bulk of the consideration was for the needs of the whole family. Mr Mullick has also urged that the appellants' suit should have been decreed on the ground of res judicata. The point arises in this way : After a sale deed of July 1919, Etwari was involved in a dispute with one Sant Lal, who had purchased the one-fifth share of Jamuna (or rather his widow's) in an execution sale. He put in a claim under O. 21, R. 58, Civil P. C.; but this was rejected. He thereupon brought a regular suit against Sant Lal and all his vendors, viz., the adult members of the family left by Jaimangal Singh, and also Jogesh's two younger brothers. Against Sant Lal he claimed a prior lien ; and failing this he claimed in the alternative a money decree against his vendors and the two younger brothers of Jogesh for the amount of the lien, which he put at one-fifth of Rupees 12,000, on the strength of the ekrarnama containing an indemnity to him "if put to

7. Gopalnarain Mozoomdar v. Muddomutty Guptee, (1875) 14 Beng L R 21.
8. Dwarka Nath Chowdhury v. Bungshi Chandra Saha, (1905) 9 C W N 839.
9. Sukhadakanta Bhattacharjya v. Jogineekanta Bhattacharjya, A I R 1934 Cal 73=149 I C 878=60 Cal 1197=37 C W N 1087.

any loss by his purchase." Jogesh's younger brothers were represented by their guardian ad litem in the suit, and it was contended for them that Etwari's sale deed did not affect their interest. The trial Court addressing itself to the question whether Etwari's kabala was invalid and inoperative and collusive, found in favour of the plaintiff, but added :

Plaintiff's kabala and the prior mortgage bonds were executed on behalf of the minors by their uncle and brother although their mother was and is still alive. In a Bengal family co-parceners stand in the position of tenants-in-common and there is no family representation through an uncle or brother. No transfer is valid as against the minors' share unless effected by a natural or certificated guardian. The transfers did not bind the minors' share. The suit will stand dismissed as against the minors.

The suit was ultimately decreed on contest against Sant Lal alone (in part) and was dismissed "as against the minors and the rest of defendant 2." It is clear, therefore, that the actual decision was that the plaintiff was not entitled to any part of the relief which he had claimed in the alternative against defendants second party (including Jogesh's brothers) because he was entitled to relief as against Sant Lal. The finding that the share of the minors had not passed to Etwari was only an incidental finding and the Court did not even touch the question of the ekrarnama on which Etwari had founded the alternative liability of defendants second party. Sant Lal appealed to the District Judge as the suit had been decreed against him ; Etwari could not and did not appeal as it was only the alternative liability of defendants second party that had been negatived by the trial Court. The question of this alternative liability was, however, considered by the Additional District Judge who heard the appeal. He pointed out that the effect of the ekrarnama had not been considered by the trial Court, and said :

It cannot be considered here, simply because the suit has been completely dismissed as against the defendants second party and no cross-appeal has been lodged in respect of that finding. In any case a contribution suit is a condition precedent towards determination of any such claim since otherwise it would be impossible to determine its amount.

We are not now concerned with the correctness or otherwise of the learned Judge's observations. What is clear is that in his view the liability of defendants second party, which was only a relief asked for by the plaintiff, in the alternative, did not arise for decision in the suit as framed. The learned Judge as a matter of fact allowed the appeal and dismissed the entire suit. The finding of the trial Court that the share of the minors had not passed, which had at the most a distant bearing on the alternative liability of defendants second party (though the Court did not consider the ekrarnama at all), had no bearing on the liability of Sant Lal, and even this liability, such as it was, found by the trial Court, was negatived by the Court of first appeal. There was a second appeal preferred to the High Court, which proved unsuccessful. The judgment of Kulwant Sahay, J. (with whom Macpherson, J. agreed) does not deal with the alternative liability of the defendants second party at all. The learned Munsif in the present suit held that the finding that the share of the minors had not passed could not operate as res judicata because there was no question in that suit of the validity of the kabala so far as these shares were concerned. The lower appellate Court gave an additional reason for the same view, viz., that the decree of the High Court destroyed the effect as res judicata of the finding regarding whether the shares of the minors had passed under the kabala. In my opinion both these views are substantially right. The matter was not directly and substantially in issue in the former suit and the Court of first appeal had found that the question of the alternative relief did not arise at all, a view that was not disturbed in the second appeal. I would, therefore, dismiss the appeal with costs.

Courtney-Terrell, C. J.—I agree.

B.D./D.S. *Appeal dismissed.*

A. I. R. 1937 Patna 144

JAMES AND VARMA, JJ.

Khaja Abdul Ghani and *others* — Petitioners.

v.

Emperor—Opposite Party.

Criminal Revn. No. 100 of 1936, Decided on 29th April 1936, against order of Sess. Judge, Purnea, D/- 23rd January 1936.

Bengal Ferries Act (1 of 1885), Ss. 16 and 28—Ferry—Person who conveys passengers for hire is liable under Act—Proprietor of village merely leasing out ferry to lessees — Lessees who convey passengers and collect tolls are liable under Act and not proprietor who merely leases out ferry.

The person who is liable under Ss. 16 and 28 of the Act is the person who conveys passengers for hire. [P 145 C 2]

Where a proprietor of a village merely leases out a ferry to lessees but does neither convey passengers nor collect tolls from them he is not liable under the Act. But the lessees or farmers who convey passengers and collect tolls from them are liable under the Act: *A I R 1926 Pat 520, Expl.* [P 145 C 2]

S. N. Sahay and *J. Rahman* — for Petitioners.

Manohar Lal and *R. K. L. Nandkeolyar*—for Opposite Party.

James, J.—The petitioners who are the proprietors of Chota Salkhi village in Purnea District have been each fined fifty rupees under S. 28, Bengal Ferries Act. It appears that up to the beginning of 1928 there were two ferries across the Mahananda river, one of which was the ferry of the petitioners, while the other which belonged to Raja P. C. Lal Chaudhuri had fallen into disuse. Raja P. C. Lal Chaudhuri's ferry was acquired by the District Board; and by a Government notification of 25th June 1928 it was declared to be public ferry. It appears that nothing was done for some years, until at the end of 1932 the District Board caused notice to be issued on the petitioners to discontinue the working of their ferry while the Board at the same time made arrangements for boats to convey passengers across their own ferry. The petitioners on receipt of the notice from the District Board objected that their ferry was not within two miles of the District Board ferry and continued to work their ferry. This led to a prosecution which resulted in conviction under S. 28, Bengal Ferries Act, though the conviction was ultimately set aside in revision on the ground that the limits of the District Board's ferry had not been defined. The matter was then again allowed to rest for two years until in August 1935 the present prosecution was instituted. The petitioners objected that the limits of the District Board had not been notified under the Act and that their own ferry was actually not within two miles of the District Board ferry. On these points the finding of the lower Court is against the contention of the petitioners, the finding being that the petitioners' ferry is within two miles of the District Board ferry, and that it has not been satisfactorily shown that the limits of the ferry at the time of the notification of 1928 were different from the present limits.

The person who is liable under Ss. 16 and 28, Bengal Ferries Act, is the person who conveys passengers for hire. The complainant on behalf of the District Board named as accused in the Magistrate's Court the proprietors of Chota Salkhi village, with the lessees of the ghat and the boatmen. The Magistrate, regarding the lessees and the boatmen as mere underlings or servants of the proprietors, acquitted them, while he convicted the proprietors who had leased out the ferry. There appears to be nothing in the evidence to indicate that any of these zamindars had actually conveyed passengers for hire or collected tolls from passengers so conveyed; and it appears that the persons really liable under the Act are the lessees or farmers of the ghat who collected tolls and conveyed passengers across the river by means of their hired boatmen. Mr. Manohar Lal on behalf of the District Board suggests that the proprietors who leased out the right to ferry should be regarded as the persons who conveyed passengers for hire within the meaning of S. 16, Ferries Act, relying on the decision in 96 I C 522.[1] In that case the persons convicted were the owners of the steamers which were disturbing the complainant's right of ferry; and Adami, J. in coming to this decision followed a decision of the Calcutta High Court wherein it was pointed out that the person who maintained a ferry in contravention of S. 16 was the farmer and not the mere servant of the farmer. There is nothing in either of these decisions which would support the view that the person liable to punishment under S. 28 read with S. 16, Ferries Act, is the person who leased out the ferry right. The person made responsible by the Act is the person who conveys passengers for hire; that is to say, the farmer, the thikadar, ghatwala or whatever he may be called. In the present case the farmers have been acquitted and we have only the lessors before us. They have not conveyed passengers for hire; and so they are not liable to punishment under S. 28, Ferries Act. Their convictions and sentences must be set aside and their fines if paid must be refunded.

1. Jeobaran Singh v. Ramkishun Lal, A I R 1926 Pat 520=96 I C 522=27 Cr L J 970.

It would be well if this dispute could now be settled. The District Board by the manner in which they have dealt with their ferry after acquisition, have given the petitioners cause to suppose that the right under S. 16, Bengal Ferries Act, would not be enforced, possibly because the District Board did not desire to be met with a claim to compensation under S. 17 of the Act. The matter should now be settled and it should be made clear whether the petitioners are to close their ferry and receive compensation under S. 17, Bengal Ferries Act or whether the claim of a monopoly is to be waived and the petitioners are to continue to enjoy their right of ferry.

Varma, J.—I agree.

K.B./A.L. *Revision allowed.*

A. I. R. 1937 Patna 146

AGARWALA, J.

Ram Sabhag Singh—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. No. 540 of 1936, Decided on 20th October 1936, against order of Dist. Magistrate, Patna, D/- 5th September 1936.

(a) Criminal Trial—Evidence—Comparison of disputed signature with another for determining its authenticity—Court should not rely on its own comparison but should obtain opinion of expert.

There is considerable danger of a miscarriage of justice, when criminal Court relies on its own comparison of a disputed signature with another signature for purpose of determining its authenticity. It is usually desirable to obtain opinion of an expert with regard to this, or better still the evidence of persons who can speak to the signature having been written in their presence.

[P 147 C 1]

(b) Sugar Cane Act (1934), S. 7—Rules under—Bihar and Orissa Sugar Cane Rules, Rr. 20 and 21—District Magistrate while considering whether to sanction prosecution suddenly convicting accused—Trial held improper.

The Act appears to contemplate, first, the sanction by the District Magistrate and secondly, a complaint to a Court within the period of limitation prescribed and then the trial of the person complained against, according to the procedure provided by the Code of Criminal Procedure. Where therefore the District Magistrate, while considering whether he should sanction the prosecution of the accused or not, suddenly convicts and sentences him, the trial is not proper.

[P 146 C 2]

Rajkishore Prasad for *Sarjoo Prasad*—for Petitioner.

Order.—The petitioner has been convicted under R. 15 (f), Bihar and Orissa Sugar-cane Rules of 1934, for having omitted to pay sugar-cane supplied to him as a purchasing agent of a sugar-cane mill and has been sentenced to pay a fine of Rs. 500. R. 15 of the Act creates a number of new penal offences in connection with the administration of the Act: but R. 20 debars the institution of a prosecution under the rules except by an order of or under authority from the District Magistrate. Sub-s. 2, R. 20, declares:

> No Court, inferior to that of a Magistrate of the second class, shall try any offence under these rules.

Rule 21 provides a period of limitation for a prosecution under the rules and R. 22 protects persons acting in good faith. The case against the petitioner is based on a receipt (Ex. 10) for Rs. 56-8. The history of the proceedings is as follows: On 30th March 1936, a number of persons presented a petition to the District Magistrate stating that they had supplied sugarcane to this factory which had not been paid for. Notices were issued to the manager and the purchaser apparently under S. 7 (6). On 2nd May 1936, the alleged sellers of the sugar-cane were directed to file receipts which they said had been granted to them for the sugarcane purchased from them. On 8th May fresh notices were issued to the manager and the purchaser apparently because the previous notices had not been served. On 24th July 1936, the purchasing agent appeared and asked for time, which was granted. On 12th August 1936, the purchasing agent filed a petition showing cause. On the next day the District Magistrate passed the order which is the subject matter of the present application convicting the petitioner and sentencing him as already stated. It is, I think, clear that there has been no proper trial of the petitioner. The Act appears to contemplate, first, the sanction by the District Magistrate and secondly, a complaint to a Court within the period of limitation prescribed and then the trial of the person complained against according to the procedure provided by the Code of Criminal Procedure. What appears to have happened in the present proceedings is that while the District Magistrate was considering whether he should sanction the prosecution of the petitioner or not he suddenly convicted and sentenced the

petitioner. So far as the order itself is concerned, it is impossible for a Court of revision to decide on the facts stated in the order whether any offence has been committed or not, for the order merely states that having compared the signature on the receipt, Ex. 10, with the signature of the petitioner on the declaration which he filed under S. 7 of the Act, the District Magistrate was satisfied that they were the signatures of one and the same person. The order does not refer to the evidence in the case other than the receipt.

The order convicting the petitioner is set aside. If the District Magistrate considers that the petitioner should be prosecuted, he will sanction the prosecution and proceed according to law. I may also point out that there is considerable danger of a miscarriage of justice when a criminal Court relies on its own comparison of a disputed signature with another signature for the purpose of determining its authenticity. It is usually desirable to obtain the opinion of an expert with regard to this or, better still, the evidence of persons who can speak to the signature having been written in their presence.

P.R./D.S. *Order set aside.*

A. I. R. 1937 Patna 147

DHAVLE AND VARMA, JJ.

Ratandeo Narayan — Defendant — Appellant.

v.

Jamuna Prasad Tewary, Plaintiff and *others*, Defendants — Respondents.

Appeal No. 1229 of 1933, Decided on 9th November 1936, from appellate decree of Addl. Dist. Judge, Saran, D/- 16th February 1933.

(a) Civil P. C. (1908), S. 99 — Irregularity— Rent suit by landlord — Heirs of deceased tenant already on record as parties but not formally substituted as his heirs—Mere want of formal substitution of heirs of deceased tenant is not a material irregularity—It does not reduce the rent decree to a money decree.

In a suit for arrears and enhancement of rent by a landlord against his recorded tenants, the heirs of a deceased tenants were not formally substituted as his heirs but were on record already as parties to the suit. Though a decree is in a suit for arrears of rent it will not operate as a rent decree, if all the tenants are not impleaded in the suit. Mere want of formal substitution of heirs of a deceased tenant is not a material irregularity and it does not reduce the rent decree to a money decree. [P 148 C 1]

(b) Civil P. C. (1908), S. 99 — Merits not affected — Decree in rent suit by Court having jurisdiction—Property, brought to sale in rent decree, already purchased by plaintiff in money decree—Plaintiff not party to rent suit — Suit by plaintiff for possession on declaring rent decree and sale thereunder fraudulent and therefore void — Fraud not being proved, rent decree cannot be varied or modified in plaintiff's suit, even though there might have been illegal exercise of jurisdiction by Court in rent decree.

A properly constituted rent suit was decreed by the Court having jurisdiction and in execution of that decree property which was purchased by plaintiff in execution of a money decree, was brought to sale. The plaintiff then brought a suit for possession on declaring that the rent decree and sale thereunder were fraudulent and therefore void :

Held : the plaintiff not having proved that the rent decree was obtained by fraud the rent decree having been passed by the Court having jurisdiction could not be varied or modified in his suit for possession, even though the Court passing the rent decree might have acted illegally in the exercise of jurisdiction. [P 148 C 2]

(c) Landlord and Tenant — Gumasta or patwari authorized to collect rent, by taking rent from transferee of tenant, cannot create relationship of landlord and tenant between his master and such transferee.

The gumasta or patwari of a landlord may be authorized to collect rents on his master's behalf, but he has no authority by taking rent from a transferee to create relationship of landlord and tenant between the master and such a transferee : *A I R 1922 Pat 619, Rel. on.* [P 149 C 1]

K. P. Jayaswal and *M. N. Pal* — for Appellant.

B. N. Mitter and *L. K. Chowdhury*— for Respondents.

Dhavle, J.—This is an appeal by defendant 2. The dispute relates to a holding which was purchased by the appellant in execution of a decree obtained in 1928 by the landlord (defendant 1) in a suit for arrears and enhancement of rent against her recorded tenants, the defendants third party. The plaintiff had previously (in October, 1923) purchased the same holding, in execution of a money decree, and obtained possession through a Court dakhaldehani in October, 1924. His case was that the rent decree and sale were "fraudulent, illegal, null and void," and he prayed that the decree and sale be set aside. Both the lower Courts held that the case of fraud failed entirely. They found however that there were various irregularities in connexion with the rent decree impugned, and they came to the conclusion that the decree obtained by defendant 1 was valid and effective against one of the tenants only, named Ramkhela-

wan, and that it could not therefore be a rent decree and could not affect the title of the plaintiff who had purchased in proceedings which did not include Ramkhelawan.

It has been urged for the appellant that the Courts had no jurisdiction to sit in judgment in the way they have done on the Munsif who had passed the decree in the rent suit brought by defendant 1. Nor has Mr. Mitter, who appears for the plaintiff-respondent, gone so far as to contend that such a jurisdiction exists. The position would of course have been different if any fraud had been established. What Mr. Mitter has therefore done is, first to take up one of the irregularities found by the lower Courts and to urge that this irregularity was sufficient to reduce what purports to be a rent decree to a money decree. This irregularity relates to the fact that Jamuna, one of the defendants in the rent suit, had been dead for some time before the process-server reported that he had actually met that defendant. Mr. Mitter argues rightly enough that a decree in a suit for arrears of rent will not operate as a rent decree, if the tenants are not all impleaded in the suit and he contends that in the suit under discussion the same result is brought about by the fact that the heirs of the deceased defendant were not brought on the record. The point was discussed in detail by the trial Court, which came to the conclusion that the heirs of Jamuna were on record as parties both in the rent suit and the execution proceedings. The learned Subordinate Judge therefore held that "the want of formal substitution, if any, may be merely an irregularity but not a material one." He was plainly right and it is equally plain that the decree of 1928 cannot be treated as a money decree on this ground : the point was so clear that it is not so much as suggested in the judgment under appeal.

Mr. Mitter next referred to the circumstances in which the lower Courts have come to the conclusion that the decree was valid and effective against Ramkhelawan only, and urged that on the findings of fact in this connexion the lower Courts should have held that fraud was established in the case. But it is not pretended that those circumstances lead to such an irresistible inference of fraud as to entitle us in second appeal to say that the lower Courts erred in law in declining to infer fraud. And apart from fraud, Mr. Mitter is unable to suggest what authority the lower Courts had to examine the proceedings in the rent suit and determine in effect what decree ought to have been passed by the Munsif on the materials before him in that suit. To the question what decree it was that the Munsif actually passed and executed, the answer is clear—a rent decree. It may be that the materials before him did not altogether warrant that decree; but if so, the remedy of the aggrieved parties to the suit was an appeal. The plaintiff was no party to that suit, and that remedy was not open to him. He could have nullified the decree by establishing fraud but has failed in the attempt to do so. The rent decree is not before us in appeal, and it seems idle to ask us to hold not that the decree is a nullity on account of fraud but that the Munsif ought to have passed a decree against Ramkhelawan only because there appear to have been some irregularities in the proceedings before him. He had a properly constituted rent suit before him and had jurisdiction to deal with that suit. If he acted irregularly in the exercise of that jurisdiction, the decree he passed cannot be now varied or modified on that ground.

Mr. Mitter's next contention was that the plaintiff had paid the landlord the rent for which the suit of 1928 had been brought, and that he had been recognized as a tenant by the landlord. It was therefore, so it is argued, fraud on the landlord's part to sue the old tenants and leave the plaintiff out. Now, the finding of fact of the lower appellate Court in this connexion is that the plaintiff did pay Rs. 63 and Rs. 126 to one Baldeo Lal for the rents of 1931 to 1933, fasli, and that Baldeo granted two receipts for these two payments, the later receipt being in the name of the plaintiff-respondent. The learned Additional District Judge declined to accept the plaintiff's story about a third payment made on 9th March 1928, (the day the suit was at first dismissed). In concurrence with the trial Court he also definitely negatived the plaintiff's case of recognition by the landlord as a purchaser from the old recorded tenants. The learned advocate contended that it was for the landlord to show that Baldeo had no authority to recognise the purchaser ; but this is entirely opposed to the decision

in 3 P L T 653,[1] where it was laid down that although the gumashta or patwari of a landlord may be authorised to collect rents on his behalf, he has no authority by taking rent from a transferee to create the relationship of landlord and tenant between his master and the transferee. The lower appellate Court says that "there is no satisfactory evidence that Baldeo Lal was anything more than a mere rent collector." It is, therefore, impossible to hold that the plaintiff was recognized as a tenant by the landlord, or to entertain Mr. Mitter's argument that there was fraud in the suit of 1928 because the suit was brought against the old tenants omitting the plaintiff.

In the plaint thirteen grounds were given for avoiding the decree as "altogether fraudulent, illegal, null and void, inoperative and ineffectual." The Courts below have found that there was no fraud but some irregularities. These irregularities, as I have pointed out, did not entitle them to do what they have done and hold that the decree actually passed will operate as the decree, that on such materials as are now shown to have been before the Munsif, he ought to have passed. In my opinion the lower Courts were clearly in error in holding that the irregularities established by the plaintiff entitled him to any relief in respect of the decree of 1928, obtained by the landlord against her recorded tenants. I would accordingly allow this appeal and dismiss the suit of the plaintiff with costs in all Courts. The cross-objection is not pressed and is dismissed.

Varma, J.—I agree.

W.D./A.L. *Order accordingly.*

1. Bhonu Lal Chowdhury v. W. A. Vincent, A I R 1922 Pat 619=65 I C 882=3 P L T 653.

* A. I. R. 1937 Patna 149

MOHAMAD NOOR, J.

Jagdam Ram—Appellant.

v.

Asarfi Ram and *others*—Respondents.

Appeal No. 84 of 1934, Decided on 25th November 1936, from appellate decree of Second Sub-Judge, Arrah, D/- 12th September 1933.

*** Abatement—Suit or appeal—Parties permitted by Court to sue or to be sued in representative capacity—Death of some parties during pendency of suit or appeal—Suit or appeal does not abate by failure to bring on record the legal representatives of such persons within time—Court can permit parties to proceed with suit or appeal against remaining parties—Provisions of O. 22, Civil P. C., cannot be made applicable to suits or appeals in representative capacity under S. 92 or O. 1, R. 8 of the Code.**

If the Court has permitted a certain number of persons to institute or defend a suit in a representative capacity on behalf of others and when some of them either by death or otherwise become incapable to conduct the suit, the suit does not abate even if the legal representatives of such persons are not brought on record within limitation. The same rule applies to appeals. It is for the Court to order whether or not the remaining persons should be allowed to conduct the case or whether more persons should be added as parties for this purpose. If others are brought on record it is addition of parties and not substitution on devolution of interest. When therefore some respondents die during the pendency of an appeal on a decision in such a suit, no question of abatement of an appeal arises and the Court can permit the appellant to proceed with the appeal against the remaining respondents. The provisions of O. 22, Civil P. C., which are applicable to suits or appeals by persons in their individual capacity cannot be made applicable to suits or appeals by some persons in representative capacity on behalf of numerous persons under S. 92 or O. 1, R. 8 of the Code : *A I R 1931 Mad 452*; *A I R 1921 P C 123* and *A I R 1931 Bom 388*, *Rel. on*; *A I R 1925 Lah 124* and *A I R 1926 Lah 31*, *Disting.*; *A I R 1935 Pat 430*, *Expl.* [P 150 C 2; P 151 C 1]

A. D. Sinha—for Appellant.

Harians Kumar—for Respondents.

Order.—In this appeal a preliminary objection has been taken by the respondent to the effect that the appeal has abated on account of the death of some of the respondents. The suit out of which the appeal has arisen was instituted by ten persons under O. 1, R. 8, Civil P. C., for a declaration of the right of the public to use a piece of land and a well situated thereon and for ordering the defendant to pull down certain structures erected by him on that land. The trial Court dismissed the suit, but on appeal by the plaintiffs the suit has been decreed by the lower appellate Court. The defendant has preferred this second appeal.

During the pendency of the appeal in this Court two of the plaintiff-respondents, i. e. Nos. 2 and 8, died and no steps were taken to substitute their legal representatives on the record. On 2nd August 1934 the learned Registrar noted that the appeal against respondent 8 had abated. No note has been made about the death of respondent 2. I do not take the note of the learned Registrar as a decision that the appeal against respondent 8 has abated. Such a decision can only be given

by the Court. The case was placed before Varma, J., who without expressly deciding the question of abatement, on the authority of the decision in 54 Mad 527[1] allowed the appellant time to take steps for applying for permission to proceed against the remaining respondents as representing the public under O. 1, R. 8, Civil P. C. Mr. G. P. Das, who appears on behalf of the respondents, however contends that the appeal has abated and no further steps can be taken. He has relied upon a decision of a learned Judge of this Court in A I R 1935 Pat 430[2] in which under similar circumstances he held that the entire appeal had abated. First of all the appeal in that case was dismissed on merits and therefore the observation about its abatement of the appeal was in the nature of obiter dicta. Then it appears that both the parties took it for granted that the appeal had abated against the deceased respondents and the only question raised was whether it had abated as a whole. In my opinion death of one or more of several plaintiffs or defendants suing or being sued in a representative character does not lead to abatement of the suit if his or their legal representatives are not brought on the record. The same principle mutatis mutandis applies to appeals. A case instituted or defended on behalf of the public in which only some out of numerous persons interested in the right are parties, stands on quite a different footing from a suit for individual rights in which all the interested persons are parties. If numerous persons have the same interest in a suit the Court may permit only some of them to sue or be sued and defend in such suit on behalf of or for the benefit of all persons so interested. When the Court permits this the remaining interested persons are not on the record at all.

The nominees of the Court are the only persons who can sue or be sued and if one of them dies, there is no question of substitution of his representatives as the right of the deceased to sue or be sued does not devolve upon his personal representatives and they as such representatives cannot be substituted as parties to the suit. But if all the persons interested are parties but only some of them under O. 1, R. 8 have been permitted to defend the suit, death of some of the defendants will have a different effect, as all the defendants are on the record in their personal capacities. In the former case the position of those who figure as plaintiffs or defendants in the suit is that they claim or defend a right not only on behalf of themselves but on behalf of numerous interested persons. It is the permission of the Court which clothes them with authority to sue or be sued not only on their own behalf but on behalf of those also who are not parties to the suit. As has been pointed out in the Madras case above referred to, anomalies will arise if we hold that when a party suing or being sued in a representative capacity dies it is essential to bring his legal personal representatives on the record as party to the suit. The legal representatives of the deceased party for some reason or other become incapable of acting as representatives of the interested persons who are not on the record. If a Court gives permission to certain persons to prosecute or defend a suit on behalf of the public after notice to the public, they and they alone are authorized to act for the public. The authority is a personal authority *eo nomine* and cannot, in my opinion, be utilised by their personal legal representatives. In my opinion the provisions of O. 22, which relate to the death of plaintiff or defendant, cannot be applied to a case instituted or defended by a few persons on behalf of numerous persons not on record under O. 1, R. 8. In ordinary cases the parties act independent of any permission of any authority ; but in cases like the present one or in a case instituted under S. 92, Civil P. C., the authority of those who conduct or defend a suit is derived from the order of the Court or from the Advocate-General.

If the Court has permitted a certain number of persons to institute or defend a suit on behalf of others, and when some of them for some reason or other either by death or otherwise become incapable to conduct the suit, it is for the Court to order whether or not the remaining persons should be allowed to conduct the case, or whether more persons should be added as parties for this purpose. If others are brought on the record it is addition of parties and not substitution on devolution of interest. I am therefore in agreement

1. Venkatakrishna Reddi v. Srinivasachariar, A I R 1931 Mad 452=130 I C 761=54 Mad 527=61 M L J 135.
2. Pati Mahto v. Mir Ali, A I R 1935 Pat 430=158 I C 983.

with the reasons given by the learned Judge of the Madras High Court in the case above referred to, that in such a case no question of abatement arises and the Court can permit the appellant to proceed with the appeal against the remaining respondents. The learned advocate for the respondents has relied upon two decisions of the Lahore High Court, in A I R 1925 Lah 124[3] and A I R 1926 Lah 31.[4] But the facts of those cases were different. There all the interested persons were parties to the suit, but some of them only were permitted to conduct it. Some of the parties (not those who were permitted to conduct the suit on behalf of all) died and their representatives were not brought on record. The appeals were held to have abated. The suit in those cases was not representative suit. All the interested persons were parties. Only some of them were authorized to conduct the suit. Those cases have been referred to in the Madras case and I agree with the view taken by the learned Judge of that Court.

A suit instituted by some on behalf of numerous interested persons is analogous to a suit under S. 92, Civil P. C. It has been held by the Privy Council in 48 I A 12,[5] at p. 16 that in a suit instituted by two plaintiffs under S. 92, Civil P. C., death of one of them was not fatal to the suit as it was a representative suit. In 133 I C 823[6] the Bombay High Court held that if those who obtained the consent of the Advocate-General to institute a suit under S. 92, Civil P. C., die or collude with the defendant the Court may add other persons as parties under O. 1, R. 10, and for this consent of the Advocate-General is not necessary. I express no opinion on the last point decided in the case as it is not before me. I am relying upon the case for the proposition that in such cases the question of abatement does not arise. I therefore hold that the appeal has not abated. Now an application has been filed by the appellants for permission to proceed with the appeal against the remaining respondents. The original permission granted by the trial Court to institute the suit was to 10 persons. Permission to prosecute the appeal against the remaining persons should not in my opinion be given without notice to the public of the village concerned. I, therefore, direct that a notice of this application, by publication in the village concerned, be given to the inhabitants of the locality. The appeal will come up for hearing after the return of service of the notice.

W.D./A.L. *Order accordingly.*

3. Wali Mohamad v. Mahlu, A I R 1925 Lah 124=86 I C 592=5 Lah 429.
4. Samail v. Haji, A I R 1926 Lah 31=89 I C 378.
5. Anand Rao v. Ram Das, A I R 1921 P C 123 =62 I C 737=48 I A 12=48 Cal 493 (P C).
6. M. I. Kadri v. Khubmia Mohomedmiya, A I R 1931 Bom 388=133 I C 823=33 Bom L R 546.

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* A. I. R. 1937 Patna 151

COURTNEY-TERRELL, C. J. AND JAMES, J.

Thakur Das—Defendant—Appellant.

v.

Ram Gulam Singh, P a intiff and *others*, Defendants—Respondents.

Appeals Nos. 159 of 1934 and 84 of 1935, Decided on 3rd September 1936, from original decree of Sub-Judge, Patna, D/- 19th May 1934.

*** Company—Liquidation—Prior unsecured debt by company—Company about to go into liquidation — Director advancing money on security of mortgage to discharge portion of prior debt—Property of company sold in discharge of prior debt—Director cannot claim priority for his loan and cannot enforce his security against innocent purchaser for value.**

If a director of a company lends money to the company and becomes its creditor, the transaction in such a case is not a contract entered into between two independent persons; it is in the nature of a contract between the trustee and his cestui que trust; the trustee by discharging a small portion of cestui que trust's indebtedness puts himself in the position of a secured creditor as against the unsecured creditor and therefore prevents the company from paying off its creditors equitably. It is not therefore right that the director of an insolvent company about to go into liquidation should be allowed the privileged position of a secured creditor by merely discharging a small portion of the company's indebtedness and as against an innocent purchaser for value of property sold in execution of a debt due to an unsecured creditor, the director should not be allowed to enforce his security : *Gaslight Improvement Co.* v. *Terrell*, *(1871) 10 Eq 168*, *Rel. on.*

[P 154 C 2; P 155 C 1]

Sultan Ahmad, *Rai Guru Saran Prasad* and *Parasnath*—for Appellant.

Baldeva Sahay, *Choudhury Mathura Prasad* and *K. P. Upadhaya*—for Respondents.

Courtney-Terrell, C. J.—These two appeals are by defendant 2 against the preliminary and final decrees, respectively, granted by the Subordinate Judge in a

suit to enforce a simple mortgage. A company named the Vishvakarna Mills Ltd., on 7th March 1925 borrowed from the Government under the Bihar and Orissa State Aid to Industries Act 1923, a sum of Rs. 75,000. Under the contract of loan the Secretary of State for India guaranteed a cash credit overdraft in favour of the borrower at the Imperial Bank of India, Patna Branch, and the borrower was to repay annually Rs. 5,000 in March of each succeeding year. The Company, in consideration of the loan, also executed a deed of mortgage of all its assets in favour of the Government. For some reason the Government neglected to register this mortgage and the Directors of the Company similarly omitted to take any steps in the matter. The instalments for March 1926 and March 1927 were duly paid by the Company, and on 5th March 1928 the third instalment fell due. Before this date, however, Government had become aware of the non-registration of the mortgage, and on 20th January 1928 had caused the Company to execute a promissory note for Rs. 60,000 being the balance of the principal, after deducting the instalments which had been paid up to that time. The Company seems to have been throughout in financial difficulties, and the loan by the Government does not seem to have been a very judicious investment.

In the month of April 1926, the Company borrowed Rs. 10,000 from the Bank of Bihar Ltd. On 26th January 1928 the Bank were demanding repayment of this loan with interest, and on 16th May the Bank brought a money suit in the Patna civil Court for the recovery of this loan. The plaintiff, Ramgulam Singh, was a share holder and a Director of the Company. There were two classes of Directors, 'Honorary' and 'Permanent' and by the Articles of Association the former had merely an advisory function whereas the latter were to conduct the business of the Company. There is no doubt that the plaintiff was a permanent Director although his services, from the point of view of any right to Directors' fees, may have been honorary. The plaintiff was a guarantor of the loan by the Bihar Bank and in the subsequent litigation he was sued in that capacity. The Company fully availed itself of the overdraft guaranteed by the Government and had withdrawn nearly Rs. 60,000. In these circumstances the finances of the Company were in a very parlous condition.

On 4th March 1928 there was a meeting of the Directors of the Company at which five persons are recorded as having been present, one of whom was the Managing Director, Deodhari Singh, one was Saiyid Sultan Husain, a Director, who from his evidence, would appear to have had little comprehension of the business to be transacted. Mithila Saran Singh and Permeshwar Prasad Varma, two other Directors, were present. Babu Ramgulam Singh was also present, but there is recorded this note : "N. B. Babu Ram Gulam Singh is present but takes no active part." Babu Permeshwar Prasad Varma, M.A., B.L., was elected President of the meeting and the Managing Director was authorized to execute an agreement with Babu Ramgulam Singh according to which Ramgulam Singh & Sons were to pay the next instalment of Rs. 5,000 to the Imperial Bank which would fall due on 7th March and further would pay off the loan due to the Bank of Bihar, and that the Company through the Managing Director, would execute a mortgage in his favour of the profits and assets of the Company. It appears that it had earlier been contemplated that Babu Ramgulam Singh would take a lease of the whole of the Company's assets, but this proposal was abandoned in favour of a mortgage. On 9th March there was a further Directors' meeting at which the same persons were present, with the exception of Babu Permeshawar Prasad Varma, and Babu Mithila Saran Singh was appointed to the chair. A memorandum of agreement was read, of which we have not seen a copy, but there is a note that "the second party Babu Ramgulam Singh wants five days time to consult his legal adviser on the point," and 15th March was accordingly appointed for reconsideration, with the further sentence that "it would be executed and registered immediately."

On 26th March there was an emergent general meeting of the Directors, but the only Directors present were Babu Mithila Saran Singh, Babu Ramgulam Singh, and the Managing Director, Babu Deodhari Singh. On this occasion Babu Mithila Saran Singh was unanimously voted to the chair. It was proposed that an extraordinary general meeting should be called to consider :

(a) That the Company's business be settled at the impending session (sic) if any on the terms as may be agreed upon to conduct the business of the company ; (b) that the business of the company be sent to liquidation.

The third resolution is as follows :

That the second mortgage bond be executed in favour of Babu Ramgulam Singh who paid Rs. 5,000 (five thousand) the said (?) instalment of the Imperial Bank on 5th March 1928 to the amount of Rs. 5,000 aforesaid to be paid within a year with interest at 12 annas per cent per month and the interest to be paid every six months, i. e., on the 30th of the month ; six monthly interest will be incorporated with the principal and interest will run on the aggregate at the rate of 12 annas per cent per month.

Accordingly on 20th May 1928 the mortgage bond in question was executed and in it the earlier mortgage bond to the Government of 7th March 1925 was recited, as were the payment of the two instalments of 1926 and 1927 and the fact that the third instalment had become due on 6th March 1928. There was a recital that the Company had no money to pay the third instalment. No mention was made of any other indebtedness of the Company and in particular there was no reference to the loan by the Bihar Bank. The loan by Babu Ramgulam Singh of Rs. 5,000 to pay the said third instalment was recited and there is no doubt that in fact Babu Ramgulam Singh did find the necessary sum of Rs. 5,000 and paid it to the Imperial Bank to discharge the liability of the instalment. The bond also recites the failure of the original proposal for a lease to Babu Ramgulam Singh. Therefore, the Company agreed to repay the loan with interest at the rate of 12 annas per cent per month within a period of one year from 5th March 1928 (when the instalment to the Government was paid). If interest should be in arrears for six months then the amount of arrears was to be incorporated with the principal, that is to say the loan was to be with interest to be compounded at six monthly rests if unpaid. The mortgage was expressly stated to be a second mortgage, the Secretary of State for India in Council being recited as first mortgagee.

Now at the time when this document was executed it must have been perfectly clear to the directors that the original mortgage was defective by reason of non-registration, and moreover the promissory note to the Government in respect of the unpaid debt had been executed so that although it was piously recited that from the point of view of priority of mortgages Babu Ramgulam Singh held only a second mortgage, this on the contention of the plaintiff had very little significance. On the other hand it may perhaps be said with more credit to Babu Ramgulam Singh that at the time he desired to express that the debt to him was to be considered as secondary to the debt to the Government mortgage or no mortgage. On 24th September 1928 the Bihar Bank applied to the Court for a compulsory winding up order and this was made on 21st March 1928. The Government being unable to enforce their mortgage took the course of proceeding under the Public Demands Recovery Act and obtained an order of the Court, and on 21st January 1930 sold up the assets of the Company for Rs. 33,000, defendant 2, Thakur Das, being the purchaser.

On 24th September 1932, Babu Ramgulam Singh brought this suit to enforce his mortgage claiming about Rs. 7,500 and making Thakur Das defendant 2 and the Company defendant 1. In the winding up proceedings an application was made to the High Court to stay the suit as against the Company and this was accordingly done and the suit has proceeded against Thakur Das alone, the Company taking no part. The learned Subordinate Judge dismissed the suit against the Company, but without costs having regard to the order for stay, but he granted a decree against defendant 2 with costs.

The plaintiff took his stand upon the following contentions: It was pointed out on his behalf that the Government had not sued on their mortgage but had proceeded under the Public Demands Recovery Act and accordingly what had been sold was the right, title and interest of the judgment-debtor at the date of the sale. Therefore, it was argued that no question of priority of mortgages arose. It was conceded that had the Government been able to proceed upon its mortgage Babu Ramghulam Singh would have been merely a second mortgagee as contemplated by his mortgage bond, and it was suggested that there was nothing in the bond which put the Government debt before the plaintiff's debt otherwise than as a mere matter of priority of mortgages. It was argued that although, possibly in the winding up proceedings the liquidator, under the provisions of S. 231, Companies Act, and S. 54, Provincial Insolvency Act, (but for the

fact that there was a period of more than three months between the date of the bond and the application for the winding up order) might have had the mortgage bond set aside as fraudulent and void, they had not done so, and in any case it was said that only the liquidator or some creditor could have taken this course.

Now it is certainly true that we are not here concerned with either S. 231, Companies Act, or S. 54, Provincial Insolveney Act. These sections deal with matters of procedure governing the relief to be accorded to a liquidator or to a rival creditor, but in considering the position of defendant 2, the auction-purchaser, we must remember that he stands in the shoes of the judgment-debtor, that is to say the Company, and is entitled to and affected by the same equities and estoppels as those which the company might have laboured under or enjoyed. Therefore the question really resolves itself into whether the plaintiff in any contest with the company would have insisted that his mortgage debt should take precedence of the debt which was due to the Government. In my opinion he certainly could not have done so.

It is true that the sections of the Indian Companies Act and Provincial Insolvency Act furnish the procedure for setting aside a transfer as fraudulent in certain circumstances only, and that the absence of those circumstances will prevent the adoption of the specified procedure, but that does not imply that the transfer was not fraudulent in fact although the judgment of the learned Judge would seem to suggest that this is so. There are several circumstances from which it may be inferred that Babu Ramgulam Singh was not acting in the interests of the company: firstly the position with regard to the Government mortgage must have been well within his knowledge, for it is a specific duty imposed upon Directors to see to any necessary registration of documents to which the company is a party; he must have been aware that the document was not registered. Secondly, that he was uneasy about the position is shown by the note in the minutes of the meeting of the the 4th March to the effect that Babu Ramgulam Singh was present but took no active part: also from the note in the minutes of the 15th March that Babu Ramgulam Singh wanted five days to consult his legal adviser and that the document when completed was to be executed and registered immediately. Thirdly he was well aware that the company was in desperate financial circumstances and that its assets were in jeopardy, and that he knew on the 26th March that a liquidation had actually been decided upon; fourthly, it may be observed that notwithstanding that at the meeting of the 4th March Babu Ramgulam Singh had agreed to pay off the claim to the Bank of Bihar, he had not in fact done so, and fifthly, notwithstanding the entry in the minutes of the 4th March that a mortgage should be executed, it was not in fact executed until very much later, that is to say the 20th May.

Babu Ramgulam Singh therefore either knew that the Government would be unable to sue on their mortgage in which case the provision in his mortgage bond to the effect that his mortgage was to be considered secondary to the Government mortgage was meaningless, or was intended that the Government debt as such should take priority over the debt to him. This is not a case in which a contract is entered into between two independent persons; it is in the nature of a contract between the trustee and his cestui que trust; the trustee by discharging a small portion of the cestui que trust's indebtedness puts himself in the position of a secured creditor as against the unsecured creditor, the Government, and therefore prevents the company from paying off its creditors equitably. It is true that the mortgage to the plaintiff was executed for good consideration and that he supplied Rs. 5,000 for payment of the Government instalment but in taking security from the company which he knew to be in an insolvent condition he acted inconsistently with his duties as a director. The case in (1871) 10 Eq 168[1] is an illustration of the principle involved. It was a suit by the company in liquidation to set aside a security given by the company to the defendant directors as being an undue and fraudulent preference over the general creditors. The directors had borrowed money for the sake of the company and quite properly became creditors of the company. It was clear that the directors knew that the company was in a state of insolvency and could not avoid being wound up, and in those circumstan-

1. The Gaslight Improvement Co. v. Terrell, (1871) 10 Eq 168=39 L J Ch 725=23 L T 386.

ces they took security in the shape of an assignment of the assets. Lord Romilly dealing with the facts said:

The directors of the company think fit to pay themselves. It is to be observed that the directors of every company who are also creditors fill two distinct and antagonistic characters. In the first place, they are trustees for the benefit of the company, and are trustees for the creditors to this extent; that they are bound to apply all the assets for the benefit of the creditors as far as they will extend; they themselves are also creditors, and have an interest to have their own debts paid.

No doubt in this case the defendants had taken an assignment in payment of their debts and not a mortgage, but the difference in this matter between this and the present case is one of degree and not of principle. In my opinion it is of no avail to contend in this case that the Company by merely paying off the plaintiff's mortgage could have freed the assets from the plaintiff's debt. It is not right that the director of an insolvent company about to go into liquidation should be allowed the privileged position of a secured creditor by merely discharging a small portion of the company's indebtedness. As against an innocent purchaser for value of property sold in execution of a debt due to an unsecured creditor, the plaintiff director should not be allowed to enforce his security. I would therefore allow both the appeals and dismiss the plaintiff's suit with costs throughout.

James, J.—I agree.

V.B.B./D.S. *Appeals allowed.*

A. I. R. 1937 Patna 155

JAMES, J.

Gangadeo Singh and *another*—Plaintiffs—Appellants.

v.

Ram Prasad Singh and *others*—Defendants—Respondents.

Appeal No. 367 of 1933, Decided on 3rd February 1936, from Appellate Decree of 1st Sub-Judge, Chapra, D/- 1st December 1932.

Limitation Act (1908), S. 7—Joint Hindu family—Suit by joint brothers one of whom is minor—Mere coming of age of one does not raise presumption of his being manager—No evidence to show major brother as karta—Suit which, but for minority of one brother, would have been barred, is not barred as major brother could not have given valid discharge.

Mere coming of age of one of the brothers in a joint Hindu family does not raise a presumption that he is the manager of the family in the absence of any evidence. [P 156 C 1]

Where, therefore, a suit is brought by two brothers out of whom one had become major, for possession of lands of which wrong entry was made in the record of rights, which suit would have been barred by time, but for the minority of one of them, and there is no evidence to show that the major brother was karta of the family, the suit is not barred as major brother could not have given a valid discharge: *31 All 156* and *A I R 1926 P C 16, Rel. on.* [P 156 C 1]

T. N. Sahay and *Jadubans Sahay*—for Appellants.

B. N. Mitter and *K. N. Moitra*—for Respondents.

Judgment.—The plaintiffs in this litigation are members of a joint family which consisted of three brothers, Sakaldeo Singh, Gangadeo Singh and Deonandan Singh. When the record-of-rights was under preparation the three brothers were minors; but Sakaldeo Singh, on behalf of his brothers, entered into a compromise with the defendants, whereby he abandoned the claim to certain land which had hitherto been in possession of the plaintiffs' family. After Sakaldeo came of age he separated from his brothers. The present suit was instituted by Gangadeo Singh and Deonandan Singh for recovery of possession of this land of which the wrong entry had been made in the record-of-rights. The suit would then have been barred by time if it had not been for the plaintiffs' minority. Sakaldeo had come of age, and had separated from the plaintiffs, so the Munsif held that he would not have been entitled to any relief by the application of the provisions of S. 7, Limitation Act, though, as Sakaldeo claimed no relief in the suit in which he was a defendant, that point did not necessarily arise. Gangadeo was jointly entitled to his share with Deonandan, and the Munsif finding that Gangadeo could not give a discharge or ratification of the agreement of Sakaldeo without the concurrence of Deonandan, held that the provisions of S. 7, Limitation Act, did not bar the suit jointly instituted by Gangadeo and Deonandan, since Deonandan is still a minor. He decreed the suit accordingly in respect of the plaintiffs' shares. On appeal the Subordinate Judge found that Gangadeo Singh as karta of the joint family was entitled when he came of age to give a discharge to the defendants, that is to say, to ratify an arrangement into which Sakaldeo had entered; and he

held that the plaintiffs' claim was barred by limitation and dismissed the whole suit.

Mr. Rai Tribhuwan Nath Sahay, on behalf of the plaintiff-appellants, argues that the mere coming of age of Gangadeo Singh, so long as his brother is a minor, will not render the suit liable to be barred; and he contends that there is no evidence from which the inference can be drawn that Gangadeo Singh is the managing member of the family. Without evidence to show that Gangadeo Singh acted as the manager, it cannot be presumed that he did so, or that he was the manager, and was so authorized to ratify Sakaldeo's arrangement. This was pointed pointed out in 31 All 156,[1] a case which was approved by the Judicial Committee in 48 All 152.[2] It had been held by the Madras High Court in several decisions that time would run from the date on which the eldest member of the joint family attained majority; but the Allahabad High Court in 31 All 156[1] differed from those decisions; and in 48 All 152[2] the Privy Council expressed the view that on this point the decision of the Allahabad High Court had been correct and the decisions of the Madras High Court were wrong. Mr. Tribhuwan Nath Sahay has been able to demonstrate that there is no evidence on the record from which it can be inferred that Gangadeo Singh is the managing member of the family. The only evidence regarding anybody's acting as general agent of the joint family is evidence to the effect that this work had been done by the brother-in-law of the plaintiffs, and there is nothing to indicate that either Sakaldeo or Gangadeo ever at any time exercised the authority of a karta of the joint family. In the absence of such evidence it cannot be presumed that Gangadeo Singh is the manager, as was remarked in 31 All 156;[1] and the decision of the learned Subordinate Judge must accordingly be set aside. The appeal is allowed, the decree of the lower appellate Court is set aside, and the decree of the Munsif is restored. The successful plaintiffs are entitled to their costs throughout.

K.B./A.L. *Appeal allowed.*

1. Ganga Dayal v. Mani Ram, (1909) 31 All 156=1 I C 824=6 A L J 62.
2. Jawahar Singh v. Udai Prakash, A I R 1926 P C 16=93 I C 216=53 I A 36=48 All 152 (P C).

A. I. R. 1937 Patna 156

WORT AND AGARWALA, JJ.

Sm. Nathuni Sahuain and *others* — Defendants—Appellants.

v.

Dharanidhar Jha, Plaintiff and *others*, Defendants—Respondents.

Appeal No. 191 of 1932, Decided on 21st August 1936, from original decree of Sub-Judge, Deoghar, D/- 4th April 1932.

(a) Mortgage—Interest—Consideration for mortgage left with mortgagee for payment of mortgagor's debts—Mortgagee paying debts sometime after execution of mortgage — Mortgagor's liability under mortgages begins from date of payment of debts—They are not liable to pay interest on such payments before they are actually made.

By an arrangement between the parties the consideration for a mortgage was left with the mortgagee for payment of certain debts of the mortgagor. The mortgagee paid the debts sometime after the execution of the mortgage :

Held : that in settling the amount between the mortgagor and the mortgagee, interest should be calculated on the debts paid only from their date of payment by the mortgagee and not before. The mortgagee could not have sued on the mortgage moneys before the date upon which he had made payment to mortgagor's creditors inasmuch as the mortgagors had incurred no liability under the mortgages as the consideration had not been advanced upto the date of payment of debts by the mortgagee. The mortgagors therefore not having incurred any liability to pay interest before such payment of debts by the mortgagee, it could not be calculated before such payment. [P 158 C 1]

(b) Transfer of Property Act (1882), S. 61—Mortgagee of same property prior to Amending Act of 1929—Mortgagee has right of consolidating them in one suit — Consolidated decree on basis of both of them can be passed.

Where before the Amending Act of 1929, same property was mortgaged to the same mortgagee, but in second mortgage the first mortgage was stated to be kept alive and the mortgagee sued to recover the mortgage debt on both the mortgages in one suit having consolidated them:

Held : that the second mortgage in terms being of the same property the mortgagee had a right of consolidation of the two mortgages in one suit and a consolidated decree on them could be passed: *A I R 1927 P C 32, Rel. on*; *16 All 295, Doubted* and *Dissent*. [P 160 C 2]

S. N. Bose and *Amir Ali Khan Warsi* —for Appellants.

G. C. Mukharji—for Respondents.

Wort, J.—This is an appeal by the defendants from the decision of the Subordinate Judge in an action brought on two mortgages. The first was dated 9th

April 1924, for a consideration of Rs. 2,000, and the second 18th September 1926, the consideration being stated as Rs 7,000. In the first mortgage property No. 1 of the Schedule to the plaint was mortgaged. In the second mortgage that same property together with other properties were provided as security for the mortgage moneys.

The defences raised by the defendants in the Court below were first that as regards the mortgage of 9th April 1924, the consideration had been inaccurately stated that whereas it was stated as Rs. 2,000, in fact the amount advanced was Rupees 1,000 only. That point can be disposed of by stating that the learned Judge in the Court below has come to the conclusion that the consideration was stated correctly in the deed and that Rs. 2,000 was in fact paid. There is no appeal as regards that and therefore it can be dismissed from our consideration. As regards the second mortgage of 18th September 1926 for Rs. 7,000, the Judge has come to the conclusion that the money actually advanced was Rs. 6,172-12-0. The arrangement made by the parties was that the consideration should be left with the mortgagee for the payment of certain debts and the decision of the learned Judge was that in pursuance of that agreement the debts were in fact paid to the amount mentioned above. Certain payments alleged to have been made by the mortgagee had been disallowed and there is no cross-appeal with regard to this.

The sums actually advanced by the mortgagee on this mortgage by way of payments to the mortgagors' creditors have been found to be Rs. 1,689 paid on 27th August 1928 and Rs. 2,700 paid on 20th December 1926. It will therefore be seen that as regards the latter sum the mortgagee took about three months to pay the creditor and in the case of Rs. 1,689 a period of two years. As a matter of fact by the time the Rs. 1,689 was paid by the mortgagee the amount had increased, on account of interest, to a sum of Rs. 2,040. But again no point arises with regard to that except an incidental question with which I shall in a moment deal. The learned Judge in the circumstances has made a decree for a sum of Rs. 11,000 odd, principal and interest, and a decree for sale of all the properties, the subject matter of the mortgage.

I should have stated that one of the defences to the action in the Court below was that the mortgage debts had been paid and it is with regard to that defence that a question arises in this Court. With that point I shall at once deal. The case of the defendants was that up to January 1927 various payments made by them on account of both mortgages had been endorsed on the bonds, and as regards those payments the learned Judge in the Court below has given the defendants credit for two sums, Rs. 834 and Rs. 219. The defence was that after January 1927 payments were made but they were entered in *hatchitha* and not endorsed on the mortgage bonds. No particular reason was advanced as an explanation for this although it was suggested in the argument before us that the mortgage bonds were not available. But the fact remains that the alleged payments after January 1927 were not endorsed on the mortgage bonds. The Judge in the Court below has discarded the defendants' story about those payments made after January 1927. (His Lordship after considering the evidence on the point continued.) I am not in the least surprised that the learned Judge entirely discarded the story as to these further payments on account.

Two other substantial questions are raised by Mr. Bose on behalf of the defendant-appellants. One is that in settling the account, interest should not run on the sum of Rs. 1,689 before the date of payment by the mortgagee, that is 27th August 1928 and on Rs. 2,700 before 20th December 1926. There were two arguments addressed to us by the respondents on this point. One was that the question did not strictly arise as a point of law, as it depended upon the facts of the case, and if the mortgagor-defendants desired to have credit in the manner which I have stated, they should have established the facts which would entitle them to that relief. There is nothing in that point. The defendants denied the passing of consideration in their written statement and the Judge has in fact decided that it did pass and also the date of payment by the mortgagee.

The second argument was that the mortgagors should be kept strictly to the contract and that as the contract entitled the mortgagee to have interest from the date of the mortgage, the mortgagors should be liable for interest from

that date. It was put in another form, namely, that as the mortgagee had undertaken to pay the debts of the mortgagors, and as from the dates of the mortgages the mortgagors ceased to have any liability as regards those debts, and if they were to escape paying interest to the mortgagee between the dates of the mortgage bonds and the dates of payments, they would escape entirely the payment of interest. The mortgagee would be unable to recover interest from the mortgagors and thus lose the interest under the mortgage bonds which he would have to pay to the mortgagors' creditors. The fact that the mortgagee had to pay more than he contracted to pay, as interest had run up in the meantime, was a matter entirely within the mortgagee's control.

In my judgment the contention of Mr. Bose must be sustained and for this reason. It is admitted by the respondents that had the mortgagee called upon the mortgagors to pay interest from time to time, he certainly could not have recovered interest on Rs. 1,689 before the date upon which the amount was paid on behalf of the mortgagors, that is to say, 27th August 1928. The mortgagee could not sue on the mortgage moneys before the date upon which he had made payment to the mortgagors' creditors; in other words, the mortgagors had incurred no liability under the mortgages as the consideration had not been advanced. That being so, they would have incurred no liability to pay interest. In my judgment the contention of Mr. Bose on this point must be, as I have stated, sustained, and in making up the account interest is chargeable by the mortgagee on the sum of Rs. 1,689 from 27th August 1928 and on the sum of Rs. 2,700 from 20th December 1926 only.

The last and perhaps the most difficult point is whether the mortgagee is entitled to what Mr. Bose has described as a consolidated decree. The decree made by the learned Judge is for the sum of Rupees 11,876-8-0 on the payment of which the mortgaged property will be released but in the event of failure to pay that sum the mortgaged property will be sold. Mr. Bose contends that that is depriving him of the mortgagors' rights under S. 61, T. P. Act. It is quite clear that under the section, as it now stands after the amendment made by the Act of 1929, Mr. Bose's contention would be correct. But the Act of 1929 clearly states that S. 61 has no retrospective effect and therefore, for the purposes of this case, we have to apply the law as it existed prior to the Act of 1929. The old section was to this effect:

> A mortgagor seeking to redeem any one mortgage shall, in the absence of a contract to the contrary, be entitled to do so without paying any money due under any separate mortgage made by him or by any person through whom he claims other than that comprised in the mortgage which he seeks to redeem.

Mr. Mukharji on behalf of the respondents contends that the meaning of the section properly construed is this: that if a property be mortgaged under a mortgage and then mortgaged again under a second mortgage with other properties, the mortgagee has a right to consolidate the mortgages, and that is only in cases where there are two separate mortgages of two separate properties that the right given by S. 61 exists. Mr. Bose contends that the last sentence in S. 61 is merely descriptive. Another argument which Mr. Bose advances will sufficiently appear from the discussion of the case upon which Mr. Mukharji relies. It is the case in 54 I A 68.[1] The decision of the Madras High Court from which this case is an appeal, is to be found in 44 Mad 301.[2] Free from matters which are not relevant to the present inquiry, the facts of the case shortly stated were these. There were four properties mortgaged under what is described by the Madras High Court as a usufructuary mortgage. A lease of one of the properties mortgaged by that mortgage was granted to the mortgagor and the rent made a charge on that property. Both the equity of redemption and the security were transferred and the persons before the High Court and before the Privy Council were the assignees both of the mortgagor and the mortgagee under those transfers. The questions, so far as we are concerned, which were argued both in the High Court and in the Privy Council, were first whether the mortgage of the four properties was a usufructuary mortgage; secondly whether the lease had created a charge on one of the properties; and thirdly, whether S. 62, T. P. Act, or S. 61 applied to the case. I should have

1. Ramarayanimgar v. Maharaja of Venkatagiri, A I R 1927 P C 32=100 I C 86=54 I A 68=50 Mad 180 (P C).
2. Ramarayanimgar v. Maharaja of Venkatagiri, A I R 1921 Mad 183=61 I C 612=44 Mad 301=40 M L J 236.

stated that the appeal arose out of an action for redemption and the question was whether the mortgagor was entitled to redeem the usufructuary mortgage only on payment of the rent which had become due under the lease and which was said to be charged on one of the properties contained in the first mortgage, or whether he was entitled to redeem without paying that sum. The High Court of Madras decided that S. 62 applied and that the mortgagor was not obliged to pay off the arrears of rent. On appeal to the Judicial Committee of the Privy Council Lord Sinha, in delivering the opinion of their Lordships, stated that the transactions under Ex. A (the mortgage) and Ex. 1 (the lease) were one and the same transaction, that whereas Ex. A was not a plain usufructuary mortgage but was something in the nature of an anomalous mortgage, Ex. 1 created a charge on one of the properties, or in other words, it was a second mortgage on one of the properties. Now the important part of the opinion of the Privy Council for our purpose is found at p. 78 of the Report, and I propose to read it:

> It is contended before this Board on behalf of the defendant-appellant that the two deeds, Exs. A and I, should be read together as they form parts of one transaction, the lease being in the nature of machinery for the purpose of realising the interest due on the mortgage. Further, that S. 62, T. P. Act, has no application to the case as it applies only to a case of an usufructuary mortgage pure and simple, which Ex. A is not as it contains covenants for payment both of principal and interest. The section which the appellant's counsel urges as being applicable to the facts of this case is S. 61, T. P. Act, which enacts by implication that a mortgagor seeking to redeem shall not be entitled to do so without paying any money that may be due under a separate mortgage or charge if the latter relates to the same property. Their Lordships are of opinion that these contentions on behalf of the appellant must prevail.

And then later:

> In their Lordships' opinion S. 62, T. P. Act, applies only to usufructuary mortgages pure and simple and is not in any way inconsistent with the provisions of S. 61.

As I understood the argument it was contended by Mr. Bose that their Lordships did not decide that the last sentence of S. 61 provided that if the property were mortgaged a second time, the mortgagee would have a right of consolidation. But having regard to the words of Lord Sinha which I have read to the effect that S. 61 enacts by implication that a mortgagor seeking to redeem shall not be entitled to do so without paying any money that may be due under a separate mortgage or charge, if the latter relates to the same property, that argument cannot be supported. On a close examination of the decision it is clear in my judgment that their Lordships of the Privy Council definitely and specifically decided that if a property was mortgaged a second time, as they held was the fact in the case before them, then the mortgagee had a right of what is described as consolidation. Now, if that is the correct view to take of this matter and of the decision of their Lordships of the Privy Council, there can be no doubt, and I do not think it is disputed, that the decision of the Subordinate Judge on this point is right. Mr. Bose on behalf of the appellants relies upon the decisions of the High Courts in India. There is a decision of this Court in 3 Pat 829,[3] but I purposely omit referring to it, because the particular clause upon which reliance is placed by the respondents in this case was not referred to by Sir Jwala Prasad in his judgment, nor does it appear to have been mentioned in the course of the argument. But in 16 All 295[4] that clause was specifically dealt with, and Sir John Edge, C. J. and Burkitt, J. came to a conclusion which would appear to be contrary to that at which their Lordships of the Privy Council arrived in the case to which I have referred. Had the decision of the Privy Council not been a clear decision on this point, in all probability we should have followed the decision of our own Court in 3 Pat 829,[3] particularly having regard to the decision of the Allahabad High Court in the case to which I have referred. But in my opinion it is quite impossible to hold that the Privy Council did not decide this point specifically.

Mr. Bose further contends that even assuming that this point was expressly decided by the Privy Council, he does not come within the mischief of the decision because this is not a mortgage of the same property a second time. As I understand the contention it is this: that if the second mortgage is the mortgage of the equity of redemption it is not a mortgage of the same property but it is a mortgage of another property being a mortgage of a

3. Parmeshwar Pandey v. Rajkishore Prasad Narain Singh, A I R 1925 Pat 59=80 I C 34 =5 P L T 646=3 Pat 829.
4. Tajjo Bibi v. Bhagwan Prasad, (1894) 16 All 295=1894 A W N 93.

different interest. That argument it is difficult to follow in the light of the decision of the Privy Council and the Madras case. An argument might well have been advanced in that case that the charge or mortgage created by Ex. 1 was a charge of the lease of the property in contradistinction to a charge of the property itself and, therefore, not the same property. In developing this argument it is contended that the point depends upon the construction of the mortgage deeds and Mr. Bose here suggests that if there is in the second charge or mortgage a reference to the first, and in the second mortgage the sum advanced is increased by a further advance, then it is a mortgage of the same property, whereas if the second mortgage deed makes no reference to the first and, therefore, merely mortgages such right, title and interest as the mortgagor has, it is nothing more than a mortgage of the equity of redemption and, therefore, a mortgage of a different interest. I very much doubt whether that argument finds any support from S. 61 of the Act, and I find it very difficult to believe that the legislature intended to imply any such distinction as suggested by Mr. Bose. But assuming that we accept the argument, in my judgment the proper construction of the second mortgage deed, dated 18th September 1926, meets Mr. Bose's point. This deed first of all refers to a number of mortgages on the property common to both mortgages. There were two prior mortgages and, counting the mortgage of 9th April 1924, three. The deed recites that it was necessary for the mortgagors to take a loan of Rs. 7,000 by mortgaging the property described in the schedule, and the property described in the schedule was not only the three additional properties but the property which was mortgaged under the first mortgage. The deed then proceeds to provide :

> As a security for this amount, principal as well as interest, the properties specified in the schedule below remain hypothecated to you.

And then the last clause provided :

> Be it stated that the third mortgage deed (i. e. the first mortgage of 9th April 1924) executed in your favour on Chaitra 27th 1330 B. S. remains in force as before.

That meets in my judgment the argument of Mr. Bose. These observations merely deal with the position if the distinction which Mr. Bose seeks to draw between the equity of redemption and the property itself can hold good. But in either view of the case in my judgment on a plain construction of S. 61 of the Act, and having regard to the view which their Lordships of the Privy Council take of this matter, I am of the opinion that the learned Judge in the Court below was entitled to pass what has been described here as a consolidated decree on the two mortgages. The appeal succeeds in part but to the extent only of allowing a remission of interest to the mortgagors on that part of the consideration which was represented by the payment by the mortgagee of Rs. 2,700 between the date of the bond, which is 18th September 1926, and the date of payment, which is 20th December 1926, and in respect of Rs. 1,689 between 18th September 1926, the date of the bond, and 27th August 1926, the date of payment. Subject to this remission as regards interest, the appeal is dismissed with costs. The appellants, however, will be entitled to such costs as are proportionate to their success. The period of grace will be extended to six months from the date of this judgment.

Agarwala, J.—I agree.

W.D./A.L. *Order accordingly.*

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AGARWALA, J.

Hemendra Nath Gupta and *others*—Petitioners.

v.

Emperor—Opposite Party.

Criminal Misc. Cases Nos. 50, 51, 53, 54, 56 and 57 of 1936, Decided on 8th October 1936.

(a) Criminal P. C. (1898), S. 197—Scope—Manager under Chota Nagpur Encumbered Estates Act exercising functions referred to in Part 4 is Judge within meaning of S. 19, Penal Code—Manager charged of offence in discharging his duty to pass bills for work done by contractor — Sanction of Local Government is necessary for prosecution.

Section 197, as amended protects the persons referred to in it, not only in respect of offences committed while acting in the particular capacity referred to in the section, but in respect of offences committed while acting, or purporting to act, in the discharge of official duties also. While exercising the functions referred to in Part 4 of the Chota Nagpur Encumbered Estates Act relating to the settlement of debts, the Manager is a Judge within the meaning of S. 19 of the Penal Code. In his capacity as Manager it is his duty to pass bills for work done by the contractor, so that, while passing the bill or bills the Manager is acting in his official capacity and in discharge of

his official duty. So if the offence with which the Manager is charged is committed in the discharge of such official duties, the sanction of the Local Government to the prosecution is necessary: *A I R 1929 Mad 659* and *A I R 1935 Pat 52*: *Rel. on.* [P 162 C 1,2]

(b) Criminal P. C. (1898), S. 190 (1) (b)—Facts of offence not actually written out in charge sheet but contained in document annexed to it held was sufficient compliance with requirements of section.

Where the accused were prosecuted on the charges of cheating, forgery, fabricating false documents and conspiring to commit those offences, and the facts were not actually written out in the charge sheet but they were contained in a document annexed to the charge sheet :

Held : that there was sufficient compliance with the requirement of S. 190 (1)(b) : *A I R 1930 Bom 372* and *A I R 1924 Cal 476, Disting.* [P 163 C 1]

Manohar Lal, K. K. Banerjee, S. C. Mazumdar, A. K. Ghose, S. N. Sahay, A. N. Biswas, Bhabananda Mukherji, S. M. Gupta and *G. C. Das*—for Petitioners.

Govt. Advocate and *Asst. Govt. Advocate*—for the Crown.

Order.—These six petitions are by three persons against whom proceedings are pending in the Court of the Sub-divisional Magistrate of Daltonganj on charges of cheating, forgery, fabricating false documents and conspiring to commit these offences. The petitioner, Hemendra Nath Gupta, is a Court of Wards Manager; Sukhomoy Moitra is a Sub-Overseer in the employ of the Court of Wards, and Raj Dular Singh is a contractor who, it is said, had been employed to do certain work on behalf of two estates, the Chainpur estate and the Bisrampore estate. Chainpur estate is under the Court of Wards management and the management of the Bisrampore estate has been taken over under the Chota Nagpur Encumbered Estates Act of 1876. The facts which have given rise to the prosecution are alleged to be as follows: The contractor having done certain work for these two estates and his work having been checked by the Wards Sub-Overseer, bills for the work were passed by the Manager. It is alleged that the amount of work charged for was not in fact done by the contractor, that the Sub-Overseer who is supposed to have checked the work passed accounts which misrepresented the true state of work done and that the Manager passed the bills knowing that the work had not actually been done. On 30th June 1936, the Deputy Commissioner ordered the District Board Supervisor and the District Board Overseer to check the work which had been charged for. These officers reported that work had been charged for which had not been done and that excess charges had been made for work that had been done and that the petitioner Sukhomoy Moitra had apparently given imaginary figures in his measurement book and had not, in fact, correctly checked the work done. It was estimated by these officers that as a consequence the estates had had to pay Rs. 700 in excess of the value of the work actually performed. On receipt of these reports the Deputy Commissioner sent the measurements and the report to the Senior Wards Deputy Collector with instructions to him to examine the papers and, if desirable, to institute criminal proceedings.

The Deputy Collector thereafter wrote to the Police a letter, which has been treated as the first information in the case, requiring an investigation of the charges against the Sub-Overseer and the contractor. With this letter the Deputy Collector sent the report of the District Board Overseer and Supervisor and other relevant papers. After investigation the Police submitted a charge-sheet against the contractor, the Overseer and the Manager, Hemendra Nath Gupta, and arrested the latter but released him on bail. In the present applications it has been sought to quash the proceedings at present pending or to transfer them from the Court of the Sub-divisional Magistrate at Daltonganj. The first ground in support of the application to quash the proceedings is that the sanction of the Local Government to the prosecution of Hemendra Nath Gupta has not been obtained as required by S. 197, Criminal P. C. So far as it is relevant for the present purpose that section is as follows :

> When any person, who is a Judge within the meaning of S. 19, I. P. C., is accused of any offence alleged to have been committed by him, while acting or purporting to act in the discharge of his official duty, no Court shall take cognizance of such offence except with the previous sanction of the Local Government.

It is contended that the petitioner Hemendra Nath Gupta is a Judge within the meaning of S. 19, Penal Code. That section defines the word "Judge" to denote :

> Not only every person who is officially designated as a Judge, but also every person who is empowered by law to give, in any legal proceeding, civil or criminal, a definitive judgment, or a judgment which, if not appealed against, would

be definitive, or a judgment which, if confirmed by some other authority, would be definitive.

Reference was made to various sections of the Chota Nagpur Encumbered Estates Act of 1876 which, it is contended, show that the duties and powers of a Manager under that Act are such that he falls within the definition of a Judge under S. 19, Penal Code. One of the duties of such a Manager is to ascertain what debts were owed by the proprietor of the estate at the time the management of the estate was assumed and to decide the validity of those debts and the amount of interest payable on them. The procedure to be followed by the Manager in deciding these questions is analogous to the procedure of a civil Court, and S. 10 of the Act provides that the decision of the Manager, unless appealed from, shall be final. It is true that under the concluding words of para. 1, S. 10 the decision of the Manager is subject to the provisions of Ss. 10-A and 21-A which respectively authorize the Commissioner and the Board of Revenue to revise, modify, or reverse the Manager's decision ; but, subject to any such action by the Commissioner or the Board of Revenue, the decision is final. In my view, there can be no doubt that while exercising the functions referred to in part 4 of the Act relating to the settlement of debts, the Manager is a Judge within the meaning of S. 19, Penal Code.

That being so, S. 197 debars his prosecution on a charge of any of the offences alleged to have been committed by him while acting, or purporting to act, in the discharge of his official duty. This section has been completely recast by the Amending Act of 1923. Before the amendment very nice questions arose as to whether a Judge or public servant referred to in S. 197, could not be prosecuted without the sanction of the Local Government only for an offence committed by him as a Judge or public servant, or whether the section had wider application. The amendment, as has been pointed out in a number of recent decisions, has widened the scope of the section and now protects the persons referred to in it, not only in respect of offences committed while acting in the particular capacity referred to in the section, but in respect of offences committed while acting, or purporting to act, in the discharge of official duties also. That the Manager is an official there can be no doubt. S. 21 of the Act declares that every Manager appointed under the Act shall be deemed a public servant within the meaning of the Penal Code. In his capacity as Manager it was his duty to pass bills for work done by the contractor, so that, while passing the bill or bills, in the present case the Manager was acting in his official capacity and in discharge of his official duty, and, as was pointed out in 52 Mad 602,[1] by Waller, J. :

If it is found that the Judge, Magistrate, or public servant has committed an act at a time when he was doing (or purporting to do) an official duty, this will be sufficient to attract the provisions of this section, that is to say, S. 197, Criminal P. C.

This decision was cited with approval in this Court in the case of 14 Pat 299.[2] In my view, in the present instance the offence with which the Manager is charged must be held to have been committed in the discharge of his official duties and therefore, the sanction of the Local Government to the prosecution was necessary. Admittedly, that sanction was not obtained prior to the institution of the present proceedings against the Manager. The prosecution of the Manager must, therefore, be quashed.

With regard to the other two petitioners, it is contended that their prosecution should also be quashed on the ground that the charge-sheet, on which the Magistrate took cognizance of the cases against them, was not "a report in writing of the facts" as required by Cl. (b) of sub-s. (1) of S. 190. Reliance was placed upon a decision of the Bombay High Court in 32 Bom L R 782.[3] In that case, column 7 of the charge-sheet, which should have contained information of the nature of the offence and the circumstances connected with it, contained the following entry:

In connection with Hubli Town Civil Revision Nos. 36 and 37 of 1927 the accused noted in the charge-sheet and others conspired with each other and abetted one another in committing offences under Ss. 161 to 165 and 109, I. P. C.

The Court held that this was not a statement of the facts as required by S. 190 (1) (b) of the Code of Criminal

1. Jugjivarapu Gangaraju v. Kandiboyini Venki, A I R 1929 Mad 659=1929 Cr C 140=118 I C 102=30 Cr L J 864=52 Mad 602=57 M L J 31.
2. Ram Singh v. S. A. Rizvi, A I R 1935 Pat 52=1935 Cr C 83=155 I C 126=36 Cr L J 650=14 Pat 299=15 P L T 775.
3. *In re* Shivlingappa Bhagappa, A I R 1930 Bom 372=1930 Cr C 892=127 I C 110=31 Cr L J 1142=32 Bom L R 782.

Procedure. The Bombay case followed two previous decisions of the Calcutta High Court, *viz.* 37 Cal 49[4] and 51 Cal 402.[5] Those cases, in my view, are distinguishable from the present. So far as the contractor and the Sub-Overseer are concerned, the facts alleged against them are contained in the Overseer's report to the Deputy Commissioner and this was attached to the first information by the Deputy Collector and was fixed to the charge-sheet by the investigating officer who submitted it, so that, although the facts were not actually written out in the document which is called the charge-sheet, they were contained in a document annexed to the charge-sheet. That, in my opinion, was sufficient compliance with the requirements of S. 190 (1) (b) of the Criminal P. C. I would, therefore, reject the applications of these petitioners to quash the proceedings against them.

There remain the applications made on their behalf for transfer of the proceedings from the Court of the Sub-Divisional Magistrate. The application for transfer is not opposed, but it is suggested by the learned Government Advocate that the circumstances of the present case do not justify the case being sent altogether out of the District and the inconvenience of this course is pointed out in the view of the fact that the material witnesses are officials and others residing in Daltonganj where it is possible for the trial of the petitioners to be held by a Court which is above any suspicion of being influenced by local conditions, *viz.*, by the Sessions Judge of Ranchi who sits at Daltonganj to try Sessions cases arising in the Daltonganj District. The question of trial by the Sessions Court, however, will arise only in the event of the accused being committed to the Sessions for trial. Before that stage is reached a judicial enquiry has to be held by a Magistrate. There is no objection on behalf of the petitioners to the commitment proceedings being conducted by the Sub-Divisional Magistrate who at present has seisin of them. The present proceedings, therefore, will continue before the Sub-Divisional Officer, and in the event of his finding a prima facie case to be established against the two petitioners, he will commit them to the Court of the Judicial Commissioner of Ranchi for trial.

S.C./D.S. *Application rejected.*

4. Lee v Adhikarry, (1910) 37 Cal 49=5 I C 553=11 Cr L J 145.
5. Nagendranath Chakravarty v. Emperor, A I R 1924 Cal 476=81 I C 220=25 Cr L J 732=51 Cal 402.

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* A. I. R. 1937 Patna 163

COURTNEY-TERRELL, C. J. AND JAMES, J.

Kali Prashad Gope and *others* — Defendants—Appellants.

v.

Ram Golam Sahu and *others*, Plaintiffs and *others*, Defendants—Respondents.

Appeal No. 115 of 1933, Decided on 20th October 1936, from original decree of Sub-Judge, Bhagalpur, D/- 31st December 1932.

*** (a) Succession Act (1925), S. 119—Vested remainder — Will by person giving life estate to some persons and remainder to another with power of appointment in the first taker —Power of appointment does not prevent vesting of the remainder.**

Where a person by his will gives the life-estate in his property to some persons with a remainder to another and gives the power of appointment to the first taker, i.e., persons taking the life-estate, the existence of a power of appointment does not prevent the vesting of the remainder, because where estates are subjected to a general power of appointment in the first taker with remainder over in the default of such appointment, the power does not suspend the remainder from vesting. [P 164 C 2]

*** (b) Transfer of Property Act (1882), S. 6 (a)—Vested interest—Life-estate given to two persons by will with remainder to certain other person — Interest in remainder is not mere spes successionis but is vested interest and is also transferable.**

Where by a will, the life-estate is given to two persons, with a remainder to certain other person, the interest in the remainder is not a mere chance or possibility but a vested interest. The remainder is not property of the nature described in S. 6 (a) of the Act and so is transferable : *A I R 1930 P C 17, Rel. on.* [P 165 C 1]

(c) Hindu Law—Will — Life-estate — Will by person giving life-estate to widow and widowed daughter-in-law with remainder to his son and giving power to widow to appoint persons other than limited heirs—Will prohibiting alienation by widows even for necessity or for acts of charity or piety—Estate created is not a Hindu widow's estate but an ordinary life-estate.

A person by will gave a life-estate to his widow and his widowed daughter-in-law with remainder to his son and with a power to the widow to appoint persons other than limited heirs. The will did not give power to the widows to alienate the property even for necessity and the testator even prohibited the widows to alienate the property under the pretext of spending money in acts of charity or piety:

Held : the will did not create a Hindu widow's estate but only an ordinary life-estate with the remainder over. [P 165 C 1]

K. P. Jayaswal and *B. C. Sinha*—for Appellants.

P. R. Das, S. N. Bose and *K. Dayal*—for Respondents.

James, J. — This appeal arises out of a suit for the enforcement of two mortgage bonds dated respectively 25th September 1917 and 8th February 1922 which were executed by Ramkinker Thakur. Ramkinker's father Bharosi Thakur died on 8th March 1896, leaving him surviving his son Ramkinker Thakur, his second wife Arjunbati and a daughter-in-law Mt. Kuntabati, the widow of his second son Raj Narain Thakur. By his will Bharosi Thakur left that portion of his property with which we are here concerned to his widow and his daughter-in-law for their lives with remainder to Ramkinker. Arjunbati had a power of appointment, by which if she should have no male children, she was empowered to make a gift of not more than two specified items of property to her daughter's sons. Arjunbati died on 17th December 1909 without having exercised the power of appointment and Kuntabati died in 1930. It is not quite clear from the will whether if Arjunbati had a son the power of appointment was to be exercised in his favour or whether the remainder would vest in the son, or whether the life-estates would end; but as this event did not happen, the matter is of no importance.

The items of property with which we are here concerned are contained in two villages Tatpur Ranga and Narkatia in which the widows enjoyed a life-estate. On 15th December 1921 Mt. Kuntabati failed to pay cess, which led to the sale of Tatpur Ranga under the Public Demands Recovery Act when it was purchased by Kuntabati's grandson Pusp Narain. On 18th July 1927 Pusp Narain and his brother Anup Narain Jha mortgaged Tatpur Ranga to Kali Gope, who sued on his bond and obtained a decree, in execution of which he purchased Tatpur Ranga on 1st December 1930. On 24th January 1924 Ramkinker and Kuntabati sold Narkatia to Kali Sahu, the defendant (fifth party) of this suit. These items of property had already been mortgaged by Ramkinker in 1917 and 1922; and the suit with which we are here concerned is for the enforcement of those earlier mortgages. The subsequent purchasers Kali Gope and Kali Sahu, who are the appellants now before the Court, contested the suit alleging that the earlier mortgages were not for consideration, taking as a matter of course every defence which could be taken in a suit of this kind, but chiefly maintaining the ground that Ramkinker had no interest which he could transfer at the time of the mortgages. The suit was decreed by the Subordinate Judge.

No question of fact is in dispute in this appeal, so that the argument is limited to the question of whether Ramkinker at the time when he executed the mortgages had a transferable interest. The will of Bharosi Thakur on the face of it conveys a remainder which would vest on Bharosi's death, a point which, as the learned Subordinate Judge has observed, is made clear by the terms of S. 119, Succession Act. The existence of a power of appointment would not prevent the vesting of the remainder, because where estates are subjected to a general power of appointment in the first taker with remainder over in default of such appointment, the power does not suspend the remainder from vesting. If the remainder was contingent on the failure of male issue to Arjunbati, the point is certainly not made clear by will; and if Arjunbati had borne a son, the ambiguity in the will would have probably led to litigation on the question of whether the power of appointment or the remainder was cancelled. But nine months after Bharosi Thakur's death this contingency ceased to be of importance. Mr. Jayaswal suggests that so far as Ramkinker is concerned, the question of whether he took a vested or contingent remainder is to be regarded as res judicata. In 1916 Ramkinker sued Pusp Narain and his brother for a declaration that a deed of gift executed by Kuntabati was invalid. One of the issues in that suit was :

Are the plaintiffs entitled to get possession of the property in suit after the lifetime of the defendant second party ?

The Subordinate Judge declared the gift to Pusp Narain to be invalid as conveying nothing beyond the life interest of Kuntabati, but he refused the prayer for a declaration that Ramkinker was entitled to succeed on the death of Kuntabati. The judgment on the sixth issue in that case is brief and it is as follows :

The defendant second party is yet alive and there is no knowledge as to if plaintiff 1 would be a reversioner to the properties in dispute after her death. I therefore find that his right to get the properties is yet too contingent to entitle him to claim their possession. And on this view thereon I refuse him his prayer for the possession thereof. Issue 6 is therefore found against him.

From this it appears to be possible that the Subordinate Judge misunderstood the effect of a vested remainder, apparently thinking that it was nothing more than a *spes successionis* and that if the remainder man should die before the life tenant, it might be necessary to look elsewhere for what he calls the reversion. But he is correct when he says that Ramkinker's right to get the property was too contingent to entitle him to claim possession. Mr. Jayaswal lays some stress on the use of the word 'contingent,' and he also argues that the finding on this issue converts Ramkinker from a remainder man to a mere reversioner. But in a sense every remainder man's expectation of enjoyment of property is contingent, because unless he survives the life tenant he will not himself enjoy possession; and it appears to be only in this sense that the expression is used in the judgment. This decision is in any view of the matter not binding on the plaintiffs who were not parties to the suit. The point is not of any real importance, because there can be no doubt that the remainder of the kind described by this will is not property of the nature described in S. 6 (a), T. P. Act, which cannot be transferred. It is not a mere chance or possibility but a vested interest. This was made clear by the Judicial Committee of the Privy Council in 8 Rang 8,[1] where the remainder of a kind classed by the Judicial Committee as contingent was held to be transferable.

Mr. Jayaswal suggests that the will created a Hindu woman's estate in the life estates of Arjunbati and Kuntabati; but the will clearly describes an ordinary life-estate with remainder over. The estate conferred in no way resembles a Hindu widow's estate. Power is given to appoint persons other than the limited heirs. No power is given to alienate even for necessity, and the testator makes it clear that if either of the two ladies shall spend money in acts of charity or piety, she is to do it at her own expense and the act is not to be made a pretext for alienation of property. The decision of the learned Subordinate Judge was correct and I would dismiss this appeal with costs.

Courtney-Terrell, C. J.—I agree.

W.D./A.L. *Appeal dismissed.*

1. Ma Yait v. Official Assignee, A I R 1930 P C 17=121 I C 225=57 I A 10=8 Rang 8 (P C).

A. I. R. 1937 Patna 165

MOHAMAD NOOR AND MADAN, JJ.

Surpat Singh and *others*—Plaintiffs—Appellants.

v.

Bhupendra Narayan Singh and *others*—Defendants—Respondents.

Appeals Nos. 821 and 1116 of 1933, Decided on 7th October 1936, from decision of Dist. Judge, Purnea, D/- 31st March 1933.

Record of Rights—Presumption as to correctness—Rebuttal of—Entry of land as rent free—Admission by tenant that land is within permanently settled villages of landlord does not rebut presumption—Such presumption cannot be rebutted by presumption under general law in view of S. 103-B, Bihar Tenancy Act.

The correctness of an entry in Record of Rights can only be rebutted by proof of fact which is inconsistent with the entry. Assessment of land revenue on any land is not inconsistent with its having been made rent free after the assessment of the land revenue. It is certainly inconsistent with its being malikana which originated at the time of the Permanent Settlement. It is not a general proposition of law that the presumption of the correctness of the entries in the Record of Rights about particular land being rent free is in every case rebutted by the proof that the land is within the permanently settled village of the landlord and was assessed to revenue. Whether the presumption as to correctness of an entry has been proved to be incorrect is a question of fact and has to be decided on the facts of the particular case : *A I R 1922 P C 272, Expl.* [P 167 C 2]

The presumption of the correctness of the Record of Rights cannot, owing to the provisions of S. 103-B, Bihar Tenancy Act, be rebutted by another presumption under general law : *A I R 1931 Pat 224* and *12 M I A 286* (*P C*), *Foll.* [P 167 C 2]

A malikanadar claims a title independent of the landlord, as the malikana had its origin at the time of Permanent Settlement. Either he claims that the land was excluded from the Permanent Settlement or that by an arrangement between the Government and the man with whom the Permanent Settlement was made, a certain land was set apart for the ex-proprietor as malikana. In such cases the production of evidence to show that the land was in fact included in the Permanent Settlement will rebut the entry of malikana in the Record of Rights. But in other cases where the assessment of revenue has no connexion with a land being rent free the facts found by the settlement authorities to have existed at

the time of cadastral survey cannot be rebutted by proof of facts which existed at the time of Permanent Settlement . *A I R 1922 P C 272, Expl.*; *Case law referred.* [P 168 C 2; P 169 C 1]

S. N. Bose and *J. C. Sinha*—for Appellants.

K. P. Jayaswal, *S. C. Mazumdar*, *Bindeshwari Prasad* and *D. L. Nandkeolyar*—for Respondents.

Mohamad Noor, J. —These two appeals arise out of two suits instituted by the same plaintiffs against two sets of defendants for recovery of possession of certain lands on the ground that the defendants were in their wrongful possession and that their names were wrongly recorded in the Survey Records of Rights in respect of them.

The plaintiffs of the suits are the landlords of the villages where the suit lands are situated. The defendant of one of the suits, Kumar Bhupendra Narayan Singh (who is respondent in Second Appeal No. 821 of 1933) has been recorded in the settlement records as a rent free tenure-holder in respect of 125·08 acres of land in village Achra, situated in the area known as Kosi Diara in the District of Purnea. In the other case the defendants (who are respondents in Second Appeal No. 1116 of 1933) have been recorded as milikdar in respect of 14·03 acres of land in village Kusmaul also within Kosi Diara. The plaintiffs instituted these two suits for recovery of possession of these lands on the declaration of their title to them and on a finding that the defendants have not got the status given to them in the Record of Rights. The first suit was instituted before the Subordinate Judge and the second before the Munsif. Both of them were dismissed by the respective trial Courts. The appeal of the plaintiffs in the first suit has been dismissed by the learned District Judge of Purnea and that in the second suit by the learned Subordinate Judge of the same place. The plaintiffs have, therefore preferred these two second appeals. As the appellants are the same and the points of law raised on their behalf are common to both the appeals they have been heard together.

Strictly speaking, on the findings of the lower Courts, no question of law arises in either of the two appeals. In Second Appeal No. 821 of 1933, the plaintiffs' case was that the suit lands were their mal lands and not rent free. They further urged that, assuming that they were rent free tenure of the defendant he lost it by the adverse possession of the plaintiffs. It was alleged by them that the lands were submerged under the Kosi river and that since they came out of the river they had been in their possession through their own tenants. There is a clear finding of the lower appellate Court which is in agreement with that of the trial Court, that the lands are the rent free tenure of the defendant and that the entry in the Record of Rights is correct. It has also been found that after their emersion from the river the lands were for a considerable time unfit for being taken possession of and therefore on the basis of his title the defendant must be held to have continued in possession. Both the Courts have disbelieved that the plaintiffs were in possession of the lands after they came out of the Kosi. Similar is the case in respect of the lands involved in Second Appeal No. 1116 of 1933. The defendant of this suit claimed, as I have said, to be the milikdar of the suit land and was recorded as such in the Record of Rights. The lower appellate Court has found that at least since 1909 he had been holding it as milikdar having in that year purchased it under a sale deed in which it was described as milik. It was also held that the entry in the Record of Rights was not proved to be incorrect by the plaintiffs. The learned advocate for the appellant has contended that the statement in the deed that the land was milik was not admissible in evidence. It is true that the statement is not admissible to prove that the land is the milik of the defendant, but it is admissible to prove that when the defendant came in possession of the land he did so with an assertion that he was holding it as a milikdar, and since then, he began to prescribe against the plaintiffs as milikdar. The suit having been instituted after 12 years of the commencement of that possession, is obviously barred. The only other point urged in this case is that the entry in the Record of Rights is based upon no evidence. No material has been placed before us to support this contention.

The main contention of the learned advocates for the appellants in both the appeals has been that the onus to rebut the presumption of the correctness of the entries in the Record of Rights was wrongly placed upon the plaintiffs. It was

contended that the entries stood rebutted as soon as it was admitted that the lands were within the ambit of the permanently settled villages of the plaintiffs and were assessed to revenue. After that it was incumbent on the defendants of the two suits to prove that they acquired from the zamindar either rent free tenure or milik as the case may be. Now, the question of onus does not really arise in these cases. As the learned District Judge in his judgment (appealed against in Second Appeal No. 821 of 1933) has pointed out, both the parties adduced evidence and the cases were decided on the balance of evidence. However, as the learned advocates of the appellants have very elaborately argued the question of onus and placed a number of authorities before us, I think I should give my decision especially as I find myself with all respect in disagreement with the view taken in this connexion by a Division Bench of this Court.

Now, the contention of the learned advocates, as I have said, has been that the lower Courts were wrong in relying upon the entries in the Record of Rights as they were proved to be incorrect by the fact that it was established that the lands were assessed to revenue and were within the permanently settled villages of the plaintiffs. In support of this contention reliance was placed upon the observations of their Lordships of the Judicial Committee in the well known case, 2 Pat 38.[1] It was contended that their Lordships have laid down that the presumption of the correctness of an entry in the Record of Rights about a certain land being rent free is rebutted if the landlord proves that the land was included within the ambit of his village which was permanently settled with him. If the facts of the case which was before their Lordships are not kept in view, the argument of the learned advocates at first sight may appear to have some force and one may think that there is a conflict between the view taken in that case and the clear words of S. 103-B, Bihar Tenancy Act. The observations relied upon are at p. 48 of the report and are these:

> Considerable stress has been laid on the assumption (i. e., the assumption under S. 103-B, Tenancy Act). Once, however, the landlord has proved that the land which is sought to be held rent free lies within his regularly assessed estate or mahal the onus is shifted. In the present case the lands in dispute lie within the ambit of the estate which admittedly belongs to the plaintiffs and the pro forma defendants for which they pay the revenue assessed on the mouza. In these circumstances it lies upon those who claim to hold the lands free of the obligation to pay rent to show by satisfactory evidence that they have been relieved of that obligation either by some contract or by some old grant recognized by Government.

As I shall presently show this observation is in connexion with the particular rent free tenure which was before their Lordships, i. e., malikana, and cannot be applied to ordinary rent free tenures or holdings which are before us. The correctness of an entry in a record of rights can only be rebutted by proof of facts which are inconsistent with the entry. Assessment of land revenue on any land is not inconsistent with its having been made rent free after the assessment of land revenue. It is certainly inconsistent with its being malikana which, as I shall show, originated at the time of the Permanent Settlement. I am absolutely certain that their Lordships have not laid down as a general proposition of law that the presumption of the correctness of the entries in the record of rights about a particular land being rent free is in every case rebutted by the proof that the land is within the permanently settled village of the landlord and was assessed to revenue. Obviously, whether the presumption of the correctness of an entry has been proved to be incorrect is a question of fact and has to be decided on the facts of a particular case. S. 103-B which was being considered by their Lordships runs thus (*see* p. 48 of the report):

> Every entry in a record of rights so published (i. e., Ch. 10 of the Act) shall be presumed to be correct until the contrary is proved.

The sub-section now runs thus:

> Every entry in a record of rights so published shall be evidence of the matter referred to in such entry and shall be presumed to be correct until it is proved by evidence to be incorrect.

Though the amendment was made in 1907 it does not seem to have been brought to the notice of their Lordships. As was pointed out by Ross, J. in A I R 1931 Pat 224,[2] the presumption of the correctness of the record of rights cannot now be rebutted by another presumption under the general law in favour of the

1. Jagdeo Narain Singh v. Baldeo Singh, A I R 1922 P C 272=71 I C 984=49 I A 399=2 Pat 38 (P C).

2. Lachman Lal Pathak v. Kumar Kamakshya Narayan Singh, A I R 1931 Pat 224 = 131 I C 788=12 P L T 891.

landlord as laid down by Sir James Colvile in 12 M I A 286.[3] In a large number of cases the very record which shows that a particular tenancy is rent-free shows that a particular person is the landlord of the village and that the tenancy is held under him and is not revenue free, that is to say, it is assessed to revenue. Under the Bihar Tenancy Act the word 'landlord' is defined as a man immediately under whom a tenant holds, and 'tenant' is one who holds land from another person and is, but for a special contract, liable to pay rent for that land to that person. A rent free holder is in most cases a tenant. Therefore, if the contention of the learned advocates be accepted that their Lordships have held that the proof that a particular person is the landlord of a land holding it under the Permanent settlement rebuts the presumption of the record of rights that the land is held rent free by another person, then it will follow that in most cases we shall have to hold that the entry of rent free tenancy is rebutted by another entry that it is under the landlord. This will lead us to a vicious circle and we shall have to hold that their Lordships' decision is in conflict with the clear provisions of S. 103-B, Bihar Tenancy Act, which says that every entry in the record of rights shall be evidence of the matter referred to in such entry, and shall be presumed to be correct until it is proved by evidence to be incorrect. We will have to insert into this section an exception that an entry about the land being held rent free shall not be presumed to be correct in cases where the land is held under a landlord of a village which has been assessed to revenue.

In *Sri Jagarnath Kishore Lal Singh Deo* v. *Prasana Kumar Misra* (Second Appeals Nos. 1584 to 1590, decided by me singly, on 26th April 1933), I explained that the observations of their Lordships have to be read as referring to the entry in the particular case where the claim of the defendants who were appellants before them was independently of the landlord. I quote the following passage from the judgment which I then delivered:

> The defendants in that suit claimed to be malikanadars of certain lands in a village and they were recorded as such in the record of rights published under the Bengal Tenancy Act. I may note that the provision about the presumption of the correctness of the record of rights and the entry therein under the Bengal Tenancy Act is similar to the one under the Chota Nagpur Tenancy Act. Now, the plaintiff instituted that suit for a declaration that the defendants were not malikanadars and were liable to pay rent. The two Courts below upheld the plaintiff's contention and held that the defendants were not malikanadars of the lands. This Court in second appeal reversed those decisions, and relying among other things upon the record of rights held in favour of the defendants. The matter went up to the Privy Council and their Lordships examined the evidence for themselves and held that there was no malikana in the village when it was assessed to revenue in 1839. Now according to the glossary of the terms given by the Settlement Authorities in the Settlement Report of the Patna District from where that case came, 'malikana' means the allowance of a dispossessed malik. In some cases the right to malikana has been compounded for a certain area of land thus known as malikana land. The word is also used in Bihar to describe the land retained by the ex-proprietors for their subsistence when parting with the estate. When at the time of Settlement Land Revenue a proprietor refused to take settlement of an estate, or the Revenue Authorities for some reason or other did not consider it proper to settle the estate with him and consequently settled it with somebody else, the ex-proprietor was allowed some compensation. This compensation was either a perpetual annual payment of money known as the malikana money or some land in the village itself and was known as malikana land. The land was given by an arrangement between the Revenue Authorities, the new proprietor and the old proprietor. Now their Lordships of the Judicial Committee, as I have said, examined the history of the settlement of the village which had taken place by the year 1839 and came to the conclusion that the entire village was included in this settlement with the then proprietor Mt. Umatul Zohra. The passage quoted above comes after the finding and should be read in the light of the finding and referring to it. It is clear to me that what their Lordships meant was that the plaintiff having proved that the land which was claimed by the defendants to be the malikana land was included in the land which was settled with the predecessor of the plaintiff and pro forma defendants and assessed with revenue, they sufficiently rebutted the presumption of the record of rights. I do not read the passage as meaning that once the plaintiff has proved that he is the landlord of the village the presumption about the record of rights in favour of the tenancy being rent free is at once rebutted.

Further I said:

> The important words in the judgment of their Lordships of the Judicial Committee in the *case of Jagdeo Narain*,[1] are "the land which is sought to be rent free lies within his regularly assessed estate or mahal," "the land in dispute lies within the ambit of the estate," and "for which they pay revenue assessed in the mauza." These facts rebutted the presumption in favour of the malikana.

It is obvious that a malikanadar claims a title independent of the landlord, as the malikana had its origin at the time of the Permanent Settlement. Either he

3. Rajah Sahib Perhlad Sein v. Doorga Persaud Tewaree, (1867-69) 12 M I A 286=2 Beng L R 111=12 W R 6=2 Sar 429=2 Suth 225 (PC).

claims that the land was excluded from the Permanent Settlement or that by an arrangement between the Government and the man with whom the Permanent Settlement was made a certain land was set apart for the ex-proprietor as malikana. It is obvious that in such cases the production of evidence to show that the land was in fact included in the Permanent Settlement will obviously rebut the entry of malikana in the record of rights. But in other cases where the assessment of land revenue has no connection with a land being rent free the facts found by the Settlement Authorities to have existed at the time of the cadastral survey cannot possibly be rebutted by proof of facts which existed at the time of the Permanent Settlement, and, if the facts of the case in which these observations were made were kept in view, there is no conflict between the law and the observations of their Lordships. The case of *Jagdeo Narain*[1] was considered in several cases. They are 11 P L T 444;[4] 59 Cal 629;[5] 11 P L T 468;[6] A I R 1931 Pat 224,[2] already referred to, and 17 P L T 507.[7] In none of these cases the observations of their Lordships of the Judicial Committee have been held to mean what the learned advocate for the appellants has contended for. The learned advocate has referred us to an unreported decision of a Bench of this Court in *Kameshwar Singh* v. *Sakhawat Ali* (F. A. No. 86 of 1933, decided on 4th September 1936). This case no doubt supports the contention of the learned advocate. It seems, however, that the change in S. 103-B, Bihar Tenancy Act, was not brought to the notice of their Lordships. However, as in the present case, in view of the fact that it has been decided on the balance of evidence, the question does not arise, it is not necessary to refer it to a Full Bench. I would dismiss the two appeals with costs in favour of those respondents who have appeared. There will be one set of costs in each case.

Madan, J.—I agree.

K.B./A.L. *Appeals dismissed.*

4. A. J. Stonewigg v. Kameshwar Narayan Singh, AIR 1923 Pat 340=71 I C 1022=11 PLT 444.
5. Nibaran Chandra Mukherji v. Harendra Lal Roy, A I R 1932 Cal 446=138 I C 157=59 Cal 629=36 C W N 259.
6. Jodha Sahu v. Tirbena Sahu, A I R 1929 Pat 248=120 I C 625=11 P L T 468.
7. Jyoti Prasad Singh Deo v. Bharat Shah Babu, A I R 1936 Pat 543=165 I C 589=15 Pat 260 =17 P L T 507.

* A. I. R. 1937 Patna 169

COURTNEY-TERRELL, C. J. AND DHAVLE, J.

Firm Jankiram-Sital Ram and *others* —Defendants—Appellants.

v.

Chota Nagpur Banking Association, Ltd., Plaintiff and *others*, Defendants—Respondents.

Appeals Nos. 201 of 1932 and 25 of 1933, Decided on 14th August 1936, from original decree of Sub-Judge, Dhanbad, D/- 22nd September 1932.

(a) Estoppel—*X*, sleeping partner of family firm—Firm conducted by another member of family *C* — *C* mortgaged firm property to Bank for loan for business—Mortgage bond read and attested by *X* at instance of Bank, without any objection—*X* subsequently setting up 2/3 ownership to mortgage property—*X* held estopped from so doing by his contract with the Bank.

X was sleeping partner of a family firm which was in the name of *C*, another member of the family, who conducted the business. *C* mortgaged the firm property to the Bank for loan for the business. The mortgage was read and attested by *X* at the instance of the mortgagee Bank. *X* raised no objection. Subsequently *X* set up his 2/3 ownership against the mortgagee Bank:

Held: that *X* was prevented from raising his title by the contract with the Bank: *Jordan* v. *Money*, *(1854) 5 H L C 185, Disting.*; *Cairncross* v. *Lorimer*, *(1852) 3 Macq H L 827* and *20 Cal 296, Rel. on.* [P 171 C 2]

(b) Estoppel—Representation by *X* that *C* had authority to mortgage his interests in property—Acting on this representation *D* in auction sale under mortgage purchased the mortgaged property—*X* held estopped from denying representation to the prejudice of *D*.

X represented that *C* had an authority to convey his rights in property when that property was sold by auction under mortgage sale. It was purchased by *D*, acting on the representation made to him by *X*. Subsequently *X* denied that *C* had authority to mortgage his interests in the property and challenged *D*'s title to the property purchased by him:

Held: *X* was estopped from so denying the representation made by him to *D*. [P 172 C 1, 2]

*** (c) Estoppel—Auction-purchaser is estopped by deed made by debtor before sale.**

Just as a purchaser at an execution sale may take advantage of the estoppel arising from the deed by which debtor acquired title, so the purchaser in turn is estopped by the deed made by the debtor before the sale. One who can take advantage of an estoppel in his favour should be bound by estoppel: *I I C 264, Rel. on*; *Case law discussed.* [P 173 C 1]

S. N. Bose, *Avadeshi Nandan Sahay* and *Nawal Kishore Prasad II* — for Appellants.

B. C. De and *S. N. Banerji*—for Respondents.

Courtney-Terrell, C. J. — These two appeals are respectively by defendant 5, and by defendants 2 and 3, against a decision of the Subordinate Judge of Dhanbad. The suit was for possession of three houses in Jharia. Defendants 1 and 2 are brothers. Defendants 3 and 4 are sons of a deceased brother of defendants 1 and 2. The family came from a distance and set up business in Jharia some years before the facts to be mentioned. The deceased brother and defendants 1 and 2 separated about 14 or 15 years ago and thereafter they held their property in defined shares but in common management. House No. 3 is the most valuable and the land on which it stands was acquired piece by piece between 1904 and 1914. Two of the deeds were in favour of the deceased brother and defendants 1, and three are in favour of defendant 1 alone. House No. 2 stands in a plot which was acquired in 1916 by a deed in favour of defendant 1, but the deed recites that the consideration was due to the firm under which style the family continued their business at all times. House No. 1 was acquired in 1920 under a deed which has not been produced. All three properties are recorded in the name of defendants in equal shares. The evidence amply supports the finding that the property in suit was held by the three brothers in equal separate shares. It appears that the person who actively conducted the mercantile business carried on in the firm name was defendant 1 and that the other defendants were what may be called sleeping partners.

On 13th November 1922, defendant 1 executed a mortgage bond mortgaging inter alia the three houses aforesaid to the plaintiff Bank and in the mortgage deed he described the property as his own self-acquisition. On 25th November 1923 he executed a mortgage to the plaintiff Bank of the equity of redemption of the first mentioned mortgage. The Bank, apparently warned by the occurrence of more than one name in the title deeds, insisted that defendants 2 and 3 should hear the first mortgage deed read over and should attest it as witnesses. There is some conflict of evidence as to where this happened and as to exactly what the defendants did and said at the time, but there is no dispute as to the fact that they did so attest the deed and I have no doubt on the evidence that the deed was read over to them and that they raised no objection whatever. I have also no doubt that they thoroughly understood the nature of the deed. They were interested in the business for which the money borrowed was required. The plaintiff had suggested that defendants 2 and 3 should execute the bond as parties, but defendant 1 had objected on the ground that they might in that event claim a share in the property mortgaged which he had described as his own acquisition. I am further satisfied that the state of affairs as to the business and property was sufficiently obscure to cause the rights to it to be a matter of doubt and difficulty to the Bank, although they might have insisted on a minute examination of title and might have discovered the title rights of defendants 2, 3 and 4 in that property. Further I am satisfied that the action of defendants 2 and 3 in attesting the document with knowledge of its contents in fact induced the plaintiff company to advance the money lent by them on the mortgage security. In 1929 the plaintiffs sued to enforce their mortgages against defendant 1 only, and on 17th March 1930, having obtained judgment, they purchased the property at the auction sale and the sale was confirmed on 15th August 1930.

On 20th September 1930, defendant 5 who had obtained a money decree against defendants 1 to 4 executed it, put up house No. 1 for sale, purchased this house, and the sale to him was confirmed on 1st December 1930. On 3rd March 1931, defendants 2—4 sold their two-thirds share in house No. 3 to defendant 6. The plaintiffs took out delivery of possession of the mortgaged property the sale of which to them had been confirmed and were resisted by defendants 2 to 6. They therefore brought this suit. Defendant 1 did not appear. Defendants 2—4 filed one written statement, and at the trial set up their ownership of the mortgaged property to the extent of a two-third interest and this contention they have justified. The real contention in this appeal is as to whether in the face of their conduct and attestation they are entitled to defend this suit. The facts are clear. Defendant 5 contends that he purchased bona fide and as an execution creditor the shares of defendants 2—4 and that he is not bound by the conduct of defendants 2 and 3 of which he had in any case no notice. Defendant 6 supports the case of defendants 2—4 and says that he is in

possession. The Subordinate Judge decreed the suit against defendants 1, 2 and 3, and defendant 5 and defendant 6 as to 5/6th share in the property. As against defendant 4 he dismissed the suit and in this dismissal he was clearly right, for defendant 4 having a clear 1/6th right in the property (being one-half of his deceased father's share) and being unaffected by the conduct of defendants 2 and 3 is not affected by the mortgages or by the sale in execution of the money decree obtained by defendant 5. The cross-appeal by the plaintiff against this part of the decision must be dismissed but without costs as defendant 4 has not appeared.

The learned Judge held that defendants 2 and 3 were estopped by their conduct as against the plaintiffs from setting up their titles (as to defendant 2 to the extent of a one-third share and as to defendant 3 as to a one-sixth share). Defendants 2 and 3 in appeal contend that at the most they had merely contracted with the plaintiffs that they would not set up their title in consideration of the loan by the plaintiffs to their relative, defendant 1, which contract would merely sound in damages for breach and would not operate as an estoppel. They further contend that in fact they made no contract at all but merely expressed an intention for the future to abstain from setting up title. They contended that they made no representation as to the title of defendant 1 to mortgage the property and they relied on the case of (1854) 5 H L C 185.[1] This case arose out of a suit for a declaration that a certain debt secured by a bond executed by the plaintiff had been abandoned and released. It was alleged that the bond-holder, Mrs. Jordan, had relinquished her rights under the bond in certain oral conversations at the time when the marriage of the plaintiff was under consideration. The case turned purely upon the facts, and as can be seen by the judgment of Lord Brougham at p. 230, the House was of opinion that she never relinquished her rights or released the plaintiff from his obligation under the bond. It has no bearing on this case. It was cited because of a passage in the judgment of Lord Cranworth at pp. 214-215. After stating the principle of law that a representation of fact will create an estoppel and that on the facts of the case there had been no such representation, he said :

> I am clearly of opinion, as clearly as I can be, knowing that I am counter in this respect certainly to an authority for which I feel great deference, namely the Master of the Rolls, probably to the Lords Justices, and I have some reason to suppose also to some at least of your Lordships, that it does not. I am bound to state my view of the case ; I think that that doctrine does not apply to a case where the representation is not a representation of a fact, but a statement of something which the party intends or does not intend to do. In the former case it is a contract, in the latter it is not.

After dealing with the facts the Lord Chancellor then said :

> My opinion is that if all the evidence had come up to the mark, which for reasons I shall presently state, I do not think it did, that if upon the very eve of marriage she had said 'William Money, I never will enforce the bond against you' that would not bring it within these cases. It might be if all statutable requisities, so far as there are statutable requisites, had been complied with, that it would have been a very good contract whereby she would have bound herself not to enforce the contract ; in short, it could not have been, because it must have been a contract reduced into writing and signed, but that is not the way in which this case is put ; it is put entirely upon the ground of representation.

The Lord Chancellor was dealing with the requirements of the Statute of Frauds in force in England. He held that there was in that case no contract which would satisfy the statute, and moreover, there had been no representation, and for these reasons the suit failed. But in the case before us the facts indicate either a valid contract or a silence amounting to representation. The circumstances were fully known to defendants 2 and 3. They were aware of their own rights, they knew the contents of the mortgage deed, they were interested with defendant 1 in the loan money, which was good consideration in so far as they were concerned, and they attested the deed raising no objection. They did more than merely stand by and allow the plaintiffs to part with their money. By their conduct they impliedly represented that whatever the title of the defendant might be he had their authority to mortgage the property and attested the deed on that basis. As was said by Lord Kingsdown in 3 Macq H L 827,[2] cited with approval by the Privy Council in 20 Cal 296[3] :

1. Jordan v. Money, (1854) 5 H L C 185=23 L J Ch 865.
2. Cairncross v. Lorimer, (1852) 3 Macq H L 827=7 Jur (n s) 149.
3. Sarat Chunder Dey v. Gopal Chunder Laha, (1893) 20 Cal 296=19 I A 203=6 Sar 224 (P C).

> The doctrine will apply, which is to be found, I believe, in all civilized nations, that if a man either by words or by conduct has intimated that he consents to an act which has been done and that he will offer no opposition to it, although it could not have been lawfully done without his consent, and he thereby induces others to do that from which they otherwise might have abstained, he cannot question the legality of the act he had so sanctioned, to the prejudice of those who have so given faith to his words or to the fair inference to be drawn from his conduct.

Therefore, whether the case is based on the contract or is based on estoppel, it is equally operative against defendants 2 and 3 and prevents them from setting up their title as against the plaintiffs. The learned Judge has based his judgment on representation and estoppel, but even if the defendants were right in their contention that they had merely contracted not to raise their title against the plaintiffs, the contract would be a bar. In my opinion the appeal of defendants 2 and 3 must fail and be dismissed with costs. I now approach the more difficult question of the relative positions of defendant 5 and the plaintiffs. Leaving apart for the moment the position of defendant 5 as an auction-purchaser at an auction sale, what is the position of an innocent purchaser for good consideration with regard to prior statements by his vendor which have deceived a prior purchaser into a prior sale? Is he bound by such statements or not?

Now in this case the representations by defendants 2 and 3 were not direct representations as to the title of defendant 1, to the property in dispute. They were representations that defendant 1 had authority to convey such rights as defendants 2 and 3 might have if any, and, as I have held, they were effective to prevent defendants 2 and 3 from raising their title as against the Bank. But are they effective so as to prevent the subsequent purchaser defendant 5 from raising the title which he has acquired. In other words if a man has once represented that another has a right to convey property, are his representations effective to prevent any subsequent purchaser from him from asserting his (the subsequent purchaser's) title?

In 20 Cal 996,[3] a husband had executed a hibanama (deed of gift) in favour of his wife. After his death, she, represented by her son, mortgaged the property. After her death the plaintiff purchased from the son his inherited share of the property including the mortgaged property. The mortgagee sold the property in execution of a mortgage decree which they had obtained and it was purchased by the defendants. It was held that S. 115, Evidence Act, was applicable. The son has represented that the hibanama gave his mother authority to mortgage and consequently neither he nor his representatives in estate could be allowed to deny the truth of the representation intentionally made and acted on by the mortgagee, and the purchaser from the mortgagee was in as good a position as the mortgagee himself even if he (the purchaser) were aware of the facts. Then, is the purchaser at an auction-sale held by the Court in any better position than a private purchaser?

In 22 Cal 909,[4] it was expressly held after quoting the passage from the judgment in I A Sup Vol 40,[5] in which Sir Montague Smith laid down the general principle of estoppel, that the execution creditors purchased only the right, title and interest of the person making the representation and were in no better position. In 9 Cal 265,[6] a suit for rent by a zamindar and patnidar against a darpartnidar, was defeated on the defence of the latter that he had conveyed his interest to others, against whom the former afterwards obtained a decree, and brought the darpatni to sale in execution, buying their right, title and interest therein himself. From the darpatnidar who had thus disclaimed title, a third party claimed to be mortgagee, and set up a decree on his mortgage followed by a purchase of the tenure at a sale in execution. He was, therefore, allowed to intervene in a suit for rent brought by the zamindar and patnidar against an ijaradar of lands within the darpatni estates. It was held that notwithstanding this purchase, the intervening mortgagee was bound by the estoppel arising out of the mortgagor's disclaimer of title in the suit abovementioned. It was sought on behalf of defendant 5 to distinguish these cases from the one before us on the ground that although a mortgagee auction-purchaser

4. Mohamad Mozuffur Hossain v. Kishori Mohan Roy, (1895) 22 Cal 909=22 I A 129=6 Sar 583 (P C).
5. Ramcoomar Coondoo v. Macqueen, (1873) I A Sup Vol 40=11 Beng L R 46=18 W R 166=3 Sar 160 (P C).
6. Poreshnath Mukerji v. Anathnath Deb, (1883) 9 Cal 265=9 I A 147 (P C).

was in no better position than a mortgagee as such, a stranger purchaser would be free from the estoppel against the mortgagee, but it is clear that in 10 C L J 150,[7] after a careful review of the authorities it was laid down that just as a purchaser at an execution sale may take advantage of an estoppel arising from the deed by which the debtor acquired title [*see* e. g., the cases in 9 Cal 265[6] and 20 Cal 296,[3] cited above] so the purchaser in his turn is estopped by the deed made by the debtor before the sale; in other words, the levying creditor is bound by an estoppel against the debtor as grantor.

This case shows that the principle on which the auction-purchaser is bound by estoppel against the judgment-debtor depends not merely on the particular character borne by the auction-purchaser but on the view that one who can take advantage of an estoppel in his favour should be bound by estoppel. In my opinion, of the two innocent parties defendant 5 and the plaintiffs both deceived by defendents 1 to 3, the law protects the plaintiffs. The decision of the Subordinate Judge was right and both appeals must be dismissed with costs. I wish to add that I have read the judgment prepared by my brother Dhavle and agree with it.

Dhavle, J.—I agree.

The learned Subordinate Judge has found that defendants 2 and 3 attested the first mortgage bond of defendant 1 in favour of the plaintiff Bank with full knowledge of the contents and that they did so by way of giving assurance to the Bank that the properties that were going to be mortgaged were the self-acquired properties of the mortgagor (as was stated in the bond) and that they claimed no interest in the same. Defendant 2 stated in his evidence that he and his nephew Damodar attested the mortgage bond at the request of Bishuni, without knowing that the three houses were being mortgaged under it. He is unsupported, and as shown in detail by the lower Court, thoroughly unreliable It was not the defendants' case that Bishuni was practising any fraud upon the other defendants, and in the circumstances it is difficult to believe that Bishuni took the signatures of his brother and nephew without the contents of the bond being brought to their knowledge.

The learned advocate for defendant 5, appellant in First Appeal No. 201, has laid stress on the failure of Babu Jatindra Chandra Mullick, P. W. No. 4, a pleader (now retired) and one of the local directors of the Bank, to recollect if defendant 2 and his nephew attested the mortgage bond or if there was any talk regarding them, and on his admission that it was on the representation of Bishuni that the bond recited that the mortgaged properties were acquired by him and belonged exclusively to him. But the pleader was very advanced in years when called upon to depose to a transaction that had taken place ten years previously; and it is obvious that the examination of the title deeds and the inquiry about possession which would appear from the evidence of Panchu Gopal Roy, the Manager of the Bank, to have been made, led the Bank to ask Bishuni to get the bond attested by defendants 2 and 3. Panchu Gopal claims to have asked Bishuni to get the bond executed by those two persons and to have been satisfied, on Bishuni pointing out that in that case they would claim a share in the property, if Bishuni would get the bond attested by them.

It appears from the evidence of Mahabir Pathak, P. W. No. 3, that Bishuni brought defendants 2 and 3 from Jharia and that when the latter were asked whether they had any shares in the property, they said: "We have no objection. We accept what is being done by Bishuni Sao." It also appears that the recital that the mortgaged property belonged to Bishuni was explained to them, upon which they said: "We have no objection." An estoppel cannot, it is true be founded upon a representation which is doubtful or a matter of questionable inference; but this only means that the representation should be such as would, in the circumstances of the case, be reasonably understood in the sense contended for by the party to whom it is addressed. Regarded from this point of view, the representation amounted to no less than this: that defendants 2 and 3, so far as they had a title to the mortgaged property and an interest to challenge the mortgage, consented for their interest to represent Bishuni as having the legal right to grant the mortgage of the entire property as if it belonged to him exclusively

7. Debendra Nath Sen v. Mirza Abdul Samad Seraji, (1909) 10 C L J 150=1 I C 264.

—the representation was really much stronger than that of Ahmad in 20 Cal 296.[3] The learned advocate for the appellant has urged that there can be no estoppel where the statement relied upon is made to a person who knows the real facts. That may be conceded but does not help the appellant: the Bank was obviously in doubt about the exclusive title alleged by Bishuni and only accepted the mortgage from him on the representation made by defendants 2 and 3. The representation was quite unlike that discussed in (1854) 5 H L C 185[1] and was much more than a mere expression of any future intention of defendants 2 and 3 or a mere waiver by them.

The learned advocate for the appellant also contended that the estoppel could only bind defendants 2 and 3 personally, or that at any rate it did not bind defendant 5 who purchased their right, title and interest in an execution sale. Estoppels under S. 115, Evidence Act, are by the very terms of the section not confined to parties but extend to their representatives. The learned advocate has contended that the execution purchaser is not a representative of a judgment-debtor, and has cited (1887) 18 Q B D 451[8] and 43 Mad 135,[9] in support. The former was a decision on an interpleader issue with regard to goods taken in execution. The evidence showed that the claimant had not interest in nor the possession of the goods at the time of seizure but that they belonged to a third person. It was held that the execution creditor was entitled to succeed, and that assuming that the execution debtor (who had been paying the hire of the goods to the claimant even after the latter's bankruptcy) was estopped from denying that the goods were the claimant's, such estoppel did not bind the execution creditor. The case was one in which the claimant had no property in the goods at the time of the seizure, but "at the utmost only a right by way of estoppel against the execution-debtor." But in the present case the entire property, including the interest of defendants 2 and 3, had been mortgaged to the Bank and had been purchased by it in the execution sale, and the sale confirmed, before the appellant purchased that interest in his execution. The Bank was thus in a very different position to the appellant than the claimant in 18 Q B D 451[8] to the execution creditor. In 43 Mad 135,[9] the second case relied upon by the learned advocate, the contest was between two execution purchasers. The earlier of these purchases was made in execution proceedings carried on in a Court which had been deprived (by a notification of the Local Government) of local jurisdiction over the subject matter after the application for attachment of the judgment-debtor's property and before the issue of the order of attachment. The judgment-debtor could have objected to the jurisdiction, but omitted to do so and allowed the sale to be confirmed. The other sale, which was later, was held by a Court with jurisdiction at the time in question. The judgment-debtor was precluded by the principle of S. 21, Civil P. C., from asserting afterwards that the earlier execution sale was a nullity because of want of jurisdiction; and Seshagiri Ayyar, J. held that:

> Whatever may be the general position of an execution creditor in regard to cases over which a Court has jurisdiction, the principle of 10 C L J 150[7] should not be extended to cases where the judgment-debtor is sought to be affected by rule of procedure relating to jurisdiction.

This would have been sufficient for the disposal of the matter; but the learned Judge appears also to have dissented from the view taken in 10 C L J 150,[7] viz., that:

> The purchaser at an execution sale is bound by the same rule of estoppel as the judgment-debtor on the principle that the former has purchased merely the right, title and interest of the latter and does not consequently occupy a position of greater advantage.

He was of opinion that in 22 Cal 909[4] the Privy Council should not be taken to have disapproved (1859) 4 H & N 660[10] and 18 Q B D 451,[8] and laid down that an execution creditor under all circumstances is estopped by considerations which affect the judgment-debtor, and that the contrary view would attribute to the Judicial Committee a departure from the decision in 7 Cal 107[11] and from the high authority of the learned Lord Justices who decided 18 Q B D 451.[8] 10 C L J 150[7] has, so far as it lays down a general rule, been

8. Richards v. Jenkins, (1887) 18 Q B D 451=56 L J Q B 293=35 W R 355=56 L T 591.
9. Veerappa Chetty v. Ramasami Chetty, A I R 1920 Mad 505=53 I C 579=37 M L J 442=43 Mad 135.
10. Richards v. Johnston, (1859) 4 H & N 660=1 F & F 447=28 L J Ex 322=5 Jur (n s) 520=157 E R 1000.
11. Dinendranath Sanyal v. Ramkumar Ghose, (1881) 7 Cal 107=8 I A 63=4 Sar 213 (P C).

followed in this Court in 1 Pat 174,[12] where certain exceptions to the rule were also expressly referred to. 18 Q B D 451[8] itself points to the existence of the general rule while furnishing an exception to it. In 7 Cal 107[11] their Lordships of the Judicial Committee merely pointed out that under the rule of *lis pendens* or rather the rule now found in S. 64, Civil P. C., the execution purchaser, notwithstanding that as in a private sale he acquires merely the right, title and interest of the judgment-debtor, acquires that title, by operation of law, adversely to the judgment debtor and freed from all alienations and encumbrances effected by him after the attachment of the property sold. But this plainly does not involve a denial of the general rule unmistakably found in Kay, L. J.'s observations in (1891) 1 Q B D 230[13]:

> Where property is subject to any rights by which it would be bound in the hands of the . . . execution debtor, nothing can be more clear as a general proposition than that it would be subject to such rights as against the execution creditor. The defendants' counsel admitted that as a general rule this was so. . . .

Exceptions to the general rule other than those arising out of the application of the rule of *lis pendens*, &c., have been recognized, such as for example the case put in 14 M I A 101,[14] where it was said that an auction-purchaser from a mortgagor, who takes without notice of the mortgage thinking that he had an absolute title and holds possession for 12 years as absolute owner, was not in the same position as the mortgagor or a person claiming under a voluntary alienation from him. (1854) 4 H & N 660[10] and 7 Cal 107[11] were cited for the appellants in 9 Cal 265[6] in support of the contention that a purchase by a mortgagee in excution of his mortgage decree placed him in a better position than he was in as mortgagee as regards an estoppel (by disclaimer) operative against the mortgagor at the time of the mortgage. The contention was rejected, and the decision of their Lordships of the Judicial Committee implies that there is a general rule and that the cases cited for the appellants were distinguishable on the facts (there being a finding by the jury in (1859) 4 H & N 660[10] that there had been no actual transfer of the property from the judgment-debtor to the claimant's vendor furnished exceptions which did not affect the matter for decision). Their Lordships said that it was admitted that the estoppel would have been binding on a mortgagee or assignee. This was a different estoppel altogether from the rule laid down in I A Sup Vol 40[5] and afterwards embodied in S. 41, T. P. Act. The decision in 22 Cal 909[4] was based on that rule, and their Lordships of the Judicial Committee expressly held :

> This principle applies to Abdul Ali (the original owner) and the appellants (execution purchasers from the heirs) are in the same position, as they purchased only his right, title and interest and are equally bound by it.

This again plainly implies what I have called the general rule, notwithstanding the exceptions that have been recognized from time to time. What Mookerjee, J., showed in 10 C L J 150[7] was the absence of a "comprehensive rule of absence of estoppel against the execution purchaser" deduced from earlier decisions; he was not thinking of the exceptions. The decision in 43 Mad 135[9] furnishes an exception to the general rule of estoppel against the execution purchaser ; but if it was really meant to lay down that there is no general rule such as was expressly recognized in 10 C L J 150[7] and in this Court in the case from 1 Pat 174[12] I must respectfully dissent. When it is said that the execution purchaser is not a representative of the judgment-debtor, what is meant is that there are occasions when he takes the judgment-debtor's property freed from certain encumbrances, etc., created by him.

If the judgment-debtor, whose right, title and interest passes to the execution purchaser, be subject to any estoppel, it might be a question in particular cases whether or not that estoppel binds the execution purchaser, for estoppels are not confined to S. 115, Evidence Act. We are in the present case dealing with an estoppel coming within the ruling in I A Sup Vol 40[5] and included in the wider rule contained in S. 115, Evidence Act. And it seems to me quite clear, notwithstanding anything that was said in 43 Mad 135[9] that what the appellant took by his execution purchase from defendants 2 and 3 was their right, title and interest in house No. 1 subject to the estoppel imposed

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12. Kali Dayal v. Umesh Prashad, A I R 1922 Pat 63=65 I C 266=3 P L T 506=1 Pat 174.
13. Madell v. Thomas, (1891) 1 Q B D 230=60 L J Q B 227=64 L T 9=39 W R 280.
14. Anundo Moyee Dossee v. Dhonendro Chunder Mookerji, (1871) 14 M I A 101=16 W R 19=8 Beng L R 122 (P C).

upon them by their conduct to the plaintiff Bank.

M.D./V.V. *Appeals dismissed.*

A. I. R. 1937 Patna 176

ROWLAND, J.

Ramdin Lal—Accused—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. No. 452 of 1936, Decided on 15th September 1936, from order of Sess. Judge, Patna, D/- 25th July 1936.

(a) Criminal P. C. (1898), Ss. 195 (1) (b), (3) and 407 (1), (2)—Additional District Magistrate is not person to whom second class Magistrate is subordinate within meaning of S. 195 (3)—Additional District Magistrate, therefore, has no jurisdiction to institute complaint of offence committed in Court of Second Class Magistrate.

An appeal from a decision of Second Class Magistrate ordinarily lies under S. 407 (1) to the District Magistrate. So Additional District Magistrate is not a person to whom the Second Class Magistrate is subordinate within meaning of S. 195 (1) (b) and (3) and this position is not altered even if the Additional District Magistrate is empowered under S. 407 (2) to hear appeals. Therefore the Additional District Magistrate has no jurisdiction to institute complaint of offence committed in the Court of a Second Class Magistrate. [P 177 C 1]

(b) Criminal P. C. (1898), S. 537—Scope and object.

After the amendments made in the Code in 1923, Cl. (b) of S. 537 has been repealed and the intention seems to be to keep a want of complaint under S. 476 outside the scope of S. 537. [P 177 C 2]

(c) Criminal P. C. (1898), S. 529 (e)—Words 'not be so empowered' refer to want of power in Magistrate rather than defect in or absence of complaint itself—Cl. (e) does not apply to cases where Magistrate is barred by statute to take proceeding.

Under S. 529 (e) if a Magistrate not empowered by law to take cognizance of an offence under S. 190, sub s. (1), Cl. (a) or Cl. (b) erroneously in good faith does that thing, his proceedings shall not be set aside merely on the ground of his not being so empowered. S. 190, sub-s. (1), Cl. (a) refers to cases in which there is a complaint and cannot cover cases under which it has to be held that there is no complaint as required by law before the Court and the words 'not be so empowered' refer to a want of power in the Magistrate rather than a defect in or absence of the complaint itself. [P 177 C 1]

This being so, Cl. (e) of S. 529 does not apply to a case where there is a statutory bar to the taking of proceedings by a Magistrate. [P 177 C 1]

Avadhesh Nandan Sahay—for Petitioner.

K. K. Banarji for *Asst. Govt. Advocate*—for the Crown.

Order.—The petitioner has been convicted under S. 193, I. P. C., in respect of an offence said to have been committed in respect of false evidence said to have been given in the course of a deposition which he gave before a Second Class Magistrate, Mr. S. M. Rab. After the proceedings in which that deposition had been given had terminated, the accused in that case, one Mithu, moved for an order under S. 476, Criminal P. C., for the institution of proceedings and for the presentation of a complaint against the petitioner. By this time the officer who tried the previous case had been transferred and Mr. Khan referred the matter to the Sub-Divisional Officer or the District Magistrate to determine under S. 559, Criminal P. C., if necessary, who was to be considered the successor of Mr. Rab. A petition was also presented by Mithu to the Additional District Magistrate who took up the matter on this petition and purporting to act under S. 476-A, Criminal P. C., drew up a proceeding and framed a complaint under S. 193, I. P. C., on which the petitioner was tried and convicted as above. The regularity of these proceedings is challenged on the ground that the Additional District Magistrate had no jurisdiction to take any proceeding under S. 476-A, or to institute the complaint in respect of the offence committed in the Court of Mr. Rab.

Under S. 195 (b) the essential preliminary to taking cognizance of an offence under S. 193, I. P. C., committed in a proceeding in any Court is that there should be the complaint in writing of such Court or some other Court to which such Court is subordinate. So the question raised is whether the Additional District Magistrate is some other Court to which the Court of the Second Class Magistrate is subordinate. Sub-s. 3, S. 195 says that a Court shall be deemed to be subordinate for the purposes of this section to the Court to which appeals ordinarily lie from the sentences of the former Court. So we are to see to whom do appeals ordinarily lie from the Court of the Second Class Magistrate. The answer is in S. 407, Cl. (1) of the Code, and the appeal is to the District Magistrate. There is power under S. 407 (2) in the District Magistrate to direct that appeals may be heard by any Magistrate of the first class subordinate to to him and duly empowered and there is power to allow appeals to be presented to such a Subordinate Magistrate.

This does not, however, alter the provision of S. 407, Cl. (1), under which it is to the District Magistrate that the appeal lies in the first instance. An Additional District Magistrate by virtue of S. 10, Cl. (3), is deemed to be subordinate to the District Magistrate for the purpose of this section. It appears to be the opinion of all the High Courts that where a Sub-Divisional Officer or other Magistrate of the first class is empowered under Section 407 (2) to hear or to receive appeals, this will not make him the Court to which the appeals ordinarily lie for the purpose of these sections, and I cannot find any principle on which the case of an Additional District Magistrate can be distinguished from the case of another Magistrate of the first class, subordinate to the District Magistrate. Therefore the complaint was presented by a Court which was not the proper Court having jurisdiction to present it.

It has been suggested by Mr. K. K. Banarji appearing for the Assistant Government Advocate that what has occurred is an irregularity curable by S. 537, Criminal P. C. There are, however, difficulties in the way of taking this view since the amendments made in the Code in 1923. Before that date under S. 537 (b) the want of jurisdiction or any irregularity in any sanction required by S. 195, or any irregularity in proceedings taken under S. 476, was cured if in fact it had not occasioned a failure of justice. But this clause has been repealed and the intention seems to be to keep a want of complaint under S. 476 outside the scope of this section.

It has been suggested that S. 529 (e) may assist the prosecution. Under this clause, if a Magistrate not empowered by law to take cognizance of an offence under S. 190, sub-s. (1), Cl (a) or Cl. (b) erroneously in good faith does that thing, his proceedings shall not be set aside merely on the ground of his not being so empowered. S. 190 sub-s. (1), Cl. (a) refers to cases in which there is a complaint and cannot, I think, cover cases under which it has to be held that there is no complaint as required by law before the Court and the words "not be so empowered" refer to a want of power in the Magistrate rather than a defect in or absence of the complaint itself. On the other hand, S. 530 declares void the proceedings of a Magistrate who not being empowered by law in this behalf [Cl. (p)] tries an offender. I have doubt whether this clause is strictly applicable. It appears to be intended primarily for cases where a Magistrate with limited powers tries a case triable only by a Sessions Court or a Magistrate of a higher class. The case where there is a statutory bar to the taking of proceedings appears to me to stand on its own footing. It comes under the rule that where a statute says that a particular thing shall not be done unless a bar is removed, the statutory prohibition stands, and everything done in contravention of the prohibition is bad. Mr. Banarji cited the Privy Council decision in 54 I A 96,[1] and contended that the distinction between an irregularity and an illegality which has been assumed by the majority of the Courts in India since the decision in 25 Mad 61,[2] is illusory and that in all such cases where an irregularity or even a disobedience of a mandatory provision has occurred, the question is whether it has resulted in a failure of justice, their Lordships having observed:

> The bare fact of such an omission or irregularity as occurred in the case under appeal unaccompanied by any probable suggestion of any failure of justice having been thereby occasioned, is not enough to warrant the quashing of a conviction, which, in their Lordships' view may be supported by the curative provision of Ss 535 and 537.

In this Court, however, the matter does not appear to be res integra. More than once the absence of a complaint under S. 476 has been held to be fatal to the subsequent proceedings, and I think I should not go against those decisions. I may refer to 12 P L T 905[3] and 9 P L T 151.[4] For these reasons the rule must be made absolute and the conviction and sentence set aside. Another point was taken that the charge framed was in contravention of S. 233, Criminal P. C., in that a single charge was framed in respect of two or three statements alleged to be false. The proper course, as has been repeatedly pointed out, is that each distinct offence should be the subject of a dis-

1. Abdul Rahman v. Emperor, A I R 1927 P C 44=100 I C 227=54 I A 96=5 Rang 53 (P C).
2. Subramania Ayyar v. Emperor, (1902) 25 Mad 61=28 I A 257=8 Sar 160 (P C).
3. Subhag Ahir v. Emperor, A I R 1932 Pat 152 =135 P C 520=33 Cr L J 153=11 Pat 155= 12 P L T 905.
4. Barhamdeo Singh v. Emperor, A I R 1928 Pat 102=105 I C 230=28 Cr L J 902=9 P L T 151.

tinct charge. A failure to comply with the provisions of this section may or may not be fatal according to the circumstances of the case. As pointed out in 14 P L T 580,[5] the defect has been condoned in some cases where the accused could not be prejudiced, as for instance, when all the offences charged had been committed on the same day and on the same occasion though it would be otherwise if the offences had been committed at different times and places. In the present case that defect in the charge would not by itself have been fatal; but I wish to say that such defects should be carefully avoided by all Magistrates as far as possible. I am indebted to Mr. Avadhesh Nandan Sahai for the petitioner as well as to Mr. K. K. Banarji who appeared on behalf of the Assistant Government Advocate, for the care and completeness with which they have placed before me the law and the decisions bearing on it.

S.C./D.S. *Rule made absolute.*

5. Sachchidanand Prasad v. Emperor, A I R 1933 Pat 488=144 I C 936=34 Cr L J 892=1933 Cr C 1030=14 P L T 580.

A. I. R. 1937 Patna 178

MOHAMAD NOOR AND MADAN, JJ.

Pheku Mian—Plaintiff—Appellant.

v.

Syed Ali and *others* — Defendants — Respondents.

Appeal No. 325 of 1933, Decided on 7th September 1936, from appellate decree of Addl. Sub-Judge, Darbhanga, D/- 14th December 1932.

(a) Mortgage — Usufructuary — Right of mortgagor is legal right in tangible immoveable property.

The right of a mortgagor in the property which he has given in usufructuary mortgage is a legal right in a tangible immoveable property : *A I R 1928 All 726, Foll.*; *A I R 1925 Mad 566, Rel. on.* [P 179 C 2]

(b) Transfer of Property Act (1882), S. 54—Usufructuary mortgage—Sale of mortgaged property to mortgagee—Delivery of possession can be made by mortgagor renouncing his rights and getting mortgagee's name recorded in Record of Rights.

A delivery of possession when the property is in possession of the vendee can be made by the vendor making a declaration that henceforward whatever right he had has been transferred to the vendee. [P 178 C 2]

Where therefore the property in possession of usufructuary mortgagee was sold to him by the mortgagor and the mortgagor renounced his right and got the name of mortgagee recorded in Record of Rights :

Held : this was sufficient compliance with the provisions of S. 54 : *A I R 1925 Mad 566* and *A I R 1934 Pat 301, Foll.*; *A I R 1933 Cal 411, Rel. on.* [P 180 C 1]

Janak Kishore—for Appellant.

S. K. Mitter—for Respondents.

Mohamad Noor, J.—This appeal arises out of a suit to redeem two usufructuary mortgages, one dated 29th September 1893 for 1 bigha 10 kathas 16 dhurs for Rs. 30 and another dated 6th December 1897, for 10 kathas 15 dhurs for Rs. 15. The mortgage was created by the plaintiff's father Nabi Mian in favour of the ancestor of the defendants. The suit was resisted on the ground that in 1898 Nabi Mian, during the course of the settlement operations, the record of which was finally published on 25th May 1899, orally sold his rights in the lands for Rs. 90 and got the names of the defendants recorded as full owners thereof in the record. The learned Munsif decreed redemption, but on appeal the learned Subordinate Judge has dismissed the suit holding that the case of the defendants about the oral sale was true. The plaintiff has preferred this second appeal. Three points have been urged before us : (1) that after the two usufructuary mortgages the right which was left in Nabi Mian, the mortgagor, (which is commonly called the equity of redemption) could not be orally transferred as it was an intangible property for which a registered deed was necessary under S. 54, T. P. Act ; (2) that even if this right of the mortgagor be held to be a tangible immoveable property the oral sale was ineffective inasmuch as such a sale for a property of the value of less than Rs. 100 could only be made by delivery of possession, but as the properties were already in possession of the mortgagee, it was impossible for the mortgagor to put the vendees in possession of them ; and (3) that the finding of the learned Subordinate Judge was based on no evidence.

Taking up the first point, namely, whether the right left in a mortgagor after he gives his property in usufructuary mortgage, is an intangible or a tangible property, the learned advocate has referred us to a decision of the Calcutta High Court in 23 C W N 513,[1] where it was held

1. Sheikh Hushmat v. Sheikh Jamir A I R 1919 Cal 325=52 I C 558=23 C W N 513.

that the sale of the equity of redemption which was an intangible thing could under S. 54, T. P. Act, be affected only by a registered document. The conveyance was therefore inadmissible to prove the sale and to show when and how the mortgage was satisfied. On the other hand, there is a decision of a Full Bench of the Allahabad High Court in 50 All 986[2] where Mukerji and Kendall, JJ. (Sulaiman, Ag. C. J. dissenting) held that the sale by a mortgagor of his interest in the property which he has given in usufructuary mortgage is the sale of a tangible immoveable property. Now the term "equity of redemption" is a remnant of the old doctrine of English law where the mortgagor after having mortgaged his property lost all legal rights therein and the only right which was left to him was the equitable right of redemption which he could enforce only in equity Courts. This distinction of legal and equitable rights was never recognized by the Indian Legislature where the right of both the mortgagor and the mortgagee in a mortgaged property is a legal right determined by the statute. Strictly speaking in India the term "equity of redemption" is misapplied to the right of the mortgagor. Under the Indian law mortgage is a transfer of an interest in an immoveable property and not a transfer of the property itself. There is some interest still left in the mortgagor and that interest is in the tangible property. Mukerji, J. in the Full Bench decision of the Allahabad High Court has referred to a passage in Salmond (Edn. 13, 1924, p. 209) which is this :

> It (ownership) may . . . continue to subsist although stripped of almost every attribute which makes it valuable . . .

The learned Judge, while discussing how the term "equity of redemption" came to be used in England and what is the position in this country, says :

> In the case of a mortgage in England, as pointed out by that erudite jurist, Holland, the mortgagee, from the date of the mortgage, becomes the 'legal' owner of the property and nothing is left in the mortgagor except what has been called 'a bare equity of redemption.' The Indian Legislature has intentionally refused to import the expression 'equity of redemption,' and for ample good reasons. It had, however, to use the expression 'right to redeem' : *see* S. 60, T. P. Act. But the expression has been used in an entirely different sense. A 'right to redeem' is not the same thing as 'an equity of redemption' in England. In India a host of people, besides the mortgagor himself, are allowed to exercise the right of redemption: *see* S. 91, T. P. Act. One of these persons is a judgment-creditor of the mortgagor. Certainly, the interest of a judgment-creditor of the mortgagor and the interest of the mortgagor himself in the property mortgaged are not identical. It would, therefore, be very wrong to substitute the expression 'right to redeem' for the English expression 'equity of redemption,' and then to say that the 'right to redeem' possession by a mortgagor is an intangible property.

The same view seems to have been taken by the Madras High Court in A I R 1925 Mad 566,[3] where, though the question of the nature of the right of a mortgagor was not directly decided, it was held that where a usufructuary mortgagee in possession of property purchases the property, a direction by the vendor to keep the property as absolute owner amounts to delivery of possession. The position has changed even in England since the passing of the Law of Property Act, 1925. The mortgagee no longer holds a legal estate in the mortgaged property. The mortgagor is the owner at law. On the whole I am inclined to agree with the view taken by the majority of the Judges of the Full Bench of the Allahabad High Court which seems to be more in consonance with the conception of the rights of a mortgagor and a mortgagee according to the Indian law. Therefore, in my opinion, the right of a mortgagor in the property which he has given in usufructuary mortgage is a legal right in a tangible immoveable property.

The next point urged was that assuming that it was a tangible property, even then the sale of it could not be effected by means of delivery of possession. In this connexion it is sufficient to say that the decision of the Madras High Court, which I have just referred to, clearly lays down that a delivery of possession when the property is in possession of the vendee can be made by the vendor making a declaration that henceforward whatever right he had has been transferred to the vendee. The same view was taken by James, J. in this Court in A I R 1934 Pat 301.[4] The learned Judge held that where the vendee of a property sold is already in possession of the property, mutation of the vendee's name in the records is sufficient to constitute delivery of possession so

2. Sohan Lal v. Mohan Lal, A I R 1928 All 726 =118 I C 177=50 All 986=26 A L J 1084 (F B).

3. M. K. Sheikh Dawood Saheb v. Moideen Batcha Saheb, A I R 1925 Mad 566=87 I C 331=48 M L J 264.

4. Santokhi Misser v. Siro Jha, A I R 1934 Pat 301=151 I C 55.

as to satisfy S. 54, T. P. Act. A contrary view was taken by the Full Bench of the Allahabad High Court. But the observations are *obiter dicta* as the case was decided on the basis of adverse possession on account of the document being unregistered. I am inclined to follow the Madras High Court and the decision of James, J. in this Court. In 60 Cal 384[5] Mukerji, J., after referring to a number of decisions, held that a change of character of possession by appropriate and deliberate act was sufficient compliance with S. 54, T. P. Act. I am therefore of opinion that in this case, renouncing his rights by Nabi Mian and getting the name of the defendants recorded in the Record of Rights, was sufficient compliance with the provisions of S. 54, T. P. Act.

The third point urged was that there was no evidence to hold that in fact there was such a delivery of possession by Nabi Mian. The evidence, however, is very clear and it is to the effect that when Nabi Mian was asked by the defendants to execute a formal deed he said that it was not necessary to do so as he would get the names of the defendants recorded in the Record of Rights. The evidence goes further and shows that at an earlier stage of the preparation of the Record of Rights Nabi Mian was recorded as the owner of the holding, but that at his express request the settlement authorities recorded the names of the defendants as raiyats. It is true that the learned Subordinate Judge was not prepared to accept this oral evidence had it not been for the fact that the Record of Rights showed the defendants to be the raiyats of the holding and not only the mortgagees. Apart from the general question which has been raised the Record of Rights must be presumed to be correct, and when the Record of Rights which was prepared so far back as 1899 records the defendants as raiyats, in my opinion the learned Subordinate Judge was right in dismissing the plaintiff's suit. In view of what I have held it is not necessary to consider the other point raised, that the mortgagee can never acquire a title in the mortgaged property by adverse possession. On the finding of the learned Subordinate Judge no question of adverse possession arises. The defendants have acquired good title to the land. It was, however, held in the Madras case[3] above referred to that the principle that possession can be adverse only to the person competent to sue does not apply where the change in character of possession is by mutual consent. The Full Bench decision of the Allahabad High Court also proceeded on the same basis. On the whole the appeal fails and I would dismiss it with costs.

Madan, J.—I agree.

S.C./D.S. *Appeal dismissed.*

5. Kula Chandra Ghose v. Jogendra Chandra Ghose, A I R 1933 Cal 411=141 I C 155=60 Cal 384.

A. I. R. 1937 Patna 180

AGARWALA AND ROWLAND, JJ.

Maharaja Kumar Ramranbijai Prasad Singh—Appellant.

v.

Deoki Ahir and *others*—Respondents.

Appeals Nos. 1521 to 1538 of 1931, (excluding Nos. 1524, 1526, 1528 to 1530, 1532, 1536, 1537) and 1541, 1543, 1548, 1574, 1575 and 1578 of 1931 and Nos. 920, 987, 988, 1018, 1019, 1020 to 1023 of 1933, Decided on 25th March 1936, from decision of Dist. Judge, Shahabad, D/- 21st August 1931.

Agra Tenancy Act (3 of 1926), S. 19—Scope—Leases entered into before and terminating after Act came into force—Non-occupancy tenant liable to ejection by landlord on expiry of term of lease when U. P. Act 2 of 1901 was in force—Such tenant becomes statutory tenant under S. 19 of the Act—Such tenant is not liable to be ejected after expiration of lease.

The words of S. 19 are wide and they apply not only to tenancies in existence at the commencement of the Act but to affect contracts entered into before the Act and intended to be fulfilled after its commencement. [P 182 C 1, 2; P 183 C 1]

Persons who were non-occupancy tenants liable to be ejected by the landlord on the expiry of the terms of their leases under U. P. Act 2 of 1901, become statutory tenants within the meaning of S. 19 of the Act, and cannot be ejected by the landlord after expiry of the terms of leases inasmuch as the legislature did not make any provision for excepting leases entered into before and terminating after the Act of 1926, came into force: *West* v. *Gwynne*, *(1911) 2 Ch D 1*, *Rel. on.* [P 181 C 1; P 182 C 1]

S. M. Mullick, *Ramnandan Prasad* and *Rajeshwari Prasad*—for Appellant.

Parsuram Pd. Varma (in 1521 and 988); *S. N. Ray* (in 1523, 1533, 1534, 1538, 1541, 1543, 1570, 1574, 1575, 1578, 1019, 1021, 1022 and 1023); *Harians Kumar* (for guardian in 1527); *B. N. Mitter*, *K. N. Moitra*, *J. N. Shai* (in 1548) and *Harnarayan Prasad* (in 920 and 987)—for Respondents.

Agarwala, J.—The plaintiff-appellant, the Maharaja of Dumraon, instituted, in March 1929, 28 suits to eject tenants of land in Jaunhi Diara. The defendants had been inducted on to the land under registered kabuliats for a term; in each case the term was for seven years. At the time when the kabuliats were executed the demised land was in the district of Ballia in the United Provinces. Owing to a change in the course of the deep stream of the river Ganges in November 1926, the land became part of the district of Shahabad in this province. Up to 7th September 1926 the tenancy law governing the land was the United Provinces Act, 2 of 1901. On 7th September 1926, a new Act (The Agra Tenancy Act, 3 of 1926) came into operation and the Act of 1901 was repealed. Under the Act of 1901 the defendants in the present suit were non-occupancy tenants liable to be ejected by the landlord on the expiry of the term of their leases. Under the new Act of 1926 it is contended on behalf of the defendants that they have acquired the status of statutory tenants within the meaning of S. 19 of that Act, and, therefore, the landlord is not entitled to possession of the demised lands during the lifetime of the tenants and five years thereafter.

The only question that has been argued by Mr. S. M. Mullick, who appeared for the appellant in the majority of the cases, and whose arguments have been adopted by the learned advocates appearing in the remaining cases, is whether the decision of the Court below that the defendants have acquired the rights of statutory tenants within the meaning of S. 19, Agra Tenancy Act, 3 of 1926, is correct or not. It may be mentioned, however, that it has been found by the Courts below in some of the suits out of which these appeals have arisen that the defendants have acquired occupancy rights in the land; and in some of the suits it was also found that the plaintiff's right to recover possession was barred by limitation. With regard to the question that was argued by Mr. S. M. Mullick, namely the status of the defendants, it is contended that S. 19 of Act 3 of 1926 has no retrospective effect and, therefore, that the rights which the plaintiff had up to the time of the passing of that Act are not affected by the Act. In the present case the right which is alleged to have been affected is the right of the Maharaja to recover possession of the land on the expiry of the terms of the leases, which right was expressly mentioned in the kabuliats. The argument, in my opinion, reveals a confusion of thought about the meaning of the word "retrospective" as applied to statutory provisions. The meaning of this term was considered in (1911) 2 Ch D 1[1] by Buckley, L. J. in a case which arose under S. 3, of the Conveyancing Act of 1892. That section provided that in all leases containing a restriction against alienation without the consent of the lessor it should be deemed that there was a proviso to the effect that no fine, or sum of money in the nature of a fine, should be payable for or in respect of such consent. It was argued in that case that this section did not have retrospective effect and, therefore, that the statutory proviso could not be read into leases which had been executed before the Conveyancing Act of 1892 came into operation. With regard to the argument Buckley, L. J. said:

> During the argument the words 'retrospective' and 'retroactive' have been repeatedly used, and the question has been stated to be whether S. 3 of the Conveyancing Act, 1892, is retrospective. To my mind the word 'retrospective' is inappropriate, and the question is not whether the section is retrospective. Retrospective operation is one matter, interference with existing rights is another. If an Act provides that as at a past date the law shall be taken to have been that which it was not, that Act I understand to be retrospective. That is not this case. The question here is whether a certain provision as to the contents of leases is addressed to the case of all leases or only of some, namely leases executed after the passing of the Act. The question is as to the ambit and scope of the Act, and not as to the date as from which the new law, as enacted by the Act, is to be taken to have been the law.

Now in the cases before us, at the time when the Act of 1901 ceased to operate and the new Tenancy Act of 1926 came into operation, the lessor had not the right to present possession of the lands. That was a right which would, in due course, have accrued to him, but it was not a right which he had at the time when the new Act came into force. The new Act has not taken away any right which he had in the past, that is to say, before the Act of 1926 came into operation, or which he had at the moment when that Act came into operation. It has merely taken away a right which would have accrued to him in due time but which had not in fact

1. West v. Gwynne, (1911) 2 Ch D 1=80 L J Ch 578=104 L T 759=58 S J 519=27 T L R 444.

then accrued. In this view of the matter, it seems to me that the argument with regard to the "retrospective effect" of the statute is irrelevant in the present case. Nor can I find anything in the statute to indicate that it was intended to have the effect contended for, namely, to leave untouched the position of landlords whose lands were held on leases at the time the Act of 1926 came into operation. The material portion of S. 19 is as follows :

> Subject to the provisions of sub-s. 3 of S. 8, every person who is, at the commencement of this Act, a tenant of land (other than land of certain specified character) not being a permanent tenure-holder or a tenant, with a right of occupancy or a tenant holding from a permanent tenure-holder, shall be called a statutory tenant and, subject to the provisions of this Act, shall be entitled to a life-tenancy of his holding.

There follows a proviso that no statutory rights shall accrue in favour of a sub-tenant and that no sub-tenant shall be deemed a statutory tenant. The section provides that "every person" who is a tenant of land (not being land of the excepted class) at the commencement of the Act, shall be called a statutory tenant. To accept the construction which the learned advocate for the appellant seeks to put on this section, it would be necessary to read after the words "every person," restrictions against those persons who were holding under leases for a term at the time when the Act came into operation. That was very much like what was sought to be done in (1911) 2 Ch D 1,[1] already referred to, and which the Court of appeal declined to do. Kennedy, L. J., in reference to this argument, said :

> The opening words 'In all leases' prima facie negative a distinction between leases made before and leases made after the passing of the Act. Nor is there anything in the context to prevent or modify this inference. In order to give the section the limited application for which the appellant contends, you must add by implication after the words 'all leases' some such words as 'made after the passing of this Act.'

Their Lordships held that they were not entitled to do this. The opening words of S. 3 of the Conveyancing Act "in all leases" were held to be perfectly general and not to be confined to leases executed after the passing of the Conveyancing Act. Similarly, S. 19 of the Act of 1926 is expressed to apply to "every person" and we are not entitled to read it as though it were "every person except those holding on leases for a term at the time that the Act comes into operation." There is all the less reason to import this limitation into the section in the present case in view of the fact that the Legislature has itself omitted it while expressly barring the acquisition of statutory tenancy rights by sub-tenants and making the operation of S. 19 subject only to the provisions of sub-s. 3 of S. 8. Sub-s. 3 of S. 8 has no bearing on the question we have to decide. Mr. Mullick contends that the landlord's right to re-enter has not been taken away by S. 19. S. 8 (1) of the Act, however, provides as follows :

> Every agreement which purports, or would operate, to restrict a tenant from enforcing or exercising any right conferred on or secured to him by this Act is void to that extent.

It is contended that the sub-section does not affect a contract which was in existence when the Act came into operation. In the first place the generality of the expression 'every agreement' has not been limited and therefore on the analogy of (1911) 2 Ch D 1,[1] full effect must be given to it. Secondly, a comparison of the language of S. 8 (1) of the Act of 1926 with that of the corresponding section of the Act of 1901, namely S. 3 (1) shows that it was not the intention of the Legislature to make any exception in favour of existing agreements. S. 3 (1) of the Act of 1901 was as follows :

> Notwithstanding anything contained in S. 2, nothing in any lease or agreement made between a landholder and a tenant on or after the first day of April 1900, shall take away or limit any right of the tenant as conferred or recognized by this Act.

The Legislature, therefore, when it intended to save the rights under certain agreements, i. e., agreements made before a certain date, said so. There is no such provision in the Act of 1926. For these reasons I would dismiss these appeals, except Nos. 1521, 1533, 1534 and 1538, with costs. There will be separate pleaders' fee for each batch of the respondents represented at the hearing. In Second Appeals Nos. 1521, 1533, 1534 and 1538 petitions of compromise have been presented today. Let these petitions be filed and these four appeals be disposed of in terms of the petitions. In Second Appeal No. 1533 respondents 4 and 5, having died and the appeal having abated as against them, an application to set aside the abatement has been made on behalf of the appellant. The respondents agreed to the abatement being set aside. Let this be done and let the heirs of the deceased respondents be substituted in the appeal. In

Second Appeal No. 1534, respondent 2 has died and the appeal has abated as against him. It is agreed that the abatement be set aside and that his heirs be substituted in the appeal. Let this be done.

Rowland, J.—I agree. The words of the statute are wide and I have no doubt that they apply not only to tenancies in existence at the commencement of the Act but to affect contracts entered into before the Act and intended to be fulfilled after its commencement.

K.B./A.L. *Order accordingly.*

A. I. R. 1937 Patna 183

COURTNEY-TERRELL, C. J. AND FAZL ALI, J.

Badri Chaudhuri — Defendant — Appellant.

v.

Mt. Chamoa Chaudhrain, Plaintiff and *others*, Defendants—Respondents.

Appeal No. 119 of 1932, Decided on 26th February 1936, from original decree of Sub-Judge, Darbhanga, D/- 30th April 1932.

(a) Arbitration—Power of Court—Indivisibility of award—Arbitrators in award laying down scheme for management of property by which they gave *A* rights of ownership and *B* managership — In case of waste of property by *A* they provided for control of property by themselves and by *B* — Provisions fettering *A's* right held formed part of scheme and hence could not be separated from rest — Award could be set aside in its entirety and not in part.

A dispute between *A* and *B* regarding some property was referred to arbitration. The arbitrators by an award laid down a scheme whereby they intended to give *A* the position of the owner of the properties and *B* the position of a mere manager. They did not however intend to give *A* any higher rights than of a life owner, and in their anxiety to prevent the property from being wasted by *A* they provided by way of penalty that in case any waste was committed by *A*, she would be divested of her right as owner and the right would vest in *B*. They also provided that the arbitrators should in case of doubt be at liberty to control the management of the property. The Subordinate Judge deleted the provisions which fettered right of *A* of management and confirmed rest of the award :

Held : that the provisions of award restricting the powers of *A* being part of the scheme of management devised by the arbitrators could not be severed from other provisions and therefore the award could be set aside only in its entirety and not in part. [P 184 C 1, 2]

(b) Registration Act (1908), S. 17 — Award made without intervention of Court declaring rights of parties as basis of their title — Such declaration of rights is not mere recital of facts—Registration of award therefore is compulsory.

Where the declaration as to the rights of the parties is made in an award such declaration of rights cannot be held to amount to mere recital of facts but becomes the basis of the title of the parties in the sense that whatever the previous rights of the parties may have been, if the award is valid and can be enforced in a Court of law, the rights of the parties as declared by the award can also be enforced. This being so, such award should be compulsorily registrable. [P 185 C 1, 2]

Hasan Jan and *Saileswar De* — for Appellant.

R. K. Jha, Hareshwar Prasad Sinha and *Ramnandan Prasad* — for Respondents.

Fazl Ali, J.—This appeal arises out of a suit which related to an award made by certain arbitrators without the intervention of Court. The case which the plaintiff sought to make out at first was that the award was liable to be set aside in its entirety, but some time after the institution of the suit she made an application for the amendment of the plaint in which she asked the Court to set aside the award not in its entirety but only in part. The defendant Badri Chaudhuri, who is the appellant in this Court, contended in his written statement that the award was valid and binding on the parties. The learned Subordinate Judge having in the decree which he passed in the suit upheld certain portions of the award and declared the other portions as inoperative, defendant Badri Chaudhuri now appeals against the decision of the Subordinate Judge and contends that the award should be either upheld or set aside in its entirety. The plaintiff is admittedly the widow of one Murat Chaudhuri and the defendant Badri Chaudhuri is his nephew. After the death of Murat Chaudhuri a dispute arose between the plaintiff and Badri as to who should succeed to his estate, and both parties ultimately agreed to refer their dispute to certain persons who were appointed by them as arbitrators by a deed of reference, dated 12th December 1930. The arbitrators were under this deed empowered to give their award upon taking oral and documentary evidence regarding the immoveable and moveable properties appertaining to the estate of Babu Murat Chaudhuri aforesaid.

The arbitrators gave their award on 25th December 1930. According to the award the plaintiff was to

continue as usual to be in possession and occupation as the malik of the house in place of Babu Murat Chaudhuri deceased,

and Badri Chaudhuri was to

continue to work according to the instructions of the said Musammat just in the same way as he used to do in his uncle's time.

The arbitrators further, after referring to the principal items of property constituting the estate of Murat Chaudhury, proceeded to lay down that the cloth shop, which was part of the assets of Murat Chaudhuri, was to be managed by Badri Chaudhuri, and if the business resulted in loss the shop was to be closed and the money deposited "into the treasury of the Musammat." The arbitrators also provided that in case the plaintiff wilfully wasted "the money and the bond," the powers conferred upon her were to be exercised by Badri Chaudhuri and she was to have no right except that of receiving maintenance from Badri. The award then concludes with the following provision :

The arbitrators shall, in case of doubt and suspicion, be at liberty to examine the properties mentioned in para. 3.

There can be no doubt upon a careful reading of this award in the light of the allegations of the parties as to their respective rights in the property of Murat Chaudhuri that the arbitrators intended to give to the plaintiff the position of the owner of the properties left by Murat Chaudhuri and to defendant Badri Chaudhuri the position of a mere servant or manager. They did not however intend to give to the plaintiff any higher rights than that of a life owner, and in their anxiety to prevent the property from being wasted by the plaintiff they provided by way of penalty that in case any waste was committed by her she would be divested of her rights in the property as owner and the rights would vest in Badri Chaudhuri. The award, however, though as far as it goes it aims at doing substantial justice between the parties, contains certain clauses which make it almost unworkable, with the result that neither party seems to be satisfied with it as a whole. Thus both the parties conceded before the learned Subordinate Judge that the particular provision in the award by which the arbitrators had empowered themselves to inspect and control the properties and the affairs of the parties was ultra vires and beyond the scope of the reference. The learned Subordinate Judge on hearing the parties came to the conclusion that this provision must be deleted from the award and he also set aside the award with respect to certain other matters. The material part of his judgment runs as follows :

Consequently while the award can remain intact for the first portion it must be set aside of the second. I therefore uphold the award so far as it is covered by the terms of the reference, i e., Paras. 1, 2, 3 and a portion of Para. 4 and set it aside with respect to the rest barring Para. 6 which lays down that in case the cloth business proves a losing concern it should be closed.

Paragraphs 1, 2 and 3 are practically devoted to a narration of the facts which led to arbitration and the description of the properties left by Murat Chaudhuri. Para. 4 is the most important paragraph in the award because it defines the status of the parties and describes the plaintiff as the malik of the house and provides that defendant Badri Chaudhuri shall continue to work according to the instructions of the plaintiff. The remaining paragraphs provide how the properties should be managed by the parties. The question which is to be considered in this appeal is whether that part of the award which has been declared to be inoperative is severable from the parts which have been upheld. It seems to me to be clear that the arbitrators in their award propounded an entire scheme as to the management of the property and it is difficult to uphold a part of the scheme and delete the remaining part of it. What the arbitrators seem to have intended was that although the defendant should be given a subordinate position in the management of the properties, yet the management should be carried on with his co-operation. The provisions of the award, therefore, which restrict the powers of the plaintiff being part of the scheme of management devised by the arbitrators, cannot be easily severed from the other provisions where the status of the parties has been defined. In my opinion, therefore, the defendant's contention that the award should be set aside in its entirety must be upheld. Indeed this was the original prayer made by the plaintiff herself in her plaint at the date of the institution of the suit, though subsequently she modified the prayer. There is also a legal difficulty in upholding the award, because it has not been registered. It is

now beyond dispute that an award made by arbitrators without the intervention of Court is compulsorily registrable if it falls within Cl (b), S. 17, Registration Act. This clause refers to

non-testamentary instruments which purport or operate to create declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, of the value of one hundred rupees and upwards, to or in immoveable property.

The contention put forward on behalf of the appellant is that the award in question required registration, because it had at least declared the rights of the parties in the immoveable properties left by Murat Chaudhuri. The learned advocate for the respondents, however, contends that the word 'declare' as used in S. 17, Cl. (b) has been used in a special and restricted sense, because it is used in juxtaposition with the expression 'assign, limit or extinguish' and he relies in support of this argument upon the decision of the Judicial Committee in 59 I A 130.[1] In that case the Judicial Committee after referring to certain decisions of the Indian Courts upon the true construction of S. 17, Registration Act, observed :

Their Lordships have no doubt that this track of decision is right. Though the word 'declare' might be given a wider meaning, they are satisfied that the view originally taken by West, J. is right. The distinction is between a mere recital of a fact and something which in itself creates a title. The distinction has been acted on in cases connected with mortgages by deposit of documents of title.

In the case which was actually before their Lordships the question was whether a certain petition presented to the commissioner was admissible in evidence without registration. Their Lordships held that the particular clauses of that petition, which were relied upon as constituting a declaration of certain rights in immoveable property, were mere recitals of existing facts. In the present case, however, the declaration as to the rights of the parties being made in an award cannot be held to amount to mere recital of facts but become the basis of the title of the parties in the sense that whatever the previous rights of the parties may have been, if the award is valid and can be enforced in a Court of law, the rights of the parties as declared by the award can also be enforced. This being so, I think that the award should have been registered and as S. 49, Registration Act, lays down in clear terms that no document which is required to be registered shall be received as evidence of any transactions affecting such property, or affecting any immoveable property comprised therein, the award in question was not admissible in evidence. The mere fact that the defendant did not raise any objection to the admissibility of the award in the trial Court will not affect the question, because S. 49 is mandatory. In this view the appeal will be allowed and the award will be set aside in its entirety. In the circumstances of the case, however, the parties will bear their own costs throughout.

Courtney-Terrell, C. J. — I agree.

S.C./D.S. *Appeal allowed.*

1. Bageshwari Charan Singh v. Jagarnath Kuari, A I R 1932 P C 55=136 I C 798=59 I A 130=11 Pat 272 (P C).

*** * A. I. R. 1937 Patna 185**

FULL BENCH

COURTNEY-TERRELL, C. J.,
FAZL ALI AND JAMES, JJ.

Bishwanath Sao and *others* — Appellants.

v.

Official Receiver and *others* — Respondents.

Misc. Appeal No. 29 of 1936, Decided on 20th October 1936, from order of Dist. Judge, Bhagalpur, D/- 20th December 1935.

(a) Provincial Insolvency Act (1920), S. 2 (d)—Definition of property is not exhaustive —Power of Hindu father to sell son's interest in family property for payment of legitimate debts is property of insolvent.

The definition of the word 'property' in S. 2 (d) is not exhaustive, but was inserted only to emphasize the fact that certain kinds of property which in ordinary parlance may not be regarded as the property of the insolvent are to be treated as 'property' for the purpose of the Insolvency Act. The word 'property' as used in the Act includes all valuable right or rights which may be turned into money or whose worth can be assessed in money. The power of the Hindu father to sell his son's interest in the family property, for the payment of his legitimate debts, is, therefore, property of the insolvent within the meaning of S. 2 (d) : *Jones* v. *Skinner*, (*1835*) *5 L J Ch 87*, *Rel. on.* [P 187 C 2; P 188 C 1]

(b) Interpretation of Statutes—Meaning of word 'includes.'

When in an interpretation clause it is stated that a certain term includes so and so, it is implied that the term retains its ordinary meaning whatever else it may mean. [P 187 C 2]

*** * (c) Provincial Insolvency Act (1920), Ss. 28 (2) and 59—Joint Hindu family—Insol-**

vency of father—Son's interest in family property does not vest in receiver — But father's power to sell family property including son's interest for payment of his legitimate debts vests in receiver: *161 I C 167; A I R 1936 Pat 115=17 P L T 39, OVERRULED.*

When a Hindu father is adjudicated insolvent, the interest of his son or sons in the family property does not vest in the Court or the receiver, but the Court or the receiver has power to sell the joint family property including the interest of the minor son or sons of the insolvent for the payment of his antecedent debts not incurred for immoral or illegal purposes: *A I R 1925 P C 18, Discussed*; *A I R 1926 Mad 994 (F B)*; *A I R 1931 All 162 (F B)*; *A I R 1931 Bom 50*; *A I R 1926 Lah 41* and *A I R 1936 P C 277 Rel. on*; *A I R 1926 Pat 438* and *A I R 1932 Pat 231 Approv.*; *161 I C 167=A I R 1936 Pat 115=17 P L T 39*, **Overruled.** [P 189 C 2]

A. B. Mukherjee and *M. Rahman*—for Appellants.

S. M. Mullick and *D. L. Nandkeolyar*—for Respondents.

Fazl Ali, J.—The principal question to be decided in this reference is whether upon the father of a Hindu joint family being adjudicated insolvent under the Provincial Insolvency Act, the Insolvency Court or the receiver has power to sell the property of the joint Hindu family including the interest of the minor son of the insolvent.

If we act on the maxim *stare decisis* there can be no difficulty whatsoever in deciding this question, because in a long course of decisions under the present Insolvency Act as well as the enactments which preceded this Act it has been held that the Insolvency Court or the receiver appointed by it has the same power over the joint family property as the insolvent had and can therefore sell not only the interest of the father who has been declared insolvent but also the interest of his son or sons in order to pay off such of his antecedent debts as are not shown to have been contracted for any illegal or immoral purposes. It is however contended before us that these decisions are not correct and at any rate the matter requires further examination in view of the decision of the Privy Council in 6 Lah 1[1]. In that case a Hindu son instituted a suit to establish his right of pre-emption in respect of certain property which adjoined the ancestral property of the family to which he belonged; but the suit was resisted on the ground that his father having been declared an insolvent the whole property including his interest had vested in the Receiver and that consequently he was not entitled to pre-empt. This objection found favour with the High Court but their Lordships of the Judicial Committee overruling the decision of the High Court held that it was not the intention of the statute under which the case had been decided (that statute being the Presidency Towns Insolvency Act) that on the insolvency of a father the joint property of his family should at once vest in the Official Assignee. It may be stated here that the question whether the Official Assignee could sell the entire family property including the interest of the son for the payment of the just debts of the father did not arise directly before the Judicial Committee. Their Lordships however referred to S. 2(e) of the Act which defines the word 'property' and to S. 52 (2) (b) which provides that :

> The property of the insolvent divisible among his creditors shall comprise the capacity to exercise and to take proceedings for exercising all such powers in or over or in respect of property as might have been exercised by the insolvent for his own benefit.

Section 2 (e) states that 'property' includes any property over which or the profits of which any person has a disposing power which he may exercise for his own benefit and after referring to this provision their Lordships observed as follows :

> The father's power to dispose of the joint property is not absolute but conditional on his having debts which are liable to be satisfied out of that property and S. 2 seems to contemplate an absolute and unconditional power of disposal.

As to S. 52 their Lordships said :

> It may be that under the provisions of S. 52 or in some other way that property (the joint property of the family) may in a proper case be made available for the payment of the father's just debts.

The argument which is founded upon these observations is twofold : (1) that as the definition of the word 'property' in the Presidency Towns Insolvency Act which was construed by the Privy Council is identical with the definition in the Provincial Insolvency Act, it can no longer be held that the power which the father has to sell the whole of the ancestral property including his son's interest in satisfaction of his just debts (debts which were not contracted for illegal or immoral purposes) is property of the insolvent within the meaning of the statute; and (2) that though having regard to the language of S. 52, Presidency Towns Insolvency Act, it might be possible to hold that under

1. Sat Narayan v. Behari Lal, A I R 1925 P C 18=84 I C 883=52 I A 22=6 Lah 1 (P C).

that Act the joint family property including the interest of the son is available for the payment of the father's legitimate debts, there being no similar provisions in the Provincial Insolvency Act, such property cannot be sold by the Court or the Receiver in cases arising under the latter Act. The argument is a plausible one and as it seems to have found favour with a Division Bench of this Court in 17 P L T 39[2] and several distinguished Judges of other High Courts, it becomes necessary to examine the matter with care. The provisions of the Insolvency Act which are relevant to the present discussion are contained in S. 28 (2) and S. 59. S. 28 (2) runs as follows :

> On the making of an order of adjudication, *the whole of the property of the* insolvent shall vest in the Court or in a receiver as hereinafter provided, and shall become divisible among the creditors . . . .

The words have been underlined [*italicized*] by me. Again S. 59 lays down :

> Subject to the provisions of this Act, the receiver shall, with all convenient speed, realize *the property of the debtor* and distribute dividends among the creditors entitled thereto, and for that purpose may sell all or any part of the property of the insolvent.

It is quite clear from these provisions that the whole of the insolvent's property is available to the receiver for the payment of his legitimate debts and therefore the crucial question to be considered is whether the power or the right which the father has under the Hindu law to sell his son's interest for the payment of his proper debts is "property of the insolvent" within the meaning of the statute. Now, as I have already indicated, in S. 2 (d) .of the Act it is stated that :

> Property includes any property over which or the profits of which any person has a disposing power which he may exercise for his own benefit.

The view which seems to have prevailed in all the High Courts in this country before the decision of the Judicial Committee in *Sat Narayan's case*[1] was that this clause was wide enough to cover the power of the father to sell his son's interest for the payment of his legitimate debts. But in almost all the cases which have been decided recently it has been held that this view must be abandoned in the light of the observations of the Privy Council that the words quoted above seem to contemplate an absolute and unconditional power of disposal and not a power which could be exercised only upon proof that the property had to be sold for the payment of antecedent debts and that the debts had not been contracted for any illegal or immoral purposes. The actual words used by the Privy Council in this connection are these :

> The father's power to dispose of the joint property is not absolute but conditional on his having debts which are liable to be satisfied out of that property ; and S. 2 seems to contemplate an absolute and unconditional power of disposal. *And* if the later sections of the Act are examined, it becomes apparent that *this* cannot have been the intention of the Statute.

The words "And" and "this" have been underlined [*italicized*] by me. One of the arguments which was addressed to us was that this passage has been generally misunderstood and that what their Lordships intended to point out was that the apparent meaning conveyed by the words used in S. 2 (d) could not be their real meaning, because such a meaning was not in consonance with the intention of the statute. This argument becomes plausible if we read the word *and* as 'but,' and if we remember that the underlined [*italicized*] word *this* could have reference only to what was said in the previous sentence as to the apparent meaning of S. 2. Assuming, however, that this interpretation of their Lordships' judgment is not correct, it seems to me to be quite clear that the definition of the word "property" in S. 2 (d), Prov. Insol. Act, is not exhaustive but was inserted only to emphasize the fact that certain kinds of property, which in ordinary parlance may not be regarded as the property of the insolvent, are to be treated as "property" for the purpose of the Insolvency Act. It is to be noticed that in defining the various words which were intended to be defined in S. 2 sometimes the word "means" has been used and sometimes the word "includes" has been used. It seems to me to be clear that when in an interpretation clause it is stated that a certain term includes so and so, it is implied that the term retains its ordinary meaning whatever else it may mean. If therefore it is held that the definition of the word "property" in S. 2 is not exhaustive, it becomes necessary to consider whether the peculiar right of disposal which the father has over his son's interest in the joint family property is or is not property within the ordinary meaning of the term. The word

2. Nilkantha Narayan Tewari v. Debendra Nath Ray, A I R 1936 Pat 115=161 I C 167 =15 Pat 363=17 P L T 39.

"property" as far as I am aware has not been exhaustively defined in any Indian statute; but to use the language of Lord Langdale:

> It is the most comprehensive of all terms which can be used inasmuch as it is indicative and descriptive of every possible interest which the party can have: *see* (1835) 5 L J Ch 87.[3]

I do not wish to encumber this discussion by referring to the wide range of rights and objects to which the word "property" has been held to be applicable, but I think that it can be legitimately held that the word "property" as used in the Provincial Insolvency Act includes, to use the language of the learned author of a well known text book,

> all valuable right or rights which may be turned into money or whose worth can be assessed in money (William s Principles of the Law of Real Property, Edn. 24, 1926, p. 4).

This simple definition of the word "property" is in my opinion comprehensive enough to include the right which the father has of bringing to sale his son's interest to pay his own legitimate debts. The position of the father in a Hindu joint family is a peculiar one and if we give a restricted meaning to the word "property" and construe it to mean only those objects and rights over which the father has an absolute power of disposal, the question as to what is the whole property of the father which vests in the Receiver under S. 28, when he has been declared insolvent, would be surrounded with many difficulties and it may even be questioned whether strictly speaking any property would vest in the Receiver. The question has been dealt with so exhaustively by Mukerji and King, JJ in 53 All 239,[4] that I shall content myself by reproducing the following passage from the judgment of King, J.:

> It must be remembered that the father's power of disposal of his own undivided share is no greater than his power of disposing of the entire co-parcenary property. His undivided share only belongs to him in the sense that it would fall to his share in the event of a partition. I doubt whether his undivided share can properly be said to be "vested" in him. The share is indefinite and fluctuating in extent. The ownership of the co-parcenary property is vested in the whole body of co-parceners. No individual member can claim that he has a definite share. The father's power of disposal of his undivided share is conspicuous by its absence. He cannot dispose of it by gift or by will. On his death intestate it does not pass to his heirs. He cannot even alienate it for value without the consent of his co parceners. In short his power of dealing with his undivided share is no greater than his power of dealing with the co-parcenary property as a whole. Considering that the father can be said to 'own' his undivided share in a very limited sense, and that he has no special power of disposing of that share, I think it will be very anomalous, if only his undivided share vests in the receiver, while his very valuable right and power of disposing of the joint family property for discharging his personal debts does not so vest.

I may state here that the decision of the Privy Council in 6 Lah 1[1] has been explained in a series of cases and almost all the High Courts are now agreed that the view which prevailed before that decision should be adhered to: *see* 49 Mad 849,[5] 53 All 239,[4] 55 Bom 110,[6] 6 Lah 493.[7] The matter has also been set at rest by the Judicial Committee in their recent decision in 17 P L T 717[8] so far as cases arising under the Presidency Towns Insolvency Act are concerned. In that case it has been held that though upon the adjudication of a Hindu father as insolvent the son's interest in the family property does not vest in the Official Assignee, yet the capacity to exercise the power of the insolvent father to sell the joint family property for his antecedent debts not incurred for immoral or illegal purposes vests in him under S. 52 (2) (b), Presidency Towns Insolvency Act. As I have already stated there is no provision in the Provincial Insolvency Act corresponding to S. 52 (2) (b), Presidency Towns Insolvency Act, but their Lordships have at least in one passage referred to S. 17 of that Act which does correspond to S. 28, Provincial Insolvency Act. However that may be, I think that the legislature could never have intended that while in the Presidency-towns the Official Assignee should be able to sell the undivided share of the son to pay the father's debt, the Court or the receiver should not have such a power in the mofussil towns. It is to be remembered that the Presidency Towns Insolvency Act was enacted in 1909, whereas the Provincial Insolvency Act was enacted

3. Jones v. Skinner, (1835) 5 L J Ch 87.
4. Anand Prakash v. Narain Das Dori Lal, A I R 1931 All 162 =135 I C 119=53 All 239=1931 A L J 122 (F B).
5. Balavenkata Seetharama Chettiar v. Official Receiver, Tanjore, A I R 1926 Mad 994=97 I C 825=49 Mad 849=51 M L J 269 (F B).
6. Haridas Himatlal v. Lallubhai Mulchand Mehta, A I R 1931 Bom 50 =129 I C 153= =55 Bom 110=32 Bom L R 1362.
7. Khem Chand v. Narain Das, A I R 1926 Lah 41=89 I C 1022=6 Lah 493=26 P L R 848.
8. Sat Narain v. Sri Kishen Das, A I R 1936 P C 277=164 I C 6=63 I A 384=17 Lah 644=17 P L T 717 (P C).

11 years later in 1920. In S. 52, Presidency Towns Insolvency Act all that is enacted is that the property of the insolvent shall comprise the capacity to exercise and to take proceedings for exercising all such powers in or over or in respect of property as might have been exercised by the insolvent for his own benefit at the commencement of his insolvency or before his discharge. This provision merely emphasizes that the capacity to exercise the powers referred to therein is a species of property. The mere absence therefore of words corresponding to those used in S. 52 which merely refer to a species of property cannot restrict the meaning of the word "property." This word, as I have already stated, has ordinarily a very wide meaning and might, even without there being any express provision specifying what it does and what it does not comprise, embrace all those rights and interests which are said to be comprised within the term "property" according to S. 52, Presidency Towns Insolvency Act. As the law applicable to the Presidency-towns was modelled on the English law, most of the provisions in the Presidency Towns Insolvency Act have been copied from the English Bankruptcy Act and S. 52 of the former Act is almost a verbatim reproduction of S. 38 of the latter Act. Some of these provisions however may not have been reproduced in the Provincial Insolvency Act because they were considered redundant or unnecessary.

I think that under the old decisions it was possible to take the view that under S. 28 the whole property which the father could sell voluntarily to pay off his debts is by operation of law transferred to the Court or the Receiver. This view can no longer be taken, because it has been definitely held by the Privy Council that upon the adjudication of a Hindu father the son's interest in the family property does not vest in the Official Assignee or the Receiver. This decision, however, does not affect the view that a Receiver, by his peculiar position under the Act, may be taken to represent the insolvent as well his creditors. If he represents the insolvent, it would be illogical to hold that he cannot exercise the power which the insolvent could exercise to pay off his debts; and similarly it would be contrary to principle to hold that though the holder of a simple decree against the father can attach and sell the joint family property including the interest of his sons, the Receiver is unable to do so. In my opinion the answer to the first question which has been submitted to us for decision should be given in the following terms: When a Hindu father is adjudicated insolvent, the interest of his son or sons in the family property does not vest in the Court or the Receiver, but the Court or the Receiver has power to sell the joint family property including the interest of the minor son or sons of the insolvent for the payment of his antecedent debts not incurred for immoral or illegal purposes. The second and the third questions which have been referred to this Bench have been formulated in these terms:

(2) Having regard to the decision of the Judicial Committee of the Privy Council in 6 Lah 1[1] is the law correctly stated in the decisions of this Court in 8 P L T 278[9] and 14 P L T 63[10]?

(3) Was the case in 17 P L T 39[2] correctly decided?

In view of the aforesaid discussion, I think that our answer to these questions should be that the first two cases, namely 8 P L T 278[9] and 14 P L T 63,[10] were correctly decided so far as the decision in these cases bear on the first question, and that the third case, namely 17 P L T 39,[2] was not correctly decided.

Courtney-Terrell, C. J.—I agree.

James, J.—I agree.

K.B./A.L. *Order accordingly.*

9. Chairman, District Board, Monghyr v. Sheodutt Singh, A I R 1926 Pat 438=98 I C 364 =5 Pat 476=8 P L T 278.

10. Bhola Prasad v. Ramkumar Marwari, A I R 1932 Pat 231=139 I C 13=14 P L T 63=11 Pat 399.

A. I. R. 1937 Patna 189

WORT AND FAZL ALI, JJ.

Kali Singh—Plaintiff—Appellant.

v.

Matru Singh and *others*—Defendants—Respondents.

Appeal No. 151 of 1933, Decided on 4th March 1936, from original decree of Sub-Judge, Monghyr, D/- 31st July 1933.

(a) Bihar Tenancy Act (3 of 1934), S. 103-B —Entry of lands in possession of Mukarraridars as bakasht—It is not conclusive proof to show that lands originally belonged to proprietors and were never raiyati lands of Mukarraridars.

It is well known that even the lands in possession of mukarraridars are sometimes loosely described as bakasht and a mere entry in the record of rights describing the lands as the bakasht of the mukarraridars is by no means

conclusive to show that the lands were originally the lands of the proprietors and that they were never the raiyati lands of the mukarraridars. [P 191 C 1]

(b) Landlord and Tenant—Merger—Grant of permanent lease to occupancy raiyat—Grant does not extinguish right of occupancy—Purchaser at revenue sale is not entitled to possession of property belonging to raiyats before acquiring mukarrari lease.

Where the proprietor of an estate grants an occupancy raiyat thereof a permanent lease, such grant has not under the general law the effect of extinguishing the right of occupancy possessed by the raiyat, and so render him liable to eviction as it is inconceivable in such a case to ascribe to the tenant an intention of foregoing a right so highly prized as the occupancy right on the acquisition of the right of an intermediate holder. The purchaser at a revenue sale is not entitled to possession of a piece of property which belonged to the tenants before they became mukarraridars. If the mukarrari right was annihilated the person in whose interest it is annihilated is entitled to get the proprietary interest free from the mukarrari right, but he cannot get the lands which the mukarraridars held prior to the creation of the mukarrari right and independently of mukarrari lease. [P 191 C 2]

M. N. Pal—for Appellant.

Ganesh Sharma, L. K. Chowdhry and *B. N. Rai*—for Respondents.

Fazl Ali, J.—The only question to be decided in this appeal is whether the plaintiff is entitled to recover possession of the lands of Khatas Nos. 71, 95 and 96 from the contesting respondents. This question arises upon the following facts: Sometime in June 1926 tauzi No. 2940 in village Kaithwan was sold for arrears of revenue and purchased by one Azizul Hakim, a pleader practising in Monghyr. On 9th November 1926 the plaintiff purchased an eight annas share out of the proprietary interest in this tauzi and the remaining eight annas was purchased sometime later by defendants 47 and 48. The plaintiff, after his purchase, served a notice upon the contesting respondents intimating to them of his intention of cancelling the mukarrari deed which had been executed by a co-sharer proprietor in July 1878. The plaintiff's case was that this mukarrari constituted an encumbrance on the proprietary right and, as a purchaser at a revenue sale, he was entitled under the revenue sale law to avoid it. Sometime afterwards the plaintiff brought the present suit in which one of the reliefs claimed by him was that he was entitled to possession of the lands of the disputed khatas inasmuch as these lands were the bakasht lands of the malik, and the mukarrari interest being liable to be avoided the defendants could also be compelled to give up possession of these lands to the plaintiff. The case of the contesting respondents in this respect was that the lands were in their origin raiyati lands of the ancestors of these respondents and that they were accordingly entitled to retain possession of them even though the mukarrari interest might be avoided.

Thus the question which the Court below had to decide was a two-fold one: (1) whether the lands in dispute were in their origin raiyati lands in possession of the ancestors of the contesting respondents; and (2) whether, even if they were such raiyati lands, by the operation of the law of merger they had not become merged in the mukarrari interest upon that interest coming into existence, and, as such, were liable to be restored to the plaintiff on the annihilation of the mukarrari interest. The learned Subordinate Judge has held that the lands were raiyati in origin and that there was no merger. His decision upon both these points has been challenged by the appellant in this appeal. Dealing first with the question of fact that is to say whether the lands were originally raiyati lands, it seems to me to be clear that the decision of the trial Court upon this question is correct and ought to be upheld. The trial Court, in dealing with this matter, has referred both to oral and documentary evidence and particularly to certain admissions made by the plaintiff's own witnesses to the effect that the ancestors of the contesting respondents were raiyats and held some jote lands in the village before they became mukarraridars. The learned Subordinate Judge has pointed out in this connexion that no attempt has been made on behalf of the plaintiff to show that the ancestors of the contesting respondents held any lands other than the disputed lands. This fact by itself might not be regarded as conclusive: but the learned Subordinate Judge has also referred to the khasras prepared in certain old partition proceedings of 1871, 1882 and 1886 which show that the disputed lands were the raiyati lands of persons who have been proved to be the ancestors of the present respondents. In my opinion this is the strongest argument against the plaintiff; and it is noteworthy that the only way in which the plaintiff has tried to get over it was by contending that the khasras are not admissible in evidence. The learned Subordinate Judge, however, has elabo-

rately dealt with this question, and after a review of certain decisions has expressed the view that the khasras are admissible in evidence at least as showing the history of the plots in question before the creation of the mukarrari. There is another point which, though not referred to by the learned Subordinate Judge, is raised on behalf of the respondents and it is that as these khasras were prepared in proceedings to which old proprietors were parties, the plaintiff who claims now to be one of the proprietors is bound by admissions contained in them as those made by his predecessors-in-interest. Mr. Pal who appears for the plaintiff contends that the plaintiff being a purchaser at a revenue sale is not bound by all the actions of the previous proprietors. In my opinion, even though Mr. Pal may be correct in this last contention of his, there is no doubt that the batwara khasras were admissible in evidence as showing the previous history of the lands, and the learned Subordinate Judge was justified in basing his decision upon them. Mr. Pal contended that the disputed lands being recorded in the record of rights as bakasht, it should have been inferred that they were the lands of the proprietors and not of the mukarraridars. In my opinion, however, this contention cannot be accepted, because it is well known that even the lands in possession of mukarraridars are sometimes loosely described as bakasht and a mere entry in the record of rights which was prepared sometime in 1910 describing the lands as the bakasht of the mukarraridars is by no means conclusive to show that the lands were originally the lands of the proprietors and that they were never the raiyati lands of the respondents' ancestors. I think therefore that the learned Subordinate Judge has rightly found that the disputed lands were the raiyati lands of the ancestors of the respondents.

The next question is whether there was any merger upon the acquisition of the mukarrari right by the respondents' ancestors in the year 1878. It is clear that there could not have been any merger in 1878, because at that time the mukarrari deed was obtained in respect of a small share in the proprietary interest from a fractional co-sharer. This much is practically conceded by the learned advocate appearing on behalf of the appellant; but he contends that the merger took place in 1886 when the share of the fractional co-sharer who had created the mukarrari was converted into a separate and independent tauzi. But the authority cited before us is against such a contention. A Division Bench of the Calcutta High Court held in 76 I C 382[1] that:

> Where the proprietor of an estate grants an occupancy raiyat thereof a permanent lease, such grant has not under the general law the effect of extinguishing the right of occupancy possessed by the raiyat, and so render him liable to eviction as it is inconceivable in such a case to ascribe to the tenant an intention of foregoing a right so highly prized as the occupancy right on the acquisition of the right of an intermediate holder.

With this view I respectfully agree and I wish also to add that on no principle can the purchaser at a revenue sale be held to be entitled to possession of a piece of property which belonged to the tenants before they became mukarraridars. If the mukarrari right was annihilated the person in whose interest it is annihilated is entitled to get the proprietary interest free from the mukarrari right, but he cannot get the lands which the mukarraridars held prior to the creation of the mukarrari right and independently of the mukarrari lease. In these circumstances in my opinion the appeal fails and it should be dismissed with costs to defendants 1 to 9 and 11 to 26 and 49. It may be mentioned here that, although defendant 47 was impleaded as a respondent in this case, the appeal was not pressed against him. It will therefore also be dismissed as against him with costs.

Wort, J.—I agree.

S.C./D.S. *Appeal dismissed.*

1. Jogendra Krishna Roy v. Shafar Ali, A I R 1923 Cal 373=76 I C 382.

A. I. R. 1937 Patna 191

JAMES AND SAUNDERS, JJ.

Rajendra Nath Laha and *another*—Appellants.

v.

Emperor — Opposite Party.

Criminal Appeals Nos. 183 and 187 of 1935, Decided on 1st November 1935, from decision of Asst. Sess. Judge, Gaya, D/- 16th July 1935.

(a) Criminal Trial—Jury—Summing up of case to jury after lengthy addresses by counsel—High Court should not be too critical.

High Court Judges must not be too critical in dealing with the summing up of a Judge after a lengthy trial and speeches by counsel: *Isaac Schama's case, 11 Cr App R 49, Ref.* [P 193 C 2].

(b) Penal Code (1860), Ss. 411, 414—Satisfactory explanation of possession—Presumption under S. 114, Evidence Act, does not arise—Prosecution should prove guilty knowledge.

When in a case under Ss. 411 and 414, I. P. C., an accused has satisfactorily accounted for his possession, the question of the application of S. 114, Evidence Act, no longer arises. Then it is necessary for prosecution to show by evidence direct or circumstantial that there is some collusion between the thief and the receiver or that the receiver had real reason to believe that the property which he had purchased was stolen. It is for the prosecution to prove substantively by direct or circumstantial evidence that the accused had guilty knowledge. It is not necessary for the accused to prove affirmatively that he came by the goods innocently; it is sufficient if he has given an explanation which might raise a doubt in the mind of the jury as to his guilt.

[P 194 C 1, 2]

(c) Criminal Trial — Jury—Misdirection—Case under Ss. 411 and 414, Penal Code—Presumption under S. 114, Evidence Act, not arising—Judge must tell jury that there is no evidence of guilty knowledge—Omission to so direct amounts to serious error vitiating trial.

In a case under Ss. 411 and 414, Penal Code, proper way to charge the jury is to tell them that when once the presumption under S. 114, Evidence Act ceases to be applicable, there is no evidence of guilty knowledge at all. Omission to tell this is a misdirection being a most serious error vitiating the conviction based on it.

[P 195 C 2]

(d) Criminal Trial — Jury — Charge—Misdirection—Omission to tell jury exact point for determination—Charge given in misleading manner amounts to misdirection.

The omission to mention before the jury some small items of corroborative or discrepant evidence may be comparatively unimportant, particularly in a case where the jury had been addressed by advocates on each side. But the omission to make it clear to them exactly what they have to decide and how they have to proceed to decide it or the stating of the points in a manner which is positively misleading is a very serious misdirection since it is the business of the Judge to explain clearly to the jury what is the point which they have to decide. [P 195 C 2]

Manohar Lal, *A. C. Roy*, *S. N. Sahay* and *D. L. Nandkeolyar*—for Appellants.

Asst. Govt. Advocate—for the Crown.

James, J.—At 3 a. m. on 13th March 1935 Chaman Ali, a man of Chandhos in Patna District, entered into the female compartment of the Up Kalka Mail train at Hazaribagh Road Station. There he committed robbery of a large number of gold ornaments from the persons of women of the family of Sat Narain of Delhi who had been to Calcutta for wedding. He prevented by intimidation the pulling of the communication cord; and when the train slowed down at Gaya he slipped off and escaped in the darkness. After information had been given to the Railway Police, some of the Delhi passengers remained at Gaya for that day and the next. On the early morning of 15th March when they were waiting on the Gaya platform to continue their journey to Delhi, Chaman Ali arrived by the Bombay Mail from Calcutta changing at Gaya, in order to continue his journey in the Patna-Gaya train. While he was on the Up platform he was recognized by one of the ladies and was captured. He had in his luggage a considerable portion of the stolen property and on his person the sum of Rs. 1,070 in currency notes. In his luggage was also a new gramophone, with other articles which he had purchased on the previous day in Calcutta.

We know now to some extent how Chaman Ali had been occupying his time in Calcutta. After he had arrived there he went to the Kidderpore rickshaw stand where he took a rickshaw to Koila Sarak lane. After a short absence in Koila Sarak lane he returned to the rickshaw and asked to be taken to Watgunj to the shop of a goldsmith. He was taken to the shop of Mahabir Sonar. He told this man that he had some gold ornaments for sale. Mahabir Sonar looked at the ornaments, but he had not sufficient money in hand to be able to purchase them. He accordingly took him to the nearest goldsmith's shop, that of Rajendra Nath Laha, to whom Chaman Ali sold some ornaments for Rs. 683. After a short time Chaman Ali and Mahabir returned to the shop of Rajendra Nath Laha. Chaman Ali said that he had some more ornaments for sale; and Rajendra then purchased two bangles and a gold chain for Rs. 772. Chaman Ali thus had Rs. 1,455. He purchased a gramophone, and made some more purchases in Calcutta, after which he returned to Gaya by the Bombay Mail, carrying with him the other gold ornaments which he had not sold, the balance of the money and the new gramophone and other purchases which he had with him when he was captured. Chaman Ali was in due course placed on his trial before the Assistant Sessions Judge of Gaya and a jury, charged with an offence punishable under S. 397, I. P. C. Rajendra and Mahabir were tried jointly with him. Rajendra was charged under S. 411, I. P. C.; and Mahabir Sonar was charged under S. 414 for having assisted in the disposal of the

stolen property. The jury found all the accused guilty. Chaman Ali was sentenced to seven years' rigorous imprisonment; and Rajendra and Mahabir each to two years' rigorous imprisonment and a fine of Rs. 500. We are concerned here with the appeals of Rajendra Nath Laha and Mahabir Sonar.

There does not appear to be any ground for criticism of the charge to the jury so far as it affects the case of Chaman Ali, but learned counsel on behalf of the two appellants attack those directions to the jury which relate to the charges under Ss. 411 and 414, I. P. C. The manner in which the property was acquired by Rajendra as set out above is to be found in the account given by Rajendra himself to the police and in that of Mahabir Sonar together with the account given in Court by the accused Chaman Ali, and the two witnesses who were examined for the prosecution, the rickshaw puller and Surendra Nath Dutta, the sarkar of the accused Rajendra Nath Laha. These accounts agree, and it cannot be questioned that they are substantially true. If corroboration were needed, it is afforded by the fact that the money found on Chaman Ali when he was captured represents approximately what would be left after he had purchased the gramophone and the other articles which were found with him. The value of the stolen property according to the first information was Rs. 4,357. The value of the stolen property found with Chaman Ali when he was arrested was Rs. 2,790, so that we may infer that the articles sold to Rajendra were part of the property stolen in the train. But at the same time we must also infer that the price paid for it by Rajendra was such as to render it extremely improbable that he believed the property to have been stolen. The bulk of the golden ornaments purchased on the 14th were melted down on 16th March but there were two bangles and a chain which had not been melted down. This was because Rajendra, needing some money to complete the amount necessary for the second purchase, pawned the bangles and the chain at a neighbouring shop. He redeemed them on the 16th but being again in need of money on the 17th, he pawned them again. When the police came to his shop on the 18th, he redeemed them and produced them for inspection. There was some confusion over the identification of the bangles, but the chain was identified as part of the stolen property.

Mr. Manohar Lal on behalf of Rajendra Nath Laha complains that the learned Assistant Sessions Judge, addressing the jury on the subject of the identification of this chain, when he pointed out that the weight as given in the first information was eleven bharis where as its actual weight was eight and a quarter bharis, did not draw special attention to the statement of one of the women in evidence that the weight of her chain was eleven bharis. This omission would in any event have been a matter of small importance, and indeed it is this kind of meticulous detail which is so commonly found, and regarded as required in charges to juries, which has led in this case to actual misdirection on points of real importance. As the Court of criminal appeal remarked in 11 Cr App R 49,[1] to which reference has been made by Mr. Manohar Lal, we must not be too critical in dealing with the summing up of a Judge after a lengthy trial and speeches by counsel. As a matter of fact, the question of whether the chain was properly identified or not was not of great importance in this case, so far as it affected the alleged receiver for reasons which I shall presently show, and the stress which was laid upon it must have added to the confusion in the minds of the jury. The learned Assistant Sessions Judge remarked as a fact beyond dispute, as indeed it was, that:

> The accused Rajendra purchased the articles in open market in the ordinary course of his business through Mahabir Sonar, who sells and purchases gold ornaments and who according to Rajendra is reported to be honest, at a price which according to the evidence on the record was not at all unreasonable.

Indeed the fact that the articles were purchased openly for this price was a part of the prosecution case. The rickshaw puller who saw the business being conducted was a prosecution witness and Rajendra's sarkar was called for the prosecution to prove the transaction. As regards this general account of the transaction, the matter should have been treated as admitted by all parties and this should have been taken as the starting ground for examination of the question of whether there was evidence that Rajendra had dishonestly received the stolen property or that Mahabir had dishonestly assisted in

1. Isaac Schama, 11 Cr App R 49.

the disposal of it. The case is a stronger one than that of *Isaac Schama*[1] and the learned Assistant Sessions Judge ought to have told the jury that the onus which might have been cast on the defence by a failure to explain how the property came into the possession of Rajendra had been discharged and that it was for the prosecution to prove substantively by direct or circumstantial evidence that he had guilty knowledge. Thus the identification of the chain was not a matter of such great importance. If the jury had been applying the presumption permitted by S. 114, Evidence Act, that is to say, if the only evidence available had been that Rajendra was in possession of stolen property and that he had been unable to account for his possession, it would have been highly necessary to prove that this chain actually found in his possession was stolen property because, unless he was found in possession of property actually identified as stolen property, the presumption could not be applied. But when he had satisfactorily accounted for his possession, so that the question of the application of S. 114, Evidence Act no longer arose, then it was necessary to show by evidence, direct or circumstantial, that there was some collusion between the thief and the receiver or that the receiver had real reason to believe that the property which he had purchased was stolen. In this case, if there had been any real evidence of this nature, on which a reasonable person could convict either of these two accused, we may suppose that the matter of the identification of the chain would have presented little difficulty to the jury, since it is practically certain that all or nearly all of the articles purchased by Rajendra were stolen property.

At the every end of his charge, the learned Assistant Sessions Judge did say that it was not necessary for the accused to prove affirmatively that he came by the goods innocently; and that it was sufficient if he had given an explanation which might raise a doubt in the mind of the jury as to his guilt. But although these words are used it does not appear that the learned Assistant Sessions Judge really appreciated what the position was and it is practically certain that the jury did not. The learned Assistant Sessions Judge throughout his charge is confused between the application of the presumption admissible under S. 114, Evidence Act, and the application of the ordinary law that the onus lies upon the prosecution. This confusion appears particularly in his dealing with one point which was treated as circumstantial evidence against the accused to be considered by the jury. He had previously directed that the jury must hold that all the ornaments sold to Rajendra which had not been identified were not stolen property ; but he later on discussed the question of whether the melting down of the ornaments which were not stolen property was to be treated as evidence of the fact that Rajendra had reason to believe that they were stolen property. Again the pawning of the chain which was identified as stolen property was treated as circumstantial evidence of the fact that Rajendra believed it to be stolen property. But if the different treatment of the chain implied that Rajendra regarded it as something different from the other property, then the melting down of the property which he did not believe to be stolen would have no significance one way or the other. The learned Assistant Sessions Judge addressing the jury, as if the melting down would be significant of guilt, pointed out that the melting down was done not immediately after the articles were purchased but two days later. Stolen or not stolen, the jury are left to determine whether melting down two days after purchase is evidence of guilt. What the learned Assistant Sessions Judge ought to have said was that men who purchase gold as bullion convert it into bullion in the ordinary course of their business, and that there was no evidence to show that the melting down was as an unusual act, or that it was done in unusual circumstances and that in the absence of such evidence no significance at all could be attached to the fact that the articles were dealt with in the ordinary way of business.

Similarly with regard to the pawning : it is difficult to see by what course of reasoning an inference could be drawn that a man knew himself to be in possession of stolen property from the fact that he took this property as it was and pawned it with a neighbour, instead of melting it down. In the absence of evidence to show that pawning was unusual or that the article was pawned with some suspicious secrecy, the learned Assistant Sessions Judge ought to have told the jury that the prosecution had failed to prove that the pawning was in any (*sic*)

way suspicious. Instead of that he remarked that it was redeemed on the 16th and again pawned on the 17th. He might well have remarked that if the pawning was evidence of guilt, the prompt redemption should be evidence of innocence, but he ought to have said that as the matter stood the pawning was evidence of nothing at all except of the fact that Rajendra needed money for the completion of his transaction. In his *pucca bahi* Rajendra Nath Laha had entered his purchase, describing the gold by weight but not in detail. This *pucca bahi* was shown to the Police Officers on 18th March. When the sarkar, Surendra Nath Dutt, was examined in the committing Magistrate's Court, he produced a *kutcha bahi* in which the details were shown. This was duly proved in the Sessions Court by the witness for the prosecution and was placed on the record as an exhibit for the prosecution, with no objection from the prosecution counsel. No further questions regarding this book were put to the witness by counsel for the Crown ; yet the learned Assistant Sessions Judge has addressed the jury on this point in a manner which would imply that if details are not entered in the *pucca bahi*, guilty knowledge on the part of Rajendra will be implied, an imputation which may be rebutted if the jury considered that the *kutcha bahi* is genuine. If the *katcha bahi* rebutted any adverse inference which may be drawn from the *pucca bahi*, the learned Assistant Sessions Judge should have said that the inference was rebutted, since this document had been proved on behalf of the prosecution in the case.

The charge is vitiated throughout by the assumption that Rajendra and Mahabir had to prove their innocence. When the evidence is examined in detail, we find that if it had been our function to charge the jury, we should have been obliged to say that there was no evidence direct or circumstantial of guilty knowledge on the part of the accused Mahabir. There is also no real evidence of guilty knowledge on the part of Rajendra. There is positive evidence of innocence in the open sale for proper consideration, which would certainly not have been given by a receiver for property which he knew or believed to be stolen. The presumption under S. 114 was fully discharged by the explanation given by Rajendra, which was not merely a plausible explanation but was an explanation completely proved to be true. The learned Assistant Sessions Judge had explained this to the jury, but if he had explained to them that what was needed in order to justify a conviction was actual evidence implying guilty knowledge on the part of Rajendra, it is impossible to believe that any jury of reasonable men could have returned a verdict of guilty. For ourselves we think that the proper way to charge the jury would have been to have told them that when once the presumption under S. 114 ceased to be applicable, there was no evidence of guilty knowledge at all. This misdirection which runs throughout the charge is a most serious error vitiating the whole of the conviction based on it. The omission to mention before the jury some small items of corroborative or discrepant evidence may be comparatively unimportant, particularly in a case where the jury had been addressed by advocates on each side. But the omission to make it clear to them exactly what they have to decide and how they have to proceed to decide it or, as in this case, the stating of these points in a manner which is positively misleading, is a very serious misdirection since it is the business of the Judge to explain clearly to the jury what is the point which they have to decide. In this case the misdirection runs through practically the whole of the charge and it is impossible to support the conviction. The appeals must, therefore, be allowed, the convictions are set aside and the appellants will be acquitted and discharged.

Saunders, J.—I agree.

B.D./A.L. *Appeals allowed.*

A. I. R. 1937 Patna 195

MACPHERSON AND MOHAMAD NOOR, JJ.

Firm Jagannath Rai-Bhagwan Das —Decree-holder—Appellant.

v.

Basist Narain Singh — Judgment-debtor—Respondent.

Appeal No. 6 of 1935, Decided on 31st October 1935, from original order of Sub-Judge, Bhagalpur, D/- 6th October 1934.

Hindu Law—Debts—Decree against father and son in suit on handnote by father alone—Son cannot be arrested in execution of the decree, he being joined in suit as member of family only.

The person and personal properties of the member of a joint Hindu family are neither liable

nor can they be made liable by the father or karta of the family for debts incurred by the father as karta of the family. The other members of the family can be personally liable only if it be shown that they were parties to the debt itself. Where therefore in a suit on a pronote executed by the father a decree is against father and son, the decree-holder cannot proceed in execution to arrest the son who is impleaded in the suit only as a member of the joint family. [P 196 C 1]

G. P. Das—for Appellant.

B. P. Sinha and *K. N. Lal*—for Respondent.

Mohamad Noor, J.—This appeal arises out of an execution case. The only question involved is whether the appellant who is the decree-holder can take out a warrant for the arrest of judgment-debtor No. 2, Basistha Narain Singh. The decree was passed in a simple money suit based upon a hand-note executed by the judgment-debtor 1, Rai Bahadur Chandra Ketu Narain Singh. His son, judgment-debtor 2, was also impleaded in the suit as a member of a joint Mitakshara Hindu family. Decree was passed against both the father and the son. A question arose in the course of the execution of the decree whether the son was liable to be arrested. The learned Subordinate Judge has held that he was not and the decree-holder has preferred an appeal.

In my opinion the view taken by the learned Subordinate Judge is correct. The suit was for realisation of a debt due from a joint Hindu family and incurred by the karta of the family. It has been laid down in several cases in this Court that in such a case the person and the personal properties of the other members of the family are not liable. A karta other than the father of the family is empowered to incur debt and thereby make the family property liable for that debt, provided that the debt was incurred for the legal necessities of the family; but the karta as such has no power to bind the person or personal properties of the junior members of the family. The position is exactly the same if the karta happens to be the father of the family. The only difference is that the sons are liable for the debt incurred by the father even if there was no legal necessity provided that it was not for illegal or immoral purposes, as the sons are under a pious obligation to pay their father's debt. But nothing more than the assets of the joint family are liable. No doubt the pious obligation of the son under the Sastriac rules is not confined to the assets of the family; but the Courts have refused to extend this obligation beyond the assets of the family on the principle of justice, equity and good conscience. But neither the father nor any other karta is entitled to make the person and the other properties of the junior members of the family liable for the debt incurred by him. The other members of the family can only be personally liable if it be shown that they were parties to the debt itself, namely, that they themselves contracted it. Mr. G. P. Das who appeared on behalf of the appellant contended that in this case the money, which was the subject matter of the suit, was borrowed for carrying out the family business, of which both the father and the son were partners and when the father incurred the debt it must be taken that the son was also a contracting party to the debt. But this was not the case of the plaintiff in the suit. A reading of the plaint makes it perfectly clear that the plaintiff did not implead defendant 2 on the ground that he was himself a party to the taking of that loan. He was impleaded as a member of the joint Hindu Mitakshara family and in no other capacity, and that being the case, in my opinion the decree-holder is not entitled to proceed against the person of defendant 2 who, as is clear from the plaint, was no party to the taking of the loan. The appeal fails. I would dismiss it with costs.

Macpherson, J. — I entirely agree. I have been a party to several decisions to the same effect.

W.D./A.L. *Appeal dismissed.*

*** A. I. R. 1937 Patna 196**

WORT, AG. C. J.

Bishadendu Gupta — Applicant.

v.

H. Langham Reed and *others* — Opposite Parties.

Misc. J. Case No. 63 of 1930, Decided on 20th April 1936.

*** (a) Companies Act (1913), Ss. 3, 227 and 235—Jurisdiction — Company registered and having registered office in Province under jurisdiction of High Court— Directors making payments after winding up petition— Application for inquiry into their conduct under S. 235—All directors except one residing in England — One director living in British India but out of jurisdiction — High Court has no jurisdiction over directors**

residing in England but has it over directors in British India — Inquiry can be made with respect to such director.

The direct rs of a company made some payments more than a month after a petition for winding up of the company was presented. An application under S. 235, Companies Act, to inquire into the conduct of the directors in making such an application was made against them. The company was registered and had its registered office in the Province under the jurisdiction of the High C. urt. Some of the directors of the company were residing in England and one was residing in British India but in a different Province, during the pendency of the application :

Held : the High Court had no jurisdiction over persons residing in England but had jurisdiction over person residing in British India, though in a different Province, regarding matters connected with the company and its assets. An inquiry therefore could be made with respect to the director residing in British India under S. 227 and S. 235 of the Act. [P 198 C 2 ; P 199 C 1]

(b) International Law — Summons and other processes cannot be served by Court on persons outside its jurisdiction — Rule applies to Courts in British India also.

It is a principle of international law that a Court shall not serve its processes on persons outside its own jurisdiction and upon persons against whom, the order if passed, cannot be enforced. The power to serve outside jurisdiction is entirely a question of statute without which there is no such power. The Courts in British India therefore cannot order issue of service of summons or any other proceeding on persons beyond their jurisdiction : *In re British Imperial Corporation, (1877) 5 Ch D 749 ; In re Busfield, Whaley* v. *Busfield, (1886) 32 Ch D 123* and *Credits Gerundeuse* v. *Van Weede, (1884) 12 Q B D 171, Ref.* [P 197 C 2 ; P 198 C 2]

Netai Ch. Ghosh—for Applicant.

Order. — This is an application under S. 235, Companies Act, and relates to payments made by the directors who are persons named in this application on 24th June 1930, that date is rather more than a month after a petition for winding up had been presented. That petition was dated 5th May of the same year. There were difficulties arising in the case but ultimately this Court made an order compulsorily winding up the company on 11th May 1931. It will be seen therefore that the payment was made after winding up, the date of the winding up dating back to the presentation of the petition under the provisions of the Companies Act. Now under S. 235 this application is made and it is said that there has been a misapplication of the assets of the company in these circumstances. The Peninsular Company which had not been carrying on business for some time entered into negotiations with a firm who were the debenture-holders of the Calmoni Engineering Co., Ltd.

It is unnecessary to load the case with a great many facts. It is sufficient to state that, as a result of those negotiations, the Peninsular Company were to pay something approaching £10,000 sterling for the purchase to the Calmoni Company and under the agreement they were to pay £4,000 either as earnest money or to give them the right of option to purchase the assets of the Calmoni Engineering Co. It matters not whether under the contract, which is not before me, it was a payment of £4,000 entitling the purchasing company to exercise the option of whether it was the earnest money or part payment ; the fact remains that the directors paid over this sum of money and it is in these circumstances that an application is made under S. 235. It is a most unfortunate matter that every one of these directors is out of the jurisdiction of this Court, namely Mr. Langham Reed, Sir-George Cunningham Buchanan, Mr. Charles Thomson Gordon and Mr. Manu Subedar. All of them are actually outside the jurisdiction of this Court. The first three are living in England and with regard to them I have not the slightest hesitation as to what my order should be. It is impossible for me to hold that I can either issue an order of service of the summons or any other proceeding on persons beyond the jurisdiction of this Court or beyond the jurisdiction of the Courts in British India.

It is a principle of international law that a Court shall not serve its processes on persons outside its own jurisdiction and upon persons against whom, if an order was made, the order cannot be enforced. It is expressed in these words: "*extra territorium jus decenti non paretur legis extra terrorum non obligant.*" To say that under certain circumstances I am to enforce orders against persons out of the jurisdiction of this Court has nothing to do with the matter. But if the matter is entirely within the jurisdiction, then under certain conventions that judgment or order may be enforced in a country other than the country in which it is made but that is an entirely different subject. As to the question of jurisdiction, the Code of Civil Procedure is quite clear. S. 16 provides "subject to the pecuniary or other limitations prescribed by any law" (and then it describes suits of various kinds for

the recovery of immoveable property, for partition etc.) "shall be instituted in the Court within the local limits of whose jurisdiction the property is situate." The section applies exclusively to immoveable property. We have nothing to do with that. S. 19 provides:

> Where a suit is for compensation for wrong done to the person or to moveable property, if the wrong was done within the local limits of the jurisdiction of one Court and the defendant resides or carries on business or personally works for gain within the local limits of the jurisdiction of another Court, the suit may be instituted at the option of the plaintiff in either of the said Courts.

Section 20 provides:

> Subject to the limitations aforesaid, every suit shall be instituted in a Court within the local limits of whose jurisdiction the defendant resides, etc.

I do not propose to read the whole of S. 20 as it is not suggested for one moment that this case is governed by that section. S. 28 provides for the method of service out of the jurisdiction but it naturally assumes that it is one of those cases which the Court has jurisdiction by reason of the subject matter of the suit, over persons outside the jurisdiction. Certain authorities were relied upon; they are the English cases. The first one is (1877) 5 Ch D 749,[1] in which an application was made to serve two officials of the company resident in Scotland. The Vice-Chancellor, without stating any reasons, gave leave to serve the summons at Glasgow or elsewhere in Scotland. Lord Wrenbury in his book on the English Company Acts mentioned this case without any comment but having stated that before the year 1909 the Court had no jurisdiction to give leave to serve notices of orders and other proceedings in the winding up on persons out of the jurisdiction, he points out that this applied only to orders and proceedings which it was desired to enforce and notice of an appointment to settle the list of contributories could be served out of the jurisdiction. The other cases relied upon are in 32 Ch D 123.[2] In that case the question was whether an originating summons could be served out of the jurisdiction. Cotton, L. J. in confirming the judgment of Chitty, J. made this statement:

> Service out of the jurisdiction is an interference with the ordinary course of the law, for generally Courts exercise jurisdiction only over persons who are within the territorial limits of their jurisdiction. If an Act of Parliament gives them jurisdiction, etc., etc. such jurisdiction is valid, but apart from statute a Court has no power to exercise jurisdiction over anyone beyond its limits.

I should add that Fry, L. J. in agreeing with Cotton, L. J. made this statement:

> I think that the general orders of 1883 contain a complete Code governing service out of jurisdiction.

The position was this: that apart from statutory rules made under the Judicature Act in England there was no power to serve out of the jurisdiction excepting in so far as the Acts relating to a Chancery procedure and the Common law procedure Acts gave that power. To put it in a sentence and to repeat the words of Cotton, L. J. the power to serve out of the jurisdiction is entirely a question of statute without which there was no such power. The point that the Court of Appeal was discussing was whether an originating summons came within the terms or the Orders of 1883, and they decided that they did not. That matter was cured eventually by the enactment of R. 8-A of O. 11 of the Rules of the Supreme Court in England. Cotton, L. J. in that case referred to the decision in (1884) 12 Q B D 171[3] and pointed out that that was a case of interpleader, and the decision of Pollock, J. might be supported on the ground that the object of service was not to give jurisdiction over the party served, but only to give him notice of a proceeding affecting his rights. As I say I have no possible doubt as regards the directors in this case who reside outside British India. The question arises as to Manu Subedar who resides in Bombay. This is a very unfortunate position in which the Company finds itself. Under S. 3, Companies Act, undoubtedly jurisdiction is given to the Courts in Bihar over this Company as the Company was registered in this province, or to put it more accurately its registered office is situate in this province. That being so, although I am not deciding that question, it might be argued that that would exclude the jurisdiction of the Bombay Court. The Company, therefore, is on the horns of a dilemma. The Director Mr. Subedar is not within the jurisdiction of this Court and the Bombay Court, in the view that one might take of S. 3, has

1. *In re* British Imperial Corporation, (1877) 5 Ch D 749=25 W R 583.
2. *In re* Busfield. Whaley v. Busfield, (1886) 32 Ch D 123=55 L J Ch 467=54 L T 220=34 W R 372.
3. Credits Gerundeuse v. Van Weede, (1884) 12 Q B D 171=53 L J Q B 142=32 W R 414=48 J P 184.

no jurisdiction over any matter relating to the Company.

Now accepting the contention of the learned advocate who appears for the official liquidator that this is merely an inquiry into the conduct of the Director and is in the same line of cases as the one to which I have just made reference and to which Cotton, L. J. referred and whose remarks I have repeated, S. 235 expressly states that the Court may on the application of the liquidator, or of any creditor or contributory, examine into the conduct of the director and compel him to repay the money or restore the property, and whilst being quite clear as to my jurisdiction or want of jurisdiction to make an order against the three directors now residing in England, I find it difficult to come to the conclusion that I have no jurisdiction over persons resident in British India regarding matters connected with assets of the Company and a Company over which I have admittedly jurisdiction. In those circumstances I propose to allow the application against Mr. Subedar and make an order in this form: That this Court directs that an enquiry be made what payments out of the assets of the Company were made by the Directors or any of them subsequent to 5th May 1930 and whether any such payments were properly allowed having regard to S. 227 and S. 235, Companies Act. Whether any such payments are void under S. 227, Companies Act, and whether if void such sums could be repaid by the said Mr. Subedar.

W.D./A.L. *Order accordingly.*

A. I. R. 1937 Patna 199

AGARWALA, J.

Diwakarnath Pandey and *others*—Appellants.

v.

Kamta Prosad Singh and *others*—Respondents.

Appeal No. 61 of 1934, Decided on 9th October 1936, from appellate decree of Dist. Judge, Saran, D/- 19th August 1936.

Bengal Tenancy Act (8 of 1885), S. 153—Rent suit—Muafi claimed by tenant as incident of tenancy — Decision regarding it affects amount of rent.

If a muafi is claimed as an incident of the tenancy then the decision which arises with regard to it in a rent suit is a matter which affects the amount of rent within the meaning of S. 153: *A I R 1920 Pat 212, Foll.*; *A I R 1917 Pat 504, Expl.* [P 199 C 2]

B. N. Ray for *G. P. Singh* — for Appellants.

Ganesh Sharma—for Respondents.

Judgment.—The plaintiffs-respondents sued the appellants for rent for the years 1336—1339 Fasli at the rate of Rs. 10 including cesses. The revisional survey khatian shows that the tenants were entitled to muafi at the rate of Rs. 5-2-6 per annum out of the total rent of Rs. 9-15-6. The trial Court accordingly decreed the plaintiff's suit at the rate of Rs. 4-13-0 per annum. In appeal the learned District Judge has decreed the suit at the full rate claimed by the plaintiffs. The defendants have accordingly preferred this second appeal.

A preliminary objection has been taken by the respondents based on S. 153, Bengal Tenancy Act, but as the question raised by the preliminary objection is the very question which falls for decision in the suit, it is not necessary to deal with it separately. The respondents relied on the decision in 1 P L J 504,[1] in which it was held that muafi is not rent and that consequently when a question arises in an action as to whether the tenant is entitled to muafi or not, no question is decided in that suit regarding the amount of annual rent so as to prevent the operation of S. 153. In a later decision in 57 I C 621,[2] it was, however, pointed out that if muafi is claimed as an incident of the tenancy then the decision which arises with regard to it in a rent suit is a matter which affects the amount of rent within the meaning of the section. The only reason given by the Appellate Court for holding in this case that the muafi claimed was a mere right of set-off is the assumption that it was a privilege granted to the ancestors of the present tenants for service rendered and that the landlord was not bound to continue the grant of the privilege after rendition of the services had ceased. The learned Court below has referred to no evidence that the muafi in this case was for services rendered, nor is it argued before me that there is such evidence on the record of the case.

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1. Safait Hossain v. Waizuddin, A I R 1917 Pat 504=37 I C 670=20 C W N 1207=1 P L J 504.
2. Jagdish Misser v. Rameshwar Singh, A I R 1920 Pat 212=57 I C 621=1920 P H C C 241.

I would, therefore, overrule the preliminary objection and set aside the decree of the Court below and restore that of the first Court. The appellants are entitled to their costs.

S.C./D.S. *Decree set aside.*

A. I. R. 1937 Patna 200

COURTNEY-TERRELL, C. J. AND DHAVLE, J.

Khublal Singh — Defendant — Appellant.

v.

Ishri Prasad—Plaintiff—Respondent.

Letters Patent Appeal No. 2 of 1935, Decided on 28th November 1935, against judgment of James, J., D/. 5th December 1934, *reported in A I R 1935 Patna 142.*

Bengal Estates Partition Act (5 of 1897), Ss. 81 and 99—Tenant dispossessed by one set of landlords from portion of his holding—Tenant allowed suspension of rent in respect of entire holding—After batwara portion of holding falling in another landlord's patti—Tenant can suspend rent even as against his new landlord in respect of entire holding : *A I R 1935 Pat 142=153 I C 1024, Reversed.*

Prior to batwara a tenants' holding consisting of some plots fell to the share of certain landlords. These landlords high-handedly dispossessed the tenant for which Court had allowed the tenant suspension of rent for all the plots of his holding. After the batwara one of the plots in the holding fell in the patti of another landlord who sued the tenant for rent. Tenant pleaded the suspension of rent that he was allowed :

Held : Prior to the batwara it was by an arrangement among the landlords that the holding fell within the takhta of the high-handed cosharers. These co sharers thus represented the entire body of landlords in one sense, and the dispossession of the tenant from a part of his holding had, by reason of its conversion into bakasht and its treatment as such at the batwara, benefited all the landlords. A rent suit on the basis of the batwara was thus a matter between an innocent tenant and a landlord who had benefited from the high-handed action of a co sharer. It would therefore not be unfair if the bar of suspension of rent were to continue to apply to all the plots of the tenant's old holding in whichever pattis they might have fallen as a result of the batwara. Though this might operate unequally between the various landlords, but if it did do so, the landlords themselves were to blame for it : *A I R 1935 Pat 142=153 I C 1024*, **Reversed.** [P 201 C 2]

S. S. Bose—for Appellant.

G. P. Singh—for Respondent.

Dhavle, J.—The question in this appeal is whether the plaintiff landlord is entitled to the rent of a holding, consisting of two plots, Nos. 902 and 833, falling in his patti by reason of a Collectorate Batwara which came into force from 1335 fasli. It appears that prior to this batwara, the tenant had a cash holding consisting—we are told by Mr. Bose—of 10 plots in the takhta of one set of landlords under a pattidari arrangement among all the landlords, apparently of the nature of an imperfect partition, and that out of these 10 plots the landlords in question dispossessed the tenant from one plot. This plot is referred to as No. 844 in the papers, but it is said at the bar that the correct number of the plot may be No. 944. As a result of the dispossession from this plot, it was held by this Court in a second appeal in 1928 that the tenant was entitled to suspension of rent in respect of all the other plots of that holding, including plot No. 902, one of the two plots with which we are now concerned. The tenant-defendant, who is the appellant before us, resisted the present rent suit on the ground that the batwara among the landlords could not affect his rights, especially the right to hold the balance of his old holding free of rent until the plot from which he has been dispossessed is restored to him. This contention was accepted by the trial Court, but rejected on appeal by the District Judge on the ground that in the circumstances of the case the bar of suspension of rent could not be successfully pleaded against the present plaintiff, though it may be that the landlord or landlords to whose share plot No. 844 has fallen are not entitled to claim any rent from this tenant till the restoration of that plot to him. In second appeal James, J. sitting singly, upheld this view with a slight modification. He was of opinion that :

The penalty of suspension of rent can be enforced only for so much of the holding as may have fallen within the estate allotted to the high-handed co-sharers, or possibly (though on this point he had doubt) for so much of it as may have been allotted to the same estate as the defendant's plot No. 844 from which he was wrongfully dispossessed.

Mr. Bose, who appears for the tenant-appellant, has urged that the batwara being no more than an adjustment of the proprietary interests for revenue purposes, there is no reason why the tenant's right to suspension of rent should at all be affected by it. S. 99, Estates Partition Act, provides for the transfer of patni or other tenures, leases or any other encumbrances created by individual proprietors

on their shares or portions thereof to the lands finally allotted to them in partitions made by the Collector, but Mr. Bose has contended that the tenant's dispossession from plot No. 844 cannot properly be regarded as an encumbrance created by the evicting landlords. This contention seems irresistible. Mr. Gendhari Prasad Singh, who appears for the landlord-respondent, has in order to meet it only referred to S. 81 of the Act, which provides that no holding shall be split up for the purposes of a partition under the Act unless it is reasonably necessary to do so in order to effect an equitable partition and that before splitting up a holding the tenant must be notified and his objections heard. But this clearly does not entitle the tenant effectively to insist in the batwara proceedings that his holding shall or shall not be divided in a particular way, nor has Mr. Singh been able to refer us to any provisions in the Estates Partition Act from which it can be gathered that the Collectorate Batwara ought to be regarded as operating to deprive the tenant of his right to suspend payment of rent for the balance of his holding. It is true that the right arose because one set of landlords high-handedly dispossessed him from a portion of the holding, but that does not make it an encumbrance created on the share of those landlords or of a portion thereof. Even if it were to be regarded as an encumbrance, there may, moreover, be no lands to which it could be transferred on the lines laid down in S. 99 of the Act. The view of the District Judge that the penalty of suspension of rent can be enforced only for so much of the holding as may have fallen within the estate allotted to the high-handed co-sharers may possibly work no injustice in some cases; but it is obvious that the tenant will have lost his entire right to suspension of rent if those co-sharers contrive to have the whole holding allotted to other co-sharers.

The alternative to which James, J. referred, though not without some hesitation, namely that the penalty of suspension of rent can be enforced for so much of the holding as may have been allotted to the same estate as the plot from which the tenant-defendant was wrongfully dispossessed, is liable to a similar criticism. It is by no means inconceivable in cases of this kind that no other plot out of the old holding may be assigned to the landlord to whom the plot in question is allotted. It seems to me that the correct way of approaching the matter was indicated by an observation that fell from my Lord the Chief Justice during the course of the argument. Prior to the batwara it was by an arrangement among the landlords that the holding fell within the takhta of the high-handed co-sharers. These co-sharers thus represented the entire body of landlords in one sense, and the dispossession of the tenant from a part of his holding has, by reason of its conversion into bakasht and its treatment as such at the batwara, benefited all the landlords. A rent suit on the basis of the batwara is thus a matter between an innocent tenant and a landlord who has benefited from the high-handed action of a co-sharer. It would, therefore, not be unfair if the bar of suspension of rent were to continue to apply to all the plots of the tenant's old holding, in whichever pattis they may have fallen as a result of the batwara. It is true that this may operate unequally between the various landlords, but if it does do so, the landlords themselves are to blame for it. We know in the present case that the claim to suspension of rent was advanced before the batwara allotment, and it has now been ascertained that the order of the High Court allowing the suspension came after the actual partition. The landlords thus took their allotments subject to the result of the second appeal pending in the High Court, and it does not seem at all unfair in the circumstances that the tenant, having done nothing to lose his right to suspension of rent, should, in the present rent suit, pay rent for that part only of the present holding which did not form part of the old holding in respect of which he was entitled to suspension. James, J. observed that the difficulty of enforcing against the plaintiff the penalty of suspension of rent on account of dispossession was increased by the fact that there was nothing on the record to indicate the rents chargeable for the two plots in suit; but this difficulty has now been overcome by means of inquiries made by the parties.

I would accordingly allow this appeal and modify the decree in favour of the landlords by confining it to the rent of plot No. 833 only. We know from Mr. Gendhari Prasad Singh that the plot was assessed in the batwara proceedings at

Rs. 2-14-6 besides cess; and there is no dispute before us that there is no reason why the tenant-appellant should not pay rent for this plot. The appeal succeeds in respect of the rent of plot No. 902 only. I would allow the tenant-appellant proportionate costs in all the Courts, and direct the decree of the lower Court to be corrected accordingly.

Courtney-Terrell, C. J. — I entirely agree.

B.D./D.S. *Appeal allowed.*

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* A. I. R. 1937 Patna 202

MACPHERSON AND MOHAMAD NOOR, JJ.

Jagdish Chandra Deo Dhabal Deb—Plaintiff—Appellant.

v.

Shankarshan Bhumij and *others*—Defendants—Respondents.

Appeal No. 1049 of 1932, Decided on 12th March 1936, from appellate decree of Special Sub-Judge, Chaibassa, D/- 22nd February 1932.

(a) Chota Nagpur Tenancy Act (6 of 1908), S. 74-A—Incidents of village headmanship explained—Nature of village headmanship is difficult to describe—Details of estate and then details regarding village should be obtained.

Per *Macpherson, J.*—Subject to the basic fact that the headmanship system is the indigenous system of village tenancy, the case of each village falls to be decided on its own facts. The 'village headman' as defined in the Chota Nagpur Tenancy Act and especially the aboriginal village headman, suffers severely from the confusion caused by inadvertent (and sometimes the interested) extension of a name as pradhan to non-aboriginal or even mere non-agricultural holders of a lease with no permanent right to renewal, and again by the similar extension in popular parlance of the name thikadar with its basic implication of temporary tenancy to persons who have a permanent right in their tenancy subject only to periodical re-assessment (which generally involves enhancement of rent). As to the headmanship itself, it is generally difficult or impossible to describe it in ordinary legal terms. Indeed attempts in that regard in regard to Chota Nagpur institutions have been attended with so much peril that the legislature in desperation described the Mundari Khunt Kattidari tenancy as 'neither a tenure nor a holding.' But whether the headmanship is an office with tenancy annexed or is a tenancy with an office conjoined or whatever it is, it is always exceedingly inexpedient to attempt to interpret it in terms of ideas alien to the environment, the only safe course being to get the facts clear and in close detail for an estate first and then for the particular village. [P 206 C 1, 2]

(b) Chota Nagpur Tenancy Act (6 of 1908), S. 74-A—Law constituted authority to do an act or to pass order—That authority should decide all questions of fact and law—Appointment of village headman—Power to appoint commenced when Act came into force—S. 74-A does not confine appointment to cases where vacancy arose after passing of Act.

Per *Mohamad Noor, J.* — When an authority has been constituted by law to do a particular act or pass a particular order it is for that authority to decide all questions of law and fact which arise in the course of the proceedings and decision of which is necessary in order to enable him to pass the order which the law enjoins or authorizes him to pass. It is therefore for the Deputy Commissioner to interpret the section under which he is authorized to appoint a village headman and decide whether the vacancy mentioned in S. 74-A of the Act includes vacancies which occurred before the addition of this section to the Act. There is no question of the section being retrospective as it only requires the Deputy Commissioner to appoint a village headman under certain circumstances. The power of appointment commences when the section came into force. There is nothing in the section which confines the appointment of the village headman only to cases where the vacancy occurred after the passing of the Amending Act. The section is general and an appointment can be made even if the vacancy occurred before the passing of the Act. [P 209 C 2]

(c) Chota Nagpur Tenancy Act (6 of 1908), S. 74-A—Village headmanship—Nature of—It is a tenancy to which office is attached and in which raiyats are interested—Headman can surrender only his own interest.

Per *Mohamad Noor, J.* — Village headmanship is a tenancy to which an office is attached or vice versa and in which not only the headman but the raiyats are also interested. A headman may surrender his own interest but he cannot surrender interest of his successors nor can he terminate the tenancy and deprive the raiyats of their customary right to have a headman.

[P 209 C 2; P 210 C 1]

*** (d) Limitation—Question of limitation is to be decided by authority acting—Its wrong decision as to limitation should be challenged only by appeal to higher authorities and not by filing civil suit—Order passed on barred application is not nullity nor ultra vires.**

Per *Mohamad Noor, J.*—Whether a particular application is barred by limitation or not is a matter to be decided by the authority who is to act on that application. If that authority decides the question wrongly, the remedy is an appeal to the higher authority, and not a suit in the civil Court. An order passed on a barred application is not a nullity or ultra vires. [P 209 C 1]

(e) Jurisdiction—Four ways in which jurisdiction can be affected stated.

The jurisdiction on an authority can only be affected in either of the four ways, namely if the authority legally constituted (1) has no pecuniary jurisdiction; (2) has no territorial jurisdiction; (3) has no jurisdiction over the subject matter of the case; or (4) has no jurisdiction over the person with whom it is dealing. [P 210 C 1]

(f) Chota Nagpur Tenancy Act (6 of 1908), S. 74-A—Headmanship — Appointment of—Omission to decide existence of custom—Jurisdiction of Deputy Commissioner to appoint headman is not ousted—But in case of omission civil Court can examine basis of custom—Whether order of Deputy Commissioner can be interfered with by civil Court.

A simple omission to decide the existence of custom does not take away from the Deputy Commissioner the jurisdiction to appoint a village headman, but in case of such omission it is competent to the civil Court to examine whether the foundation of jurisdiction existed. If the civil Court finds that there was such a foundation the order cannot be interfered with simply on the ground that the legally constituted authority failed to decide a fact which it was necessary to decide before the appointment could be made: *A I R 1924 P C 175*; *17 Cal 590* (*P C*) and *A I R 1933 P C 122*, *Disting*. [P 211 C 1]

P. R. Das, *N. N. Roy*, *K. N. Moitra* and *G. C. Mukherji*—for Appellant.

R. S. Chatterji—for Respondents.

Macpherson, J. — This second appeal arises out of a suit brought in 1930, by the proprietor of the Dhalbhum estate for a declaration that the order of the Deputy Commissioner of Singhbhum, dated 16th May 1930, in T. A. Miscellaneous Case No. 3 of 1920, appointing under the provisions of S. 74-A, Chota Nagpur Tenancy Act, 1908, defendant 1, Shankarsan Bhumij as pradhan of Dhanga-am, a village in the estate, is illegal, ultra vires and without jurisdiction, and for recovery of khas possession of the village, or rather of that portion of it set out in Sch. (ka), by evicting defendant 1 therefrom. The plaintiff was successful in both the Courts below.

The plaint sets out as follows: In 1898 the khorposhdar holding Dhanga-am under the proprietor appointed Sudharsan Bhumij, father of defendant 1, pradhan of the village on a temporary basis for a term of nine years. The Dhalbhum estate was under ijara from 1905 to 1929 when it came into khas possession of the plaintiff. Sudharsan Bhumij held on from 1906 with the consent of the landlord until the khorposh lapsed to the parent estate when the manager of the 'encumbered estate,' as Dhalbhum then was wishing to take Dhanga-am into khas possession and Sudharsan Bhumij being unwilling to continue as the pradhan verbally surrendered, the pradhani office in 1915 from which date the estate is in the khas possession of the village without appointment or existence of any pradhan and in 1919 Sudharsan further executed a registered deed of abdication in favour of the manager. Nevertheless on 12th February 1930, the three pro forma defendants applied to the Deputy Commissioner of Singhbhum on the allegation that there was a pradhan in Dhanga-am from its first establishment and it was the custom that a pradhan should hold the village and prayed for appointment of a pradhan under S. 74-A, Chota Nagpur Tenancy Act. The Deputy Commissioner appointed defendant 1, Shankarsan Bhumij, son of the previous pradhan to be pradhan, of Dhanga-am and he is in possession as such. The plaintiff sets out that in fact according to the custom of Dhanga-am there has not been a pradhan throughout and also the application was barred by limitation and he accordingly craves that the civil Court will declare him entitled to and give him khas possession of the lands mentioned in the Schedule after evicting defendant 1 therefrom.

In his written statement the principal defendant claimed that the suit was not tenable under S. 74-A (5) of the Act and was not triable in the civil Court under S. 139 (6) of the Act; that the description in Sch. (ka) was incorrect, that the tenants of the mauza and the Secretary of State should be parties and that the suit was undervalued. On the facts he contended that Dhanga-am was not a khas village but from time immemorial has been held by his ancestors in pradhani right, that they had held long before 1898 and the appointment of 1898 also was not on a temporary basis and that they were entitled to a heritable pradhani right even without a patta, the sole right of the landlord being to realise the pradhani rent from the defendant. The allegations as to surrender in 1916 were denied, the bona fides of the application under S. 74-A asserted and the finding of the Deputy Commissioner that the mauza was pradhani supported. The Munsif of Jamshedpur held that the plaintiff had no cause of action, that the suit was not triable in the civil Court but was barred under S. 74-A, Chota Nagpur Tenancy Act, that Dhanga-am was always a pradhani mauza and the appointment of pradhan was never a temporary one; that the order of the Deputy Commissioner was not ultra vires and liable to be set aside and that the plaintiff was not entitled to obtain possession of the lands in Sch. (ka). He found however that Sudharsan had surrendered the office of pradhan to the manager of

the encumbered estate, as he had taken 'raiyati settlement' of the *man* lands which were the remuneration of the pradhan and had thereafter paid rent, but did not find from what year he had done so. (Actually as the Record of Rights admittedly shows the position is that the *man* remuneration consists merely of the freedom from rent of Sudharsan's own khuntkatti occupancy lands, which of course he was entitled to retain as such even if he ceased to be pradhan.) The meaning of the term 'raiyati settlement' is that on demitting office his ancestral lands were assessed to the rent which they would have borne in the hands of any raiyat of his class. It may be further observed that though these plots of his khata No. 7 are also included in the lands in Sch. (ka), it is, as Mr. P. R. Das admits, only as part of the pradhani tenancy and not on any claim to direct possession.

Before the Munsif the plaintiff's contention was that the appointment of a pradhan under S. 74-A, Chota Nagpur Tenancy Act, by the Deputy Commissioner was without jurisdiction within the meaning of S. 258 of the Act since the Deputy Commissioner refused to consider his objections that there was no custom of having always a pradhan in the village and that the application was barred by limitation. The learned Munsif held that the Deputy Commissioner had jurisdiction but almost erred in the exercise of it, and in particular that there had been no defiance of or non-compliance with the essentials of procedure: if the Deputy Commissioner made no special inquiry on the question of limitation, the remedy was by way of appeal under the Act to the Commissioner of Chota Nagpur and not by civil suit. As to the existence in the village of the alleged custom of village headmanship, which he considered to be the chief question, he held, relying upon the Record of Rights and other evidence, that Sudharsan and the father and grandfather of Sudharsan had always held the village as pradhans and from 1866 under pattas having had at least one patta each, that the office was heritable, as was also admitted, and that even though the pattas were miadi or temporary (in fact they merely follow the periodical re-assessments of rent), the pradhan had a right to the new settlement and to hold without a patta at the newly-assessed rent, so that on the whole evidence taken together there was "not the least shadow of doubt that there has always been a pradhan in the village and it is by custom held by a village headman" who could not be ejected at the expiry of the term of the patta or at the will of the landlord. The late pradhan, he proceeded, could "only surrender his personal right and not the right of the tenants to have a pradhan." He accordingly dismissed the suit. In appeal the Subordinate Judge stated that the point for determination was:

Is the suit barred under S. 74-A (5), Chota Nagpur Tenancy Act, and is the order of the Deputy Commissioner appointing defendant 1 as pradhan *ultra vires* and liable to be set aside?

It was argued before him that as the village had been in khas possession since 1915 the Deputy Commissioner had no jurisdiction to appoint a pradhan since the limitation was one year under S. 231, Chota Nagpur Tenancy Act, and also that there was no custom to have a pradhan in Dhanga-am. The learned Subordinate Judge dismissed plaintiff's appeal. He pointed out that the Deputy Commissioner had in fact considered the question of limitation and had held "that the cause of action accrued when the villagers felt the need of the appointment of a pradhan." He also pointed out that the Deputy Commissioner had found that the alleged custom existed, mentioning that the villagers had the advantage by custom of having a pradhan in the village. On the view that the Deputy Commissioner was of opinion that the application was not time-barred and that the custom existed and so had jurisdiction to decide the matter, he held that it was unnecessary for the Munsif to decide whether the custom of having a pradhan in the village actually existed since it was not the duty of the civil Court to sit in judgment over the decision of the Deputy Commissioner, that the order of the Deputy Commissioner was not shown to be tainted with any fundamental irregularity and that it was not a requisite for the jurisdiction of the Deputy Commissioner that the landlord should admit that there was a custom in the village of appointing a pradhan.

As to the question of limitation, we are informed that this question of the period of limitation is before their Lordships of the Privy Council at the instance of the appellant in connexion with applications under S. 74-A brought at an earlier date in respect of the office of pradhan in other

villages ; the proprietor having lost before the Deputy Commissioner (part of whose order is reproduced by the subsequent Deputy Commissioner in the order of 16th May 1930, appealed to the Commissioner of Chota Nagpur and went in revision to the Board of Revenue, and it is the order of the Board of Revenue on this point which is impugned before their Lordships. We have not before us the materials relating to those cases. It is however enough to say at this stage that the Courts below have rightly held that the Deputy Commissioner has in fact considered the question of limitation which arose and has decided it whether correctly or incorrectly, and that the Act makes provision for correction in appeal and revision of an incorrect decision.

The next point is whether the Deputy Commissioner actually determined that the custom referred to in S. 74-A exists. He certainly refers to the advantage of headmanship as belonging to the tenants of Dhanga-am by custom. That reference implies a finding that the custom exists. The further statement that their interests cannot be bartered away by any individual pradhan resigning, tends in the same direction. In Para. 4 he sets out the highly significant facts that the village is entirely aboriginal and was formerly pradhani and that it is certainly to the advantage of the tenants thereof to have a pradhan. These findings have to be read in relation to the commonplace that the system of village-headman is universal among aboriginals in each of the three great estates, Porahat, the Government Kolhan and Dhalbhum which make up the District of Singhbhum, and Dhalbhum is a part of the tribal area of the Bhumijs. And indeed with the pradhani swatalipi of Dhanga-am before him, with the significant absence therefrom of an entry prominently made in the record of some other villages to the effect that when the headman refuses "settlement" at the new rent, the village may be held khas by the estate and with the Record of Rights showing that the late pradhan held khuntkatti land implying that an ancestor in the male line established the village, and furnishing other unmistakable indiciae of the custom of pradhani in this Bhumij khuntkatti village, of the village family of which Shankarsan is a member, it must have seemed hopeless to the proprietor's agent if once the plea of limitation failed, to argue on the facts before a Court with local knowledge that the custom alleged did not operate in respect of Dhanga-am, and it must have seemed to the Deputy Commissioner uncalled for to enter upon a dissertation on the obvious. In my judgment the Deputy Commissioner did in fact consider and determine in the affirmative the question whether S. 74-A is applicable to Dhanga-am and in particular held that the village which had always had headmen until Sudharsan vacated the headmanship and was now without a headman, is a tenancy which in accordance with custom is held by a village headman. As to the suggestion that the provision cannot refer to a village in which there was no headman at the date when it came into operation in 1920, S. 74-A gives power to fill a vacancy existing at the date when the application is made irrespective of whether it occurred before or after the provision came into force, provided that the custom of headmanship exists at that date. That was manifestly the interpretation put upon S. 74-A by the Deputy Commissioner.

I am of opinion that the Deputy Commissioner's order under S. 74-A was made with and not, as alleged by the unsuccessful party, without jurisdiction and that accordingly this appeal fails. But even if the Deputy Commissioner had failed to find that the custom of headmanship exists in Dhanga-am the appellant's suit would still fail if in fact the custom exists. On the point the contesting defendant adduced evidence and the Munsif held that it established that the custom exists. The lower appellate Court did not find it necessary to determine the point. The Munsif and Subordinate Judge have long left the district and we were of opinion that on every ground it would be best that the issue of fact should be determined by us on the evidence on record. But as the orders in the order-sheet set out, the appellant has in spite of many opportunities failed to furnish the costs of preparing the paper book. The failure is deliberate and in the face of the assurance that in the circumstances the finding of the Munsif that the custom of headmanship exists in Dhanga-am *prima facie* must stand.

Actually the appellant could not fail to see that even on the facts as set out by the Munsif, it is quite hopeless to upset this finding in respect of a Bhumij khuntkatti village in Bhumij country where, until the present vacancy, a member of the village

family has always been headman, once it is held that the rather lengthy vacancy has not destroyed the custom. On the facts on the record before us, the Munsif's finding is certainly not displaced and indeed is clearly correct. There being a custom of headmanship in Dhanga-am the plaintiff's claim is entirely baseless and the appeal must fail on that ground also.

I had thought of including in this judgment for the sake of clearness an account of the headman system in the aboriginal area of Chota Nagpur and particularly in Dhalbhum where this reclaiming tenancy is the ancient system of land tenure. But it is sufficient in the circumstances to refer to the account given in Paras. 74 to 82 of Reid's Settlement Report of 1912. The Record of Rights in Dhalbhum was being prepared by him at the same time as I was finishing the Record of Rights in the adjoining Pargana of Porahat, both being undertaken by Government to prevent encroachment on the rights of or even extrusion of the village headman, especially aboriginal headmen. Only three observations fall to be made. First, subject to the basic fact that the headmanship system is the indigenous system of village tenancy, the case of each village falls to be decided on its own facts. Next the "village headman" as defined in the Chota Nagpur Tenancy Act, and especially the aboriginal village headman, suffers severely from the confusion caused by inadvertent (and sometimes the interested) extension of a name such as pradhan to non-aboriginal or even mere non-agricultural holders of a lease with no permanent right to renewal and again by the similar extension in popular parlance of the name thikadar with its basic implication of temporary tenancy to persons who have a permanent right in their tenancy subject only to periodical re-assessment (which generally involves enhancement of rent). The third observation is in supplement of Mr. John Reid's account. It was probably due to the necessity for compression that he makes the statement in respect of the "incidents of the tenure or office" in para. 76, which is also found in his edition of the Chota Nagpur Tenancy Act, 1908 :

> If the headman refuses to take settlement after the expiry of his lease at fair and equitable rates, the settlement may be made with a third person *or the village may be held* khas *by the landlord.*

In point of fact the portion underlined [*italicized*] appears in the Record of Rights as to non-khuntkatti headmen but is significantly absent from the pradhan satwalipis of Dhanga-am and other khuntkatti villages. The differentiation is deliberate; it is not a right of the landlord to hold such a village khas. In accordance with custom that is to say, the system, the village is entitled to have a pradhan, the preferential right in a vacancy appertaining to the members of the village family. As to the headmanship itself, it is generally difficult or impossible to describe it in ordinary legal terms. Indeed attempts in that regard in regard to Chota Nagpur institutions have been attended with so much peril that the legislature in desperation described the Mundari Khuntkattidari Tenancy as "neither a tenure nor a holding." But whether the headmanship is an office with tenancy annexed or is a tenancy with an office conjoined, or whatever it is, it is always exceedingly inexpedient to attempt to interpret it in terms of ideas alien to the environment, the only safe course being to get the facts clear and in close detail for an estate first and then for the particular village. The appeal is without merits and I would dismiss it with costs.

Mohamad Noor, J.—I entirely agree. The main question for consideration is whether the order of the Deputy Commissioner under S. 74-A, Chota Nagpur Tenancy Act, can be questioned in the civil Court, and if so, to what extent. The relevant provisions of the Chota Nagpur Tenancy Act bearing on this point are contained in Ss. 74-A, 139 (6) and 258 :

> Section 74-A (1) : Where a tenancy which in accordance with custom is held by a village headman has for any reason been vacated, any three or more tenants holding land within the said tenancy, or the landlord, may apply to the Deputy Commissioner to determine the person who in accordance with custom should be village headman entitled to hold the tenancy.
>
> (2) Such application may be made notwithstanding that a person is in possession of the land of the tenancy, or part thereof, under the authority or with the consent of the landlord.
>
> (3) On receiving such application the Deputy Commissioner shall, after giving notice in the prescribed manner to the landlord, the person, if any, referred to in sub-s. (2) the heirs of the last village headman, the tenants and such other persons, if any, as he considers should be parties to the proceeding, make such inquiry as appears necessary, and determine the person who in accordance with custom should be village headman entitled to hold the tenancy, and shall place such person in possession of the tenancy, if such person is not already in possession thereof.

(4) In every such inquiry the Deputy Commissioner shall have regard to the entries in a Record of Rights finally published under this Act or under any law in force before the commencement of this Act and to the suitability of a person in respect of tribe or caste, membership of the village family or of the late village headman's family (if it be not the village family), residence, character and other matters, to be the village headman of the particular village or group of villages comprised in the tenancy.

(5) No suit or application shall be entertained in any Court concerning any matter which is the subject of an application under sub-s. (1), or which has been determined under sub-s. (3), except a title suit in the civil Court, instituted within one year from the date of the order passed by the Deputy Commissioner under sub-s. (3) to establish the right of the plaintiff to succeed to the tenancy and to recover possession thereof from the person determined by the Deputy Commissioner to be the village headman entitled to hold the tenancy.

(6) No application shall be made under sub-s. (1) concerning a matter which is substantially in issue, or has been substantially in issue and has been determined in a suit instituted under the provisions of sub-s. (6) of S. 139.

Section 139 (6). *Subject to the provisions of sub-s. (5) of S. 74-A* all suits by or against *a village headman* [headman of villages or groups of villages] [whether known as *Mankis* or *Pradhans* or *Manjhis* or otherwise] for a declaration of title in or for] possession of *ejectment from or recovery of* [their] *his* office *or land comprised in his village headman's tenancy* [or agricultural land] whether based or not on an allegation of the existence or non-existence of the relationship of landlord and tenant *and whether brought or not by or against the landlord of such land.*

Section 258. Save as expressly provided in this Act, no suit shall be entertained in any Court to vary, modify or set aside either directly or indirectly, any *decision*, order or decree of any Deputy Commissioner or Revenue Officer in any suit, *application* or proceeding under S. 29, S. 32, S. 35, S. 42, S. 46, sub-s. (4), S. 49, S. 50, S. 54, S. 61, S. 63, S. 65, S. 73, S. 74-A, S. 75, S. 85, S. 86, S. 87, S. 89 or S. 91 [proviso], or under Chs. 13, 15, 16 or 18, except on the ground of fraud or want of jurisdiction *and every such decision, order or decree shall have the force and effect of a decree of a civil Court in a suit between the parties and subject to the provisions of this Act relating to appeal, shall be final.*

It has been contended on behalf of the defendant that sub-s. (5) of S. 74-A bars the present suit. This sub-section bars suits concerning any matter which is subject of an application under sub-s. (1) or which has been determined under sub-s. (3) except a particular kind of suit specified. The first bar refers to the stage when the application is pending before the Deputy Commissioner. The verb used 'is' in the present tense. The word "is" does not mean "can be" or "has been" and is in contrast with "has been" which refers to the stage when the matter has been determined by the Deputy Commissioner, i. e., appointment has been made. I shall presently show that suits about the disputed claim to village headmanship are still entertainable in the revenue Courts if no application has been made under S. 74-A. The second bar, as I have said, refers to the stage when the matter has been determined by the Deputy Commissioner, i. e., the appointment has been made. Had the sub-section stood alone there would have been perhaps some force in the contention of the defendants, but read with S. 139 (6) and S. 258 it is clear that sub-s. (5) does not bar all classes of suits. The subject matter of the application can only be the appointment of a village headman and the determination of the matter referred to in sub-s. (3) of S. 74-A can only be the determination as to who should be the village headman. It does not refer to a suit like the present one which is based on the ground that the Deputy Commissioner had no jurisdiction to appoint a village headman under S. 74-A. Such a suit is expressly permitted by S. 258. What is barred is a suit which questions the appointment made by the Deputy Commissioner except in the matter provided. Whether the plaintiff has been able to show want of jurisdiction in this case is another matter and I shall deal with it later. At present I am dealing with the question of the maintainability of the present suit. Other suits referred to in S. 139 (6) are also not barred, for instance, the landlord can still institute a suit before the Deputy Commissioner for ejectment of a village headman even if he be the man appointed by the Deputy Commissioner if he has behaved himself in a manner as to entitle the landlord to eject him provided that his appointment is not questioned. Then suits can be instituted by the landlord to recover possession of land which has been encroached upon by a village headman as such or a suit by the village headman on the ground that the landlord has deprived him of a portion of the land comprised in his tenancy. These are matters beyond the scope of S. 74-A.

Section 139 of the Act gives exclusive jurisdiction in certain class of suits and applications to the Deputy Commissioner and the cognizance of other Courts is barred. Sub-s. (6) deals with suits by or

against a village headman. They are (1) suits for a declaration of title in and possession of the tenancy or the office of the village headman; these are obviously suits between rival claimants for the village headmanship, (2) suits for the ejectment of the village headman or recovery of his office: these are suits by a landlord to remove the village headman for non-performance of duty or when the village headman has lost his right to hold the office or the tenancy, and (3) suits to recover possession of land comprised in the tenancy of the village headman. The present suit does not come in any one of these classes. This section relates to a suit by or against a village headman as such. It is to be noted that S. 74-A was added to the Act by the Amending Act of 1920 and in consequence of it S. 139 (6) was also amended to make it conform with the newly added section. The new words added have been underlined (*italicized*) and the portions omitted have been enclosed within brackets. It will be seen that the first amendment is that this sub-section has been made subject to the provisions of sub-s. (5) of S. 74-A, as a suit in the civil Court has been provided for in the latter. The second amendment is that the words 'village headman' have been used instead of 'headman of villages or group of villages,' etc., etc. This was in consequence of the definition of 'village headman' added by the Amending Act. The third amendment is that suit for ejectment of the village headman is provided for and the fourth is the addition of the words 'whether brought or not by and against the landlord of such land.'

Now before the amendment of 1920 a suit between rival claimants for a village headmanship was cognizable by the Deputy Commissioner only. Such a suit is still cognizable by the Deputy Commissioner if no application has been made to him under S. 74-A (1) or no appointment has been made by him under S. 74-A (3). But a new remedy has been provided not to the rival claimants but to the tenants of the village and to the landlord. It is clear that before 1920 a civil suit could only be brought when two or more persons claim to have succeeded to the headmanship. There was no provision for the tenants to get a headman appointed when the line of the last headman has become extinct or when on account of dispute between two rival claimants the office is practically vacant. There was also no provision for the tenants of the village to get a headman suited for their needs if after the office has become vacant the landlord has failed to appoint one or has appointed one who is not acceptable to them.

These defects were removed by the Amending Act of 1920. S. 74-A enables any three or more tenants of the village to approach the Deputy Commissioner for the appointment of a village headman. It also enables the landlord to have a village headman appointed if he wants to have one when there is a dispute between two rival claimants, or the man whom he wishes to appoint is unacceptable to the tenants. In all these cases the Deputy Commissioner can take action on the application of three or more tenants of the village or on the application of the landlord. Once the matter has become the subject of an application under S. 74-A the rival claimants cannot institute suits under S. 139 (6), because the institution of suits has been made subject to the provisions of sub-s. (5), S. 74-A. But after the Deputy Commissioner has made the appointment, the aggrieved claimant has his remedy now not in the Court of the Deputy Commissioner but under sub-s. (5) in the civil Court. If however a suit to settle the dispute between the rival claimants has already been instituted before the Deputy Commissioner under S. 139 (6), an application under S. 74-A has been barred by sub-s. (6) of that sub-section. The position now therefore is this. If there are rival claimants to the office of a village headman the matter can be settled in one of two ways. One is for claimant to institute a suit before the Deputy Commissioner under S. 139 (6). The suit is subject to the provisions of appeal and second appeal, etc. If no such suit is pending, or has been instituted and determined, or if there are no rival claimants and the landlord has not appointed any headman or has appointed a man not acceptable to the tenants, the tenants may approach the Deputy Commissioner for the appointment of a suitable headman.

The second class of suits referred to in S. 139 (6) are suits for ejectment of the village headman. This was added, as I have shown, in 1920. Formerly which is the forum for such a suit was doubtful and it was held in this Court in A I R 1918

Pat 392,[1] that under S. 139 (6) as it then stood, a suit for ejectment of a pradhan (village headman) did not lie before the Deputy Commissioner. That section refers only to suits relating to rival claims to the office. The third class of suits refer to suits for possession of lands within the tenancy of the village headman. This is a new provision. Now S. 139 (6) was subject-matter of an interpretation before the amendment of 1920 in 19 C W N 578.[2] It was held that the suit contemplated in this sub-section is a suit instituted by or against the village headman as such, and not when the suit is unconnected with his village headmanship though the plaintiff or the defendant happens to be the village headman. The present suit is for a declaration that the order of the Deputy Commissioner is ultra vires.

Then comes S. 258 of the Act which bars suits in respect of various orders and decisions of the Deputy Commissioner. In this section the words "S. 74-A" were advisedly added in order to bar suits in respect of the appointment of the headman by the Deputy Commissioner under that section. But the suits are not barred if instituted on the ground of want of jurisdiction or fraud. If the legislature had thought that S. 74-A, Cl. (5) or S. 139, Cl. (6), bars all classes of suits in civil Court when in any way the question of village headmanship comes in, there was no necessity of adding S. 74-A to S. 258. It is however conceded by the appellant that the suit is barred under S. 258 unless he is able to show that the Deputy Commissioner had no jurisdiction to appoint the defendant as a village headman.

This leads me to the consideration whether the Deputy Commissioner acted without jurisdiction. It is for the plaintiff to show the want of jurisdiction. Three grounds have been urged before us to show that the Deputy Commissioner had no jurisdiction to make the appointment: (1) that S. 74-A is not retrospective, that is, the Deputy Commissioner had no jurisdiction to appoint a village headman when the vacancy had occurred before the amendment of 1920 by which the new S. 74-A was added to the Act, (2) that the application for appointment of a village headman was barred by limitation, and (3) that there was no custom of the village headmanship and in the absence of custom the order of the appointment is without jurisdiction. I take up these points in the above order.

In my opinion the fact that in this case the vacancy occurred before the amendment of 1920 does not affect the jurisdiction of the Deputy Commissioner. When an authority has been constituted by law to do a particular act or pass a particular order it is for that authority to decide all questions of law and fact which arise in the course of the proceeding and decision of which is necessary in order to enable him to pass the order which the law enjoins or authorizes him to pass. It was therefore for the Deputy Commissioner to interpret the section under which he was authorized to appoint a village headman and decide whether the vacancy mentioned in S. 74-A of the Act includes vacancies which occurred before the addition of this section to the Act. It however seems that this question was not raised before the Deputy Commissioner nor was it raised before any of the two Courts below. Apart from this, in my opinion, there is no force in this contention. There is no question of the section being retrospective, as it only requires the Deputy Commissioner to appoint a village headman under certain circumstances. The power of appointment commenced when the section came into force. We are not dealing with the case of an appointment made prior to it. There is nothing in the section which confines the appointment of the village headman only to cases where the vacancy occurred after the passing of the Amending Act. The section is general, and in my opinion an appointment can be made even if the vacancy occurred before the passing of the Act. Mr. Das contended that the last village headman surrendered the tenancy which terminated before the enactment of S. 74-A and there was no tenancy to which an appointment could be made. To uphold this contention will mean nullifying the provision of the section, because it can be said in every case of surrender that the tenancy has terminated This argument ignores the nature of the village headmanship. It is a tenancy to which an office is attached or vice versa and in which not only the headman but the raiyats are also interested. A headman may surrender his

1. Tata Iron and Steel Co., Ltd. v. Raghunath Mahto, A I R 1918 Pat 392=45 I C 72=5 P L W 199.
2. Durga Prasad Singh v. Hari Ram Mahto, A I R 1915 Cal 685=27 I C 538=19 C W N 578=21 C L J 629.

own interest but he cannot surrender interest of his successors nor can he terminate the tenancy and deprive the raiyats of their customary right to have a headman.

Next comes the question of limitation in respect of which the same consideration arises. Whether a particular application is barred by limitation or not is a matter to be decided by the authority who is to act on that application. If that authority decides the question wrongly, the remedy is an appeal to the higher authority, and not a suit in the civil Court. The learned Deputy Commissioner has decided that the cause of action for filing the application accrued when the villagers felt the necessity of having a headman. It is not for the civil Court to say whether or not that interpretation is correct. No appeal lies to the civil Court against the order of the Deputy Commissioner. The jurisdiction of an authority can only be affected in either of the four ways, namely, if the authority legally constituted (1) has no pecuniary jurisdiction, (2) has no territorial jurisdiction, (3) has no jurisdiction over the subject matter of the case, or (4) has no jurisdiction over the person with whom it is dealing. In this particular case the Deputy Commissioner had all these four jurisdictions subject of course to the question of the existence of custom which I shall take up in a moment. Mr. Das has argued that the Deputy Commissioner was given a special jurisdiction which was not possessed by him before 1920 and therefore if he made an appointment which was out of time he has exceeded his jurisdiction. I am unable to agree with this contention. An order passed on a barred application is not a nullity or ultra vires. I must overrule the contention of the appellant in this respect also.

The last ground taken in derogation of the jurisdiction is that a village headman cannot be appointed unless there is a custom of having a village headman in the village. The learned Munsif, being of opinion that the question of custom was not decided by the learned Deputy Commissioner, proceeded to decide it and found that the custom existed. The learned Subordinate Judge, on the other hand, was of the view that the question of custom was decided by the learned Deputy Commissioner and held that it was unnecessary to decide it in the suit and did not give his decision on this issue of fact.

Now two questions arise. The first is whether the learned Deputy Commissioner had decided that the custom existed, and if so, can the civil Court revise the decision in order to determine the existence of the foundation of his jurisdiction. The second is if the existence of custom has not been decided by the Deputy Commissioner, what is the effect of this omission. In my opinion, the learned Deputy Commissioner has decided the question of custom though he has not very clearly expressed it. In one portion of his judgment he says that :

> It is possible that tenants had not previously felt the need for a pradhan and this fact should not now preclude them from the advantages which it was the intention of the Chota Nagpur Tenancy Act to allow them and which are theirs by custom.

Then further on he says that "the village is entirely aboriginal and was formerly pradhani." These observations clearly show that the learned Deputy Commissioner decided that it was customary in the village to have a headman. Mr. Das, however, argued that even if the Deputy Commissioner has decided that the cutom existed, the civil Court can examine the correctness of that finding and if it finds that the custom did not exist the order of appointment ought to be set aside. In my opinion this contention has no force. The learned advocate referred us to 51 I A 241,[3] 17 I A 40[4] and 12 Pat 626.[5] In my opinion, none of these cases is in point. In the first case the Board of Revenue had assessed a land which was already included in the Permanent Settlement. Their Lordships of the Judicial Committee held that the jurisdiction of the civil Court was not barred and that an appeal to the civil Court provided by Regulation 2 of 1819 was not taken away by the subsequent Act 9 of 1847. In fact the decision is based upon a statutory provision which their Lordships held was still in force. In the second case there are no doubt observations of Lord Shaw to the effect that the civil Courts can examine the foundation of jurisdiction, but there is nothing in that observation to show that when a legally constituted authority

3. Secretary of State v. Jatindra Nath Chaudhury, A I R 1924 P C 175=80 I C 1023=51 I A 241=51 Cal 802 (P C).
4. Secretary of State v. Fahamidannissa Begum, (1890) 17 Cal 590=17 I A 40 (P C).
5. Jagdishwar Dayal Singh v. Dwarka Singh, A I R 1933 P C 122=142 I C 781=60 I A 176 =12 Pat 626 (P C).

which has been given jurisdiction to do a particular act if a certain set of facts exists, decides the existence of those facts, the decision can be revised by the civil Court on materials which may or may not have been before that authority. In the third case, the question was whether a particular decree was or was not a rent decree.

The revenue authorities, who had sold the tenure in execution of that decree, held during the course of the proceeding for delivery of possession that the decree was a rent decree. It was held by the Judicial Committee that the nature of the decree can be questioned in the civil Court. It is to be noted that neither in the Chota Nagpur Tenancy Act nor under the Rent Recovery Act, under which the delivery of possession was being given, had the Revenue Court any power to decide whether or not a particular decree which had been obtained and which purports to be a rent decree is in fact so certainly. In fact, the suit was a title suit or a declaration that the interest of the plaintiff was not affected by the sale under that decree. None of these cases can, in my opinion, be any authority for holding that while taking action under S. 74-A, Chota Nagpur Tenancy Act, the Deputy Commissioner decides that there is a custom of having a headman in a certain village, that decision can be questioned in a civil Court. Assuming, however, that the learned Deputy Commissioner has failed to find the existence of custom, the question is what is the effect of that omission. Mr. Das has contended that this omission makes the order ultra vires even if we come to the conclusion that the custom existed. I am unable to agree with this contention.

The foundation of the jurisdiction of the Deputy Commissioner is the existence of the custom, and not the decision that such a custom existed. I agree with the learned Subordinate Judge that a simple omission to decide the existence of custom did not take away from the Deputy Commissioner the jurisdiction to appoint a village headman, but in case of such omission it is, in my opinion, competent to the civil Court to examine whether the foundation of jurisdiction existed. If the civil Court finds that there was such a foundation, the order cannot be interfered with simply on the ground that the legally constituted authority failed to decide a fact which it was necessary to decide before the appointment could be made. The learned Munsif on the evidence before him decided that the custom existed. The learned Subordinate Judge did not pronounce any judgment on this issue. We were prepared to hear the appellant on the issue of fact but he made persistent default in paying the cost of typing the evidence. The finding of the learned Munsif as pointed out by my learned brother is on the face of it correct and the plaintiff must have felt that on the state of the record it could not be displaced. I agree that the appeal be dismissed with costs.

B.D./D.S. *Appeal dismissed.*

A. I. R. 1937 Patna 211

VARMA, J.

Qutubuddin and *another*—Petitioners.

v.

Emperor—Opposite Party.

Crim. Revn. Nos. 241 and 245 of 1936, Decided on 30th June 1936, from order of Sess. Judge, Patna, D/- 24th April 1936.

(a) Penal Code (1860), S. 205—False impersonation—Accused representing himself as servant of another—Acceptance of notice on behalf of such other person is not offence under S. 205.

Where an accused representing himself as a servant of another accepts a notice that was to be served on such other person by writing on the process words to the effect of "received on behalf of my master," he does not commit an offence under S. 205, I. P. C., inasmuch as in doing so he does not falsely represent such another person but falsely arrogates to himself the status of such person's servant. [P 213 C 2]

(b) Penal Code (1860), S. 199—Affidavit—Swearing of—Repeating of what another has written does not amount to swearing false affidavit.

Where a person in swearing an affidavit only repeats what another person had written, it will not have the same effect of swearing a false affidavit. [P 214 C 1]

S. N. Sahay, C. P. Sinha and *Q. N. Hasan*—for Petitioners.

Asst. Govt. Advocate—for the Crown.

Order.—Criminal Revision No. 241 of 1936 in which the petitioner is one Qutubuddin and Criminal Revision No. 245 in which the petitioner is one Aziz Khan arise out of the same judgment and have been heard together. Qutubuddin was convicted under S. 205, I. P. C,, and sentenced to undergo rigorous imprisonment

for two years and to pay a fine of Rs. 100, in default to suffer six months' further rigorous imprisonment. Aziz Khan was convicted under Ss. 199 and 205/114 and sentenced to one year's rigorous imprisonment and to pay a fine of Rs. 50, in default, to three months' further rigorous imprisonment under each of the two sections, the sentences to run consecutively. There was a third man, Ejaz, who was found not guilty and has been acquitted by the trial Court. On appeal the learned Sessions Judge has reduced the sentence passed on Qutubuddin to six months' rigorous imprisonment and to a fine of Rs. 50, in default, to further rigorous imprisonment for three months. The prosecution case has been very ably summarised by the lower appellate Court and no exception has been taken to the statement of the facts made by the Court below. It appears that one Mt. Bibi Soghra instituted a rent suit in the Munsif's Court at Bihar against some tenants making one Muhammad Husain *alias* Muhammad Husi a pro forma defendant. Muhammad Husi subsequently transferred himself to the category of the plaintiff on 28th September 1933. On 30th October 1933, a joint consent decree was passed in favour of Mt. Bibi Soghra and Muhammad Husi against the tenants showing the amount payable to each of them separately besides costs. On 20th April 1934, Bibi Soghra applied for execution of her share in the decree and prayed for the issue of a notice under S. 158-B, Ben. Ten. Act, upon Muhammad Husain, the co-sharer landlord. The notice purports to have been served at Muhammad Husain's permanent residence at Desna on 29th April 1934, not personally but on the petitioner Qutubuddin who received the notice as a servant of Muhammad Husain and signed an acknowledgment on its back on the identification of the other petitioner Aziz Khan who is a servant of Bibi Soghra.

The case for the prosecution is that Qutubuddin was really a servant of Bibi Soghra and not a servant of Muhammad Husain and in pursuance of a conspiracy the servants of Bibi Soghra got the service effected at Desna on 29th April 1934, on the false allegation that Qutubuddin was a servant of Muhammad Husain *alias* Muhammad Husi. It appears further that in support of this service an affidavit was sworn by petitioner Aziz Khan on 2nd May 1934, which was filed in Court on 10th May 1934. The 18th June 1934 was fixed for the sale of the judgment-debtor's holding. On 12th June 1934, i. e., about six days before the date fixed for the sale, Muhammad Husi, it is said, accidentally heard from one Nanhku Mahto about this matter and two days later he filed a petition for execution of his share in the decree so that he might not be prevented from realising his dues out of the holding in question. On 15th June 1934, Muhammad Husain filed a petition under S. 476, Criminal P. C. before the Munsif of Bihar praying that Ejaz Husain (the decree-holder's pleader's clerk) and the serving peon might be prosecuted because they had acted in concert and abetment. The Munsif after the preliminary inquiry filed a complaint against Ejaz Husain, Qutubuddin and Aziz Khan under various sections and they were tried with the result stated already. The charge against petitioner Qutubuddin under S. 205 ran as follows :

That you on or about 29th April 1934, at Desna, falsely personated himself (yourself) as a servant of Muhammad Husain before Jagarnath, a civil Court process server, and in such assumed character caused a notice under S. 158-B, Ben. Ten. Act, to be served on Muhammad Husain by writing "*apne malik ka nam ki notice paia*" on the notice and thereby committed an offence punishable under S. 205, I. P. C.

Aziz Khan was charged under Sections 205/114, I. P. C., for having abetted Qutubuddin, and was further charged as follows under S. 199 :

That you on or about 2nd May 1934, at Bihar in a declaration made by you before the Oath Commissioner made a false statement which you knew to be false touching a point material to the object for which the declaration was made, to wit, that the notice under S. 158-B, Ben. Ten. Act, had been served on Qutubuddin, a servant of Muhammad Husain, and which declaration was by law receivable as evidence and thereby committed an offence punishable under S. 199, I. P. C.

Both the petitioners as well as the person who was acquitted were further charged as follows under S. 120-B :

That you on or about 29th April 1934 at Desna caused to be done an illegal act, viz., act to get the notice under S. 158-B, Ben. Ten. Act, served on Muhammad Husain in his absence by getting it written by Qutubuddin that he was receiving the notice as a servant of Muhammad Husain and the same act, viz., the service of the notice in absence of Muhammad Husain was done in pursuance of the agreement and thereby committed an offence punishable under S. 120-B, I. P. C.

On this charge of conspiracy the trial Court found the accused not guilty. Aziz Khan pleaded not guilty to the charges framed against him and said that he did not enter into any criminal conspiracy

with any accused, that he was a servant of Bibi Soghra and in such capacity identified Qutubuddin who was a servant and agent of Haji Muhammad Husain to the Court's peon, that as Qutubuddin was a servant of Haji Muhammad Husain, no fraud was committed, that he did not swear any false affidavit, and as such, did not commit any offence in that respect, and that Ejaz did not go to Desna on 29th April 1936, as alleged by the prosecution. Qutubuddin also pleaded not guilty to the charges and said that he was never a servant of Bibi Soghra but was appointed as a tutor to teach the children of Haji Muhammad Husain and served as such till he was in Desna, when he was brought by the said Haji and kept at Bhainsasur at Bihar Sharif, that he did not know the contents of the written statement filed on his behalf in the civil Court and he suspected that the Haji was manoeuvring for his own purposes, that it was under the influence and advice of the Haji that he made the statement before the Munsif as he was given hopes by the Haji that he would be let off if he made the statement that he did before the Munsif, and he further said that Haji Muhammad Husain's lawyer argued before the Munsif that he (Qutubuddin) might be let off and made a prosecution witness. Qutubuddin also asserted that he was authorized to sign and he signed the notice in his capacity as a servant of Haji Muhammad Husain and had informed the latter of his having done so, that as Haji Muhammad Husain had no *baithaka* of his own, he (Qutubuddin) used to teach the children at the *baithaka* of Bibi Soghra; and he submitted that he had no criminal intention in signing the notice for his employer. In revision Mr. Nazrul Hasan, appearing on behalf of Qutubuddin, urges that the act ascribed to Qutubuddin is not covered by the provisions of S. 205, I. P. C., inasmuch as the petitioner signed his own name and not of anyone else, and the fact that he signed describing himself to be a servant of Haji Muhammad Husain will not in the circumstances of the case bring him within the mischief of the section. The exact expression used by the petitioner was "*apne malik ka nam ki notice paia*" as is mentioned in the charge against him quoted above. Now, S. 205 runs as follows:

> Whoever falsely personates another and in such assumed character makes any admission or statement, or confesses judgment, or causes any process to be issued or becomes bail or security, or does any other act in any suit or criminal prosecution shall be punished with ....

The question, therefore, is that when Qutubuddin signed his own name and described himself as a servant of Haji Muhammad Husain, did he "falsely personate another" person? Here the person is the same and it is only the status he gives to himself that is according to the prosecution wrong. Applying the expression "Whoever falsely personates another" to this case, and expanding it according to the prosecution story, it seems that the allegation is that Qutubuddin falsely personated Qutubuddin (himself), a servant of Muhammad Husain. In my opinion, it is not a case of personating another as mentioned in S. 205. Other cases of false personation have been dealt with in the Code under Ss. 140, 170, 171, 229 and 416. The present case does not fall under any of those sections except perhaps S. 416, I. P. C., if the other ingredients of that section are proved. S. 140 deals with the case of a person who poses to be a soldier by wearing garb or carrying token used by a soldier, etc. S. 170 deals with the case of a person pretending to be or falsely personating a public servant. S. 171 speaks of the case of a person with fraudulent intent wearing the garb, etc., used by a public servant. S. 229 deals with the case of a person who allows himself to be empanelled or sworn as a juryman or assessor knowing that he is not entitled to be so empanelled or sworn. S. 416 deals with the case where a person cheats by pretending to be some other person or by knowingly substituting one person for another or by representing that he or any other person is a person other than he or such other person really is; and the explanation under this section says that the offence is committed whether the individual personated is a real or imaginary person.

The trial Court in its judgment has noted that Bibi Soghra has a *baithaka* and that it was not proved that Haji Muhammad Husain used his outhouse as his *baithaka*. In fact the learned Magistrate has referred to one festive occasion, in which Haji Muhammad Husain also joined, when the seating arrangements were made at Bibi Soghra's *baithaka*; and he further remarked that there was considerable force and truth in Qutubuddin's case that

he made the admissions before the Munsif under the influence of Haji Muhammad Husain in the hope of escaping prosecution. He also referred to the Munsif's report where it was noted that the advocate for Haji Muhammad Husain pleaded that Qutubuddin's story was true and that he should be let off and converted into a prosecution witness in the shape of an approver. In these circumstances the allegation attempted to be proved by the prosecution that Qutubuddin was not a servant of Haji Muhammad Husain and that he described the Haji as his *malik* as the result of a conspiracy, will not bring Qutubuddin within the mischief of S. 205, I. P. C. As regards the other petitioner Aziz Khan the facts proved do not show that his statement was responsible for the offence alleged to have been committed by Qutubuddin. Qutubuddin is a *maulvi*; and the original story was that it was Ejaz Husain who abetted Qutubuddin to write a false acknowledgment, which was not believed. It is not shown clearly what were the acts proved which establish that Qutubuddin was abetted by Aziz Khan as a servant of Bibi Soghra, or that Aziz knew that Qutubuddin was not a servant of Haji Muhammad Husain, or that he instigated Qutubuddin to sign the notice. The evidence on these points is not only meagre but unconvincing. The trial Court, while dealing with this charge, has said towards the end of its judgment that Aziz Khan abetted Qutubuddin to falsely personate himself as a servant of Muhammad Husain before the civil Court peon and in such assumed character caused a notice under S. 158-B, Ben. Ten. Act, to be served on Muhammad Husain by making him write the false acknowledgment and thereby he committed an offence under Ss. 205/114, I. P. C. In the beginning of the judgment, of course, it has given the prosecution story. The lower appellate Court only met the argument advanced on behalf of Aziz Khan and did not come to its own findings on this point.

As regards the charge under S. 199 against Aziz Khan, it refers to the affidavit sworn by him and in it he only repeated what Qutubuddin had written on the notice as a servant of Haji Muhammad Husain. I do not think that a repetition of that statement by Aziz Khan will have the effect of establishing that he was fraudulently swearing a false affidavit. In the result, I would allow these applications, set aside the convictions and sentences passed upon the petitioners and direct that they be set at liberty forthwith.

B.D./A.L. *Applications allowed.*

A. I. R. 1937 Patna 214

MOHAMAD NOOR AND MADAN, JJ.

Het Lall—Plaintiff—Appellant.

v.

Upendra Nath Basu and *others*—Defendants—Respondents.

Appeal No. 188 of 1935, Decided on 28th September 1936, from order of Sub-Judge, Patna, D/- 12th February 1935.

Award—Registration — Award amounting to release from contract—Registration is not necessary — Award declaring, creating or assigning title requires registration.

A contract for sale does not require registration nor does the award, regarded as a release from the contract, require registration. But where there is an immediate intention to create, declare or assign title, the document of award requires registration: *A I R 1932 P C 55* and *A I R 1931 Cal 223*, *Disting.* [P 216 C 2; P 217 C 1]

C. B. Agarwala and *P. Jha* — for Appellant.

S. N. Bose, *K. Dayal* and *S. Mustafi*— for Respondents.

Madan, J.—This is an appeal by the plaintiff Babu Het Lall against an order of the Additional Subordinate Judge of Patna refusing to make a private award dated 1st October 1930, a rule of the Court and to pass a decree thereon. The relevant facts are that the plaintiff, defendant 2 and defendant 3 are the sons, and defendant 4 is the grandson of one Rai Sahib Ishwari Prasad, who was resident in Benares City where defendant 1, Babu Upendra Nath Basu, also lives. In the year 1908 defendant 1 bought at a Court sale the proprietary right in village Raitar which is in the Bihar Sub-division of the Patna District. The property was subject to heavy encumbrances, and in the year 1912 defendant 1 borrowed from Ishwari Prasad, who is said to have been his close friend, a sum of Rs. 50,000 for paying off part of the encumbrances. No document was executed in favour of Ishwari Prasad, but there was an oral agreement that if the money was not repaid, Ishwari Prasad should become a half-sharer in the property. In the year 1914 there was a further oral agreement, whereby Ishwari

Prasad was recognized as half owner of the property which was valued at the sum of Rs. 1,34,000. The management remained with defendant 1, but thereafter Ishwari Prasad appeared as co-sharer in the zemindari papers first in his own name and then in that of Raghunathji, his family deity.

In the year 1924 Ishwari Prasad died, and a dispute arose between the plaintiff and defendants 2 to 4 over the division of his estate. The dispute was referred to the arbitration of Babu Chintamani Mukerji and Rai Sahib Jwala Prasad, and by their award, which is of February 1926, the arbitrators divided the property into four parts, and their award was made a decree of the Court. By this award Raitar was divided equally between the plaintiff and defendants 2 to 4. As they had no title deed in respect of this property, these persons approached defendant 1 who, on 25th April 1925, made a written declaration to the effect that he had purchased the property in the year 1908 while it was heavily encumbered, that Ishwari Prasad had lent him the sum of Rs. 50,000 at six per cent. interest with the option of taking over a half-share in the property, and that in the year 1924 the property had been divided accordingly. Defendant 1 expressed his willingness, after accounts had been made up, to execute such proper instrument as the plaintiff and defendants 2 to 4 might unanimously wish, or in the event of difference between them such as might be reasonably required by an arbitrator appointed by them. Meanwhile the property was to remain with defendant 1. On 28th December 1927, defendant 1 executed a draft sale deed in respect of one-quarter of the half-share in favour of the plaintiff alone. It was recited therein that the annual income of the half-share was Rs. 3,000 and that the plaintiff had agreed to accept a portion yielding an income of Rs. 750 as his own share together with the sum of Rs. 2,000 paid in cash. This sale deed, however, was never formally executed probably because of further differences that arose between the heirs. The result of these differences was that on 3rd April 1928, there was an agreement between the parties to refer the matter to the same arbitrators who had decided the former dispute. The reference was in the following terms :

Whereas differences have arisen between us and the two parts aforenamed regarding the accounts and transfer of Raitar property in the District of Patna by Babu Upendra Nath Basu of the first part, we hereby of both the parties of our free will and accord refer our dispute to the arbitration of Rai Sahib Jwala Prasad, Chief Engineer, Irrigation, U. P., and Shrijut Babu Chintamani Mukerjee, Sonarpura, Benares, and faithfully promise and bind ourselves hereby to abide by any award they may make in respect of the said dispute and to abide by their decisions; and we further authorize them to adopt whatever procedure they may deem fit and proper in order to settle our dispute.

On 1st August 1930, the arbitrators submitted their award which was registered before the Sub-Registrar of Benares, and, as the terms of this award have given rise to the present controversy, I quote them in full :

Know all men to whom it may concern that we . . . . . give our award as follows :

(1) That the amounts specified in the statement of accounts passed by us attached hereto and marked as Ex. B should be paid with interest at eight annas per cent. per month within three months of to-day after which period the rate of interest shall be ten annas per cent. per month on any balance unpaid till the amounts are fully paid up.

(2) That Babu Upendra Nath Basu requested us that in respect of transferring the above said Raitar property to the second party he may be allowed to pay any sum fixed by us in lieu thereof so as to save the property from being ruined, and we were asked by the party to fix the sum to be so paid by the first party to the second party. We accordingly directed that the said Babu Upendra Nath Basu do pay Rs. 15,350 to each of the four gentlemen of the second party, that is to say, a total sum of Rs. 61,400 as the equivalent of the share of the second party in the said property with interest at six per cent. per annum accruing from 1st October 1930. If the said amount is not paid by 1st October 1931, the rate of interest thereafter shall be 7½ per cent. per annum on the whole or any balance left unpaid.

The ownership of the second party in one-half of Raitar property shall not cease till after the above sum of Rs. 61,400 as well as the amounts mentioned in the statement Ex. B, together with interest specified in respect of both be fully paid up.

Thereafter the plaintiff applied to the Subordinate Judge of Benares under Para. 20, Sch. 2, Civil P. C., for filing the award in Court and passing a decree thereon. Defendant 1 resisted the application on various grounds, one of which was that the Subordinate Judge of Benares had no jurisdiction over the subject matter of the award. The Subordinate Judge held that as the heirs of Ishwari Prasad were not at that time the legal owners of the half-share in the property, and as the effect of the award was merely to grant certain sums of money to the applicant and his co-heirs, he had jurisdiction over the matter, and he, therefore, ordered the

award to be made a rule of the Court, excepting the portion dealing with the ownership of the Raitar property which portion be treated as a nullity. On appeal the Allahabad High Court held that the award did determine that the heirs of Ishwari Prasad had a legal title to a half-share in the Raitar property and that they were entitled to retain their ownership until they have received certain sums of money from the appellant.

Their Lordships observed that the arbitrators in effect gave Ishwari Prasad's heirs a charge over the immoveable property until the specified sums were paid to them, and they allowed the appeal holding that the order of the Subordinate Judge of Benares was without jurisdiction. This decision is reported in 55 All 542.[1] The plaintiff accordingly re-filed his application in the Court of the Subordinate Judge of Patna with a further prayer that a mistake in the calculation of the arbitrators should be corrected, and that he and his co-heirs should be declared to be entitled to receive the sum of Rs. 16,800 each in place of the sum of Rs. 15,350 each awarded to them. This claim which was disallowed by the learned Subordinate Judge was not pressed before us. Defendant 1 again opposed the application on various grounds, and mainly because the arbitrators had failed to determine the most important question at issue between the parties, namely what was the effect of a will said to have been executed by Ishwari Prasad in the year 1923. He also claimed that the award, inasmuch as it purported to create title in favour of himself in respect of immoveable property, required to be registered, and its registration by the Sub-Registrar of Benares was without jurisdiction. The learned Subordinate Judge rejected the contention of defendant 1 regarding the will but upheld it on the ground of non-registration and he, therefore, rejected the application. The plaintiff has now filed this appeal which has been contested by defendants 1 and 4.

Three points have been argued before us in this appeal : (1) Whether or not the sub-paragraph to Cl. 2 of the award required to be registered; (2) whether in that case it was open to the Court to separate the sub-paragraph from the rest of the award and to pass a decree on the good portion of the award; (3) whether the whole award is bad as not determining the question of the will. On the first point Mr. S. N. Bose for defendant 1 contended that the award did require registration because it created or at any rate declared title in immoveable property worth more than Rs. 100. Now it is clear that at the time of the award the heirs of Ishwari Prasad had no legal title in the property inasmuch as there was no existing title deed in their favour. Their legal position was that of a party to a contract for sale in default of repayment of the money lent by Iswari Prasad. A contract for sale does not require registration nor did the award, regarded as a release from the contract, require to be registered. The award does refer to the continuance of the 'ownership' of the plaintiff and his co-heirs, but a document of this character cannot be treated exactly as though it were a formal instrument drawn up under the advice of lawyers who are expected to understand the exact legal position of the parties.

The question before us is whether the arbitrators intended their award to operate as an instrument of title changing the status of the parties, or whether their intention was to reserve the existing right of the heirs, namely, the right to a conveyance of a half-share in the property if their dues were not paid. In my opinion the language of the award itself, directing that the ownership of the heirs should "not cease" until the money had been paid, supports the latter alternative. It is not surprising if the arbitrators, seeing that the heirs were admittedly in possession of half of the property, described them as owners although actually they were not so, and the use of this word in the award must, I am satisfied, be ascribed to a defect in drafting on the part of the arbitrators, and not to an intention on their part to confer legal ownership on the heirs by changing the status of the parties. The position would have been different, had the arbitrators fixed a time limit for the payment of the money, on the expiry of which the heirs of Ishwari Prasad were to become the absolute owners of the property. In that case the award would have become a document of title requiring registration. In the absence of a time limit the arbitrators left it to the heirs to take action themselves for recovery of the money due in default of payment, or for obtaining a transfer of the property. For

1. Upendra Nath Basu v. Het Lal, A I R 1933 All 380=143 I C 571=55 All 542=1933 A L J 741.

these purposes the award was not a document of title.

In my opinion the observation of their Lordships of the Allahabad High Court that the award did in effect create a charge on the property must be construed in the light of the above observations, which are based on a consideration of the true legal position of the parties. In reality the award recognized an existing right, which did in effect amount to a charge on the property. It was argued for defendant 1 that the award still required to be registered as it did declare the existing title of the heirs in the property. This point arose in 11 Pat 272,[2] where it was held that S. 17, Registration Act, does not apply to cases where, as in the present case, a document is merely an acknowledgment of a pre-existing right. In A I R 1931 Cal 223,[3] the word "operate" in S. 17 has been held to refer to the immediate intention of the instrument in question, and not to its ultimate consequences or collateral effects. It is only where there is an immediate intention to create, declare or assign title, that the document requires registration. In my opinion the award in this case did not create, assign or declare title, and it did not, therefore, require to be registered.

The question whether, assuming that the sub-paragraph in the award required to be registered, it was still open to the Court to separate that sub-paragraph from the rest of the award and proceed to pass a decree was also argued at length before us. Mr. Agarwala for the plaintiff referred to Russell on Arbitration, Edn. 11, p. 240, where cases are collected in which the English Courts have held that the bad portion of an award is separable from the good portion. In (1917) 1 K B 736[4] there is a discussion on the same point and the same principle is affirmed. The matter also came before the Privy Council in the Oudh case, *Amir Begam* v. *Badruddin*,[5] which was a case arising from a private award : their Lordships, holding in that case that a portion of the award bad for want of jurisdiction could be separated, observed at p. 342:

> It is well recognised law that when a separable portion of an award is bad, the remainder of the award, if good, can be maintained.

The same principle was followed in 4 Pat 670[6], which was also a case where the arbitrators had exceeded their jurisdiction. Mr. S. N. Bose contended that this principle applies only to cases where the arbitrators had exceeded their authority such as are referred to in para. 14, Sch. 2 of the Code, and not to cases where the aribitrators had not gone beyond the terms of the reference. This point does not appear to have been dealt with in any reported decision of this Court, but it was raised in the Oudh case, A I R 1936 Oudh 72.[7] In that case King, C. J. and Smith, J. observed with reference to the Privy Council decision, quoted above, that the dictum of their Lordships was couched in quite general terms and did not limit the applicability of the proposition enunciated by them to any particular set of facts and circumstances. I do not, however, find it necessary to decide the somewhat difficult question whether or not the award in this case is capable of being divided, in view of my finding already arrived at that the award did not require to be registered.

Lastly, there is the argument that the whole award is bad as it does not deal with the question of the will. Admittedly there is in existence a document purporting to be a will executed by Iswari Prasad in the year 1923. The will not having been probated or attested is inadmissible in evidence in this case so far as it relates to the Raitar property, which is in this province. According to defendant 1 and defendant 4, whose case was argued before us by Mr. Bankim Chandra De, the question of the validity of the will was uppermost in the minds of the parties at the time of the reference to arbitration In that case it is remarkable that the reference itself contains no mention of the will, nor do I find any passage from which it can reasonably be inferred that the question of will was to come before the arbitrators. The only matter for their decision was the dispute about the transfer of the property

2. Bageshwari Charan Singh v. Jagarnath Kuari, A I R 1932 P C 55=136 I C 798=59 I A 130=11 Pat 272 (P C).
3. Imperial Bank of India v. Bengal National Bank Ltd., A I R 1931 Cal 223=131 I C 689 =58 Cal 136=34 C W N 605=53 C L J 269.
4. Selby v Whitbread & Co., (1917) 1 K B 736= 86 L J K B 974=116 L T 690=81 J P 165= 33 T L R 214=15 L G R 279.
5. A I R 1914 P C 105=23 I C 625=17 OC 120= 36 All 336 (P C).
6. Muhammad Khalil v. Abdul Rahim, A I R 1925 Pat 810=93 I C 261=4 Pat 670=7 P L T 644.
7. Mata Badal Singh v. Sheo Mangal Singh, A I R 1936 Oudh 72=158 I C 812=1935 O W N 1141=1935 O L R 622.

to the heirs of Ishwari Prasad and in Ex. 7, a letter written by defendant 1 shortly before the reference, defendant 1 admitted his liability to execute a deed of relinquishment in favour of the heirs. Ex. D is another letter written by defendant 1 to the arbitrators on 19th October 1928 with reference to the will, but the letter itself shows that the will was not part of the subject matter of the reference. It is to the effect that defendant 1 had found that Ishwari Prasad had executed a will, and he, therefore, asked, as a matter of justice to the parties, that the arbitrators should refer the question of the validity of the will to the Allahabad High Court (although no such procedure is known to the law) before proceeding to determine the matters referred to them. This clearly implies that at that time defendant 1 himself did not consider that the will was part of the reference to the arbitrators.

The result of the letter was that the arbitrators did devote some consideration to the will and examined one Kishan Chandra, co-executor with defendant 4 under the will, but the arbitrators did not decide about the will as it was beyond the scope of their reference. This appears from the evidence of Rai Bahadur Jwala Prasad, one of the arbitrators, who has explained that the arbitrators did not decide about the will as it was not in their terms of reference nor were they authorized to do so. In fact the arbitrators were not in a position to decide the matter at all, as Kishun Chandra, one of the executors was not a party to the proceedings before them, a fact which defendant 1, who is a qualified lawyer, should have been fully able to appreciate. Again, on 9th January 1931, defendant 1 wrote a postcard which is Ex. 17/C, to defendant 2, wherein he urged defendant 2, as having accepted the award, to get it filed in Court without further delay. The postcard shows that at that time defendant 1 himself accepted the award as complete and final between the parties. Under the Succession Act a will executed in the United Provinces in the year 1923 did not require either probate or attestation in respect of properties situated in that province; but it is remarkable that in spite of this no step was taken in support of the will for a period of more than twelve years. Defendant 4 in his evidence admitted that he himself had done nothing about it, nor was he aware that anything had been done by his co-executor. The will is said to have been in favour of an institution called the Tulsi Technical Institute, but from the evidence of defendant 1 it appears to be doubtful whether any such institution really exists, and it is clear that the will was disregarded by all the parties concerned. The evidence shows conclusively that the matter of the will was not referred to arbitrators, nor were the arbitrators competent to decide it.

The learned advocate for the plaintiff suggested that defendant 1, in collusion with defendant 4, has changed his attitude towards the will as since the year 1928, the time of the reference, the value of landed property has fallen and defendant 1 is now anxious to surrender the half-share instead of paying the money. It is the case of defendant 1 that at the time of the arbitration he was really in doubt as to the effect of the will, but admittedly defendant 1 has since executed a sale deed in respect of a half-share of the property in favour of defendant 4, ignoring the rest of the heirs. The learned advocate for defendant 1 found it difficult to defend this action of his client in turning round and supporting the will against the legal heirs. The result has been unfortunate as Mr. Agarwala suggested that the plaintiff would still have been willing to settle the matter and take his share in the property in lieu of payment, had defendant 1 not put himself out of Court in executing the sale deed, the bona fides of which are open to serious question. Since the award the plaintiff and defendants 1 and 2 have filed a suit against the remaining defendants and the executors for the decision of all the matters in dispute between the parties including the question of the will, but Mr. Agarwala explained that the suit was filed as a matter of precaution, in view of the result of the present proceeding in the lower Court and in order to save limitation. The filing of this suit is no obstacle to the plaintiff's success in this appeal the result of which is that both the objections taken to the award must fail. I would, therefore, allow this appeal and direct that the award be filed and made a decree of the Court. The plaintiff is entitled to costs of both Courts against defendants 1 and 4.

Mohamad Noor, J.—I agree.

B.D./D.S. *Appeal allowed.*

A. I. R. 1937 Patna 219

ROWLAND, J.

Aziz Khan—Complainant—Petitioner.

v.

Ekram Hussain—Accused — Opposite Party.

Criminal Revn. No. 542 of 1936, Decided on 10th November 1936, from order of Sess. Judge, Shahabad, D/- 3rd September 1936.

Penal Code (1860), S. 497—Evidence—Fact of marriage must be strictly proved—Particular number of witnesses to prove marriage is not material—Evidence of husband and wife can be sufficient — No presumption against validity.

In criminal cases such as adultery where marriage is an ingredient in the offence, the fact of the marriage must be strictly proved in the regular way. This implies that the marriage must be proved as an event which took place and not merely as the state in which the parties were living and if it is sought to be proved by oral evidence that evidence must, in accordance with S. 60, Evidence Act, be direct, that is to say, must be the evidence of an eyewitness. It is not, however, necessary that any particular number of witnesses must be examined to prove the fact of marriage between two persons. Evidence of a husband and a wife that a marriage in fact took place between them can be accepted as sufficient to prove that fact and no presumption against the validity of such marriage will arise unless there is at least some suggestion that a particular part of the ceremony necessary to its validity was lacking : *19 Cal 79* and *164 I C 957*, *Disting.*; *20 All 166* and *5 Cal 566* (*F B*), *Foll.*

[P 219 C 2; P 220 C 1]

K. K. Banarji—for Petitioner.

M. Azizullah—for Opposite Party.

Order.—This is an application in revision against an appellate order of the Sessions Judge of Shahabad acquitting Ekram Hussain of an offence punishable under S. 497, I. P. C. The facts found are that the opposite party Ekram Hussain had kept living with him as his wife Mt. Sayidan who had before that been living with Aziz Khan, the complainant, as his wife. The prosecution case was that Aziz and Sayidan were legally married about 1926 and had never been divorced. The defence in the trial Court was that there had been a divorce terminating the marriage of Aziz and Sayidan. This contention was negatived by both Courts. It had not been denied before the trial Court that Aziz and Sayidan were legally married, nor was this fact challenged in the memorandum of appeal to the Sessions Judge. But the learned Judge after observing quite correctly that the law requires in a prosecution under S. 497, I. P. C., that the alleged marriage must be strictly proved held, that the evidence on record was not sufficient to prove that there was a legal marriage because the facts were not stated from which the Court could judge whether all the ceremonies necessary for a valid marriage under the Mahomedan law were performed or not.

In revision it is contended that the Sessions Judge has gone beyond the law in rejecting the evidence as insufficient and that there has been a miscarriage of justice. It was laid down in the Full Bench decision of the Calcutta High Court in 5 Cal 566,[1] that in criminal cases such as adultery where marriage is an ingredient in the offence, the fact of the marriage must be strictly proved in the regular way. This implies that the marriage must be proved as an event which took place and not merely as the state in which the parties were living, and if it is sought to prove it by oral evidence that evidence must, in accordance with S. 60, Evidence Act, be direct, that is to say, must be the evidence of an eyewitness. I do not understand the decision as laying down that any particular number of witnesses must be examined to prove the fact of marriage between two persons, for that would be in contravention of what is expressly laid down in S. 134, Evidence Act, that no particular number of witnesses shall in any case be required for the proof of any fact. In 9 Mad 9,[2] where the husband and the wife both deposed that the marriage between them had as a fact taken place, that evidence was accepted as sufficient and the judgment of acquittal by the lower Court was set aside. In 20 All 166,[3] on the other hand, where a conviction under S. 498 had been obtained in the lower Court with only the evidence of the husband and the wife to prove their marriage it was observed that :

> The Court should require some better evidence of the marriage than the mere statement of the complainant and the woman.

That was a case in which apparently it was suggested for the defence that the woman was only the mistress of her alleged husband and the High Court

1. Queen-Empress v. Pitambar Singh, (1880) 5 Cal 566=5 C L R 597=3 Schome L R Cr 13 (F B).
2. Queen Empress v. Subbarayan, (1886) 9 Mad 9=1 Weir 572.
3. Queen-Empress v. Dal Singh, (1898) 20 All 166=1898 A W N 7.

remanded the case for further evidence. But the observations made there as to the desirability of having better evidence on the disputed point were clearly made with reference to the facts of the particular case. As was pointed out in 36 All 1,[4] the above decisions did not lay down that there was any requirement of law that the fact of marriage could be proved only in some particular way. The opposite party has referred to two decisions of the Calcutta High Court: 19 Cal 79[5] and 63 Cal 415.[6] Both these were bigamy cases in each of which there was a disputed question regarding an alleged marriage to a minor girl. The High Court held on the facts in the former case that there was not sufficient evidence of the legality of the first marriage and that if it had been legal, it was open to the girl on attaining puberty to repudiate the betrothal and contract a valid marriage with another person. No doubt in that particular case special caution was necessary in accepting the alleged validity of a marriage repudiated by the girl herself on attaining puberty. In 63 Cal 415[6] again the alleged marriage was of a minor girl and was repudiated by her after attaining puberty. The Court here as in the other case examined the details of the evidence as to what ceremonies were performed and determined that a valid marriage was not established. These cases in no way lay down that the evidence of a husband and a wife that a marriage in fact took place between them cannot be accepted as sufficient to prove that fact, nor will any presumption against the validity of such a marriage arise unless there is at least some suggestion that a particular part of the ceremony necessary to its validity was lacking. The Sessions Judge was, therefore, in error if he thought that the depositions of the husband and wife could not in law be accepted as sufficient to prove the marriage. No doubt the question whether as witnesses deposing to the fact of a marriage they were truthful or untruthful was a question to be determined by the Sessions Judge and if he felt himself in a difficulty it was open to him to follow the course taken in 20 All 166[3] above cited and call for further evidence. The application will be allowed, the judgment and order of acquittal set aside and the appeal remanded to the Sessions Judge of Shahabad to be re-heard and disposed of according to law.

B.D./D.S. *Application allowed.*

4. Emperor v. Nazir Khan, A I R 1914 All 214 =22 I C 430=15 Cr L J 78=11 A L J 994 =36 All 1.
5. Badal Aurat v. Queen-Empress, (1892) 19 Cal 79.
6. Jogu Bibi v. Mesel Shaikh, (1936) 164 I C 957 =63 Cal 415=37 Cr L J 1072.

A. I. R. 1937 Patna 220

WORT AND AGARWALA, JJ.

Mahanth Shib Narain Das—Plaintiff—Appellant.

v.

Pandey Jamuna Prasad and *others*—Defendants—Respondents.

Appeal No. 87 of 1933, Decided on 14th September 1936, from original decree of Sub-Judge, Darbhanga, D/- 4th July 1933.

Hindu Law—Debts—Father—Son's liability—Father responsible for collection of rents on behalf of certain estate negligently allowing agent to retain rents collected—No evidence of any criminal intention - Decree on mortgage of joint family property executed by father to discharge liability held could be executed against son's share.

A father and his sons were members of a joint Hindu family. The father was appointed on behalf of certain estate to collect decretal amounts and rents from the tenants. The rents were collected by the karpardaz as agent of father but the father negligently allowed the karpardaz to retain rents collected by him. There was no evidence of any criminal intention on the part of the father. The father executed a mortgage of the joint family property to discharge the liability:

Held: the decree on the mortgage could be executed even against the share of the son in the joint property: *A I R 1934 P C 238, Ref.*; *16 Mad 99, Doubted.* [P 221 C 1, 2]

B. C. De and *K. K. Banerjee* — for Appellant.

A. K. Mitter—for Respondents.

Wort, J.—This is an appeal from the decision of the Subordinate Judge arising out of action on a mortgage bond, dated 1st October 1929. The defendants (father and two sons) were the members of a joint Hindu family. The learned Judge in the Court below has held that the father alone is responsible for the debt, and has therefore given a decree for sale against one-third share of the mortgaged properties. In those circumstances the plaintiff appeals.

The only question that arises is whether the debt was tainted with immorality or illegality which would release the sons

from their obligation to discharge that debt. I repeat that the appeal has been made to depend upon that question and that question alone. The fact was that the father was a vakil appointed on behalf of a certain estate and had been responsible for collection of decretal amounts and rents from tenants. In the course of the business of the estate he employed two karpardaz for the purpose of this collection. It is said that they were not the servants of Mahendra, the father, but the servants of the estate; but that in my judgment makes no difference to the case. It is contended by Mr. Mitter on behalf of the defendant-respondents that the sons were not liable as the debt was incurred by the father Mahendra as surety for the honesty of others. In putting forward that argument Mr. Mitter relies upon the statement in Mulla's Principles on Hindu Law, para. 298 (5). It is contended in the first instance, a contention which is based upon the observation of the learned Judge in the Court below, that Mahendra was criminally liable. This contention cannot be supported by the evidence in the case. There may have been a threat against Mahendra, but it was nothing more than a threat, and there is nothing in the evidence of this case upon which this Court could come to the conclusion that Mahendra was criminally liable. That point therefore must be ruled out of the case for the purpose of the conclusion at which we are to arrive. It is perhaps desirable to notice the evidence of the defendants themselves with regard to this question. The first witness for the defence says in the course of his evidence speaking of Mahendra:

> He was authorized to receive decretal amounts from judgment-debtors and receive money from tenants and was responsible for the money. There were two karpardaz under him for the estate. Mahendra Babu did not remit all the money realized by him to the estate.

Later the witness says:

> He was not authorized to keep the decretal amount realized by him as long as he liked.

The second witness for the defence states in the course of his examination-in-chief:

> Money was defalcated by the karpardaz, but he (Mahendra) was responsible for the money realized;

and in cross-examination he mentions the fact that in 1925 or 1926 it was found that Rs. 7,000 had been defalcated by his two karpardaz. Now, that evidence discloses at the most a case of negligence on the part of Mahendra in allowing the two karpardaz to retain the money which they had collected as Mahendra's agents although perhaps they were not, as I have already pointed out, his own servants. But that state of affairs discloses a civil and not a criminal liability, nor is it, in my judgment, possible to hold that Mahendra was in any way a surety for these two karpardaz. If we are to take the evidence of the defence witnesses, the evidence to which I have referred, had an action been brought against Mahendra, it must have been held that Mahendra was himself responsible for the moneys collected by the karpardaz: there is no question of his being a surety. He was primarily and solely liable for the money so collected, and in the circumstances it would have been no defence to Mahendra to have stated that the money had been collected by the karpardaz and had been misappropriated by them.

Several cases were referred to in the course of the argument. One of them is the case in 61 I A 350[1] where their Lordships of the Judicial Committee of the Privy Council held that in so far as the father in the case retained certain sums of money and was guilty of criminal misappropriation or breach of trust, to that extent the sons were not liable. It may therefore be said that the authority of the decision in 16 Mad 99[2] is doubtful. There the decision was that although a Hindu had dishonestly retained sums of money, the debt was not of such an illegal or immoral nature as to exclude the pious obligation of the sons to discharge the debt. But I would dispose of the case on the short point that there is nothing in the evidence to indicate or to establish that Mahendra was criminally responsible for the money which had come into the hands of the karpardaz. In my judgment that is sufficient reason for coming to the conclusion that the decision of the learned Judge in the Court below was erroneous and therefore in my opinion the appeal succeeds and the plaintiff is entitled to a mortgage decree against the whole of the property, the subject matter of the bond. The appeal is allowed with costs throughout.

Agarwala, J.—I agree.

P.R./D.S *Appeal allowed.*

1. Toshanpal Singh v. District Judge, Agra, A I R 1934 P C 238=151 I C 33=61 I A 350 =56 All 548 (P C).
2. Natasayyan v. Ponnusami, (1893) 16 Mad 99 =3 M L J 1.

A. I. R. 1937 Patna 222

WORT AND ROWLAND, JJ.

Mukhi Ram—Defendant—Appellant.

v.

Firm Kamta Prasad-Balam Das —Plaintiff—Respondent.

Appeal No. 801 of 1932, Decided on 14th January 1936, from appellate decree of Sub-Judge, Ranchi, D/- 25th April 1932.

(a) Civil P. C. (1908), O. 13, R. 4 — Non-compliance—Effect.

Non-compliance with O. 13, R. 4, however reprehensible, does not make the document inadmissible in evidence : *A I R 1916 P C 27, Ref.* [P 222 C 2]

(b) Practice—Evidence—Plaintiffs' witnesses not stating that they gave evidence regarding certain transaction from personal knowledge — Defendant not caring to cross-examine them—Court may regard it as proved.

There is nothing in law to prevent the Courts from coming to a conclusion that the particular transactions are proved by the evidence of certain witnesses even though the witnesses have not stated that the evidence they give is from their own personal knowledge. It is a matter entirely for the party against whom they have deposed. If he does not wish to cross-examine the witnesses on those matters and attempt to shake their evidence in cross-examination, he and he alone must suffer. [P 223 C 1]

Khurshed Husnain and *N. C. Roy*—for Appellant.

B. P. Sinha—for Respondent.

Wort, J.—The cross-objection in this case is not pressed. The appeal is by the defendant in an action brought by the plaintiff on a *bahikhata* account. It appears that business was done between the parties, the defendants (being a joint Hindu firm) purchasing cloth from the plaintiff paying from time to time sums on account of dues. As a result of the account, the plaintiff claimed a balance of upwards of Rs. 1,600 which included the price of cloth together with interest at 12 per cent. per annum according to the agreement made at the time between the parties.

Mr. Khurshed Husnain who appears on behalf of the defendant-appellant contends that the evidence upon which the learned Judge in the Court below relied was not properly before the Court in two respects. So far as Ex. 3, which was the ledger account produced by the plaintiff, is concerned, the argument is that it was not endorsed in accordance with O. 13, R. 4, Civil P. C. What appears to have happened was that the learned Judge in the trial Court below marked the book of account with the number of the suit, the date and his signature. It is a non-compliance with O. 13, R. 4, as it is contended that neither the name of the person producing the book or document nor a statement that it had been admitted in evidence had been included in the endorsement made by the trial Judge, and it is therefore said that in that respect the evidence upon which the learned Judge in the lower appellate Court relied in reversing the decision of the trial Court was not properly before the Court. The decision in 43 I A 212[1] is cited and reliance is placed on the observation of their Lordships of Judicial Committee of the Privy Council at p. 236 of the Reports. There appears to have been a controversy before their Lordships' Board as to whether certain documents had been admitted in evidence ; and, as there had been a non-compliance with O. 13, R. 4, Civil P. C., a difficulty arose as to whether the document had been admitted or not and their Lordships made this observation :

> Finally, their Lordships feel bound to criticize adversely a practice followed in these two cases, which is as illegal as it is slovenly and embarrassing.

Reference is then made to the provisions of the Civil Procedure Code and then the following observation is made :

> Their Lordships, with a view of insisting on the observance of the wholesome provisions of these statutes, will, in order to prevent injustice, be obliged in future on the hearing of Indian appeals to refuse to read or permit to be used any document not endorsed in the manner required.

Reference is made by Mr. Husnain to two decisions of the Lahore High Court with regard to the case before their Lordships of the Privy Council. But in those cases, as in the case before the Privy Council, as my learned brother pointed out in the course of the argument, there was a controversy as to whether the document had been in fact admitted in evidence in the Court of first instance. That is not the question in this case. There is no doubt that the document or the book of account now objected to by Mr. Husnain was before the trial Court and the appellate Court and was discussed in evidence. I cannot come to the conclusion that their Lordships of the Privy Council ever intended to say that non-compliance with O. 13, R. 4, however reprehensible, makes the document inadmissible in evidence.

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1. Sadik Husain Khan v. Hashim Ali Khan, A I R 1916 P C 27=36 I C 104=43 I A 212=19 O C 192=38 All 627 (P C).

The second point argued is that there was no proof of the debts alleged to be owing by the defendant, and this argument is addressed to us more particularly with regard to an item of Rs. 1,350 which in the book of account produced before the learned Judge was an item described as being 'brought forward.' First the original book from which this item was brought forward was not produced before the Court and it is said also that there was no definite evidence, apart from the book itself, to show that there had been any transaction between the defendant and the plaintiff. In other words and put shortly, there was no relevant evidence to prove the transaction between the defendant and the plaintiff.

Now the learned Judge in the Court below comments upon this matter but from another point of view. The argument on behalf of the defendant before him was that the witness who purported to prove these debts did not state that the matters with respect to which he was giving evidence were matters upon which he could speak of his own personal knowledge. That is true, and coming more particularly to the point that Mr. Husnain argues, the evidence of the witness who purported to prove this transaction was of the baldest possible kind. We have looked into the evidence for the purpose of deciding the question of whether there was any legal proof of this transaction, and we find that the witness went into the witness-box and stated broadly that there were transactions between the plaintiff firm and the defendant firm and that certain sums were owing. Now there is nothing in law to prevent a Judge relying upon evidence of that kind ; there is nothing in law to prevent the learned Judges in the Courts below from coming to the conclusion that the transactions were proved even though the witnesses had not stated that the evidence they gave was from their own personal knowledge. It was a matter entirely for the defendant. If he did not wish to cross-examine the witnesses on these matters and attempt to shake their evidence in cross-examination, he and he alone must suffer. The fact that there was no cross-examination does not assist the defendant, and indeed goes against him ; and, as I have already said, in the absence of cross-examination and in the absence of witnesses being shaken in cross-examination, the learned Judges in the Courts below are entitled, if they were so minded, to rely upon the bald statement that was given for the plaintiff in his behalf. That in substance disposes of the point in appeal.

There remains only one short point. It is contended by Mr. Husnain in a somewhat vague manner that the transactions were barred by limitation—particularly the item of Rs. 1,350, to which I have already referred. The learned Judge of the trial Court sets out in the course of his judgment the statement of account, and it will be seen that on the debit side there is an item, so far as sale of goods is concerned, of a total of Rs. 2,081-2-3. It must be taken that Rs. 1,350 would be added to the head of this column as the item brought forward from the accounts entered in the books of previous years. On the right hand side are the items of payment amounting to Rs. 2,195-8 0. Now it is not clear whether on the debit side, and, therefore, whether, in the item of Rs. 1,350, there is any item of interest ; and I would state in this connexion that so far as the amounts themselves are concerned there can be no controversy in this Court. Now the net result of the statement that I have made is this : that the defendant (the debtor) not having appropriated the payments of Rs. 2,195 odd, the plaintiff (the creditor) was entitled to appropriate those amounts to such items as he thought fit, and in this case he has appropriated them to all the earlier items which would, apart from the appropriation, have been barred by limitation. Rs. 2,195 odd thus being appropriated shows that all the items prior to 8th January 1927 have been paid off and in consequence such items as remain are within the period of limitation.

In my judgment, although the conduct of this case in the trial Court was anything but satisfactory, and although perhaps the trial Court has not complied strictly with the provisions of O. 13, R. 4, Civil P. C., in regard to endorsement on the exhibit, there seems to be no reason in law why the judgment of the lower appellate Court should not be affirmed. For those reasons I would hold that the appeal fails and must be dismissed with costs.

Rowland, J.—I agree.

V.B.B./D.S. *Appeal dismissed.*

A. I. R. 1937 Patna 224

VARMA, J.

Manager, Dhalbhum Estate—Petitioner.

v.

Overseer, Jugsalai Notified Area Committee—Opposite Party.

Criminal Ref. No 32 of 1936, Decided on 6th August 1936, reference made by Sess. Judge, Manbhum-Singhbhum, D/- 8th June 1936.

Bihar and Orissa Municipal Act (7 of 1922), S. 242—Notice served upon manager of estate under S. 238 – Non-compliance with the provision of S. 359, Cl. (2)—This defect makes the notice illegal and no prosecution could be based thereon.

A notice under S. 238 was served upon the manager of the estate asking him to construct a proper type of drains within one month. The other alternative, that if he did not do what he was being asked to do, the Commissioners would get it done themselves, was not mentioned in the notice:

Held : that the provisions of S. 359, Cl. (2) are imperative and non-compliance with those provisions makes the notice illegal. Hence prosecution could not be based thereon. [P 225 C 1]

Held further : that the notice was very vague as nothing was expressed regarding the idea of Municipal authorities about proper type of drains and the notice was defective even from the point of view of S. 217 as no specification had been supplied: *1 C W N 244n, Rel. on*; *2 C W N 187n* and *11 C W N 508, Appr.* [P 225 C 2]

Manohar Lal and *G. C. Mukharji*—for Petitioner.

Government Pleader—for the Crown.

Order.—This is a reference by the Sessions Judge of Manbhum-Singhbhum against an order of the Magistrate convicting the Manager of the Dhalbhum Estate under S. 242, Bihar and Orissa Municipal Act, by his judgment and order dated 21st March 1936, and sentencing him to pay a fine of Rs. 50.

The case against him, as appears from the record, was that there were kachcha drains on either side of the road within the Jugsalai Notified Area, which were not in a satisfactory condition and were such as to affect injuriously the health of the public. A notice was served upon the Manager of the Dhalbhum Estate under S. 238 of the Act; but it appears from the evidence that no attempt was made by him to comply with the order mentioned in the notice before the prosecution actually started. As the form of the notice has been the basis of a reference by the learned Sessions Judge, I think it necessary to give it in extenso, so that one can appreciate the argument advanced on behalf of the petitioner by Mr. Manohar Lal and the reply thereto by the learned Government Pleader for the Crown. The notice runs as follows :

Under S. 238 (1) and (2), Bihar and Orissa Municipal Act.

To

The Manager,

Dhalbhum Estate.

Whereas it appears that the kacha drains on both sides of the road from Nayabazar road to Nullah and also the kacha drain along Gaushala Nayabazar road are for want of proper drainage in a state injurious to health and offensive as all the water remains standing on them and stagnates, which is a very unsatisfactory arrangement of drainage

you are hereby required under S. 238 (1) and (2), Bihar and Orissa Municipal Act, to improve the drainage along both these in Nayabazar area by constructing proper type of drains within one month of the receipt of this notice. Failing compliance proper legal action shall be taken against you in due course.

Dated Jugsalai, The 22nd October 1935.

(Sd.) Illegible. 22/10,
Chairman,
Jugsalai N. A. Committee.

The learned Sessions Judge refers to Cl. (2), S. 359, Bihar and Orissa Municipal Act, and says that the non-compliance with the provisions thereof makes the notice served upon the petitioner an illegal one. S. 359 runs as follows :

Whenever it is provided in this Act that the Commissioners or the Commissioners at a meeting may require the owners or the occupiers, or the owners and occupiers of any land, to execute any work or to do anything within a specified time, such requisition shall be made, as far as possible, by a notice to be served on every owner or occupier who is required to execute such work or to do such thing; but if there be any doubt as to the persons who are owners or occupiers, such requisition may be made by a notice to be posted up on or near the spot at which the work is required to be executed or the thing done, requiring the owners or the occupiers, or the owners and occupiers, of any land, to execute such work or to do such thing within a specified time; and in such notice it shall not be necessary to name the owners or the occupiers.

(2) Every requisition as aforesaid, other than a requisition under S. 196 or S. 197, shall give notice to the persons to whom it is addressed that, if they fail to comply with the requisition or to prefer an objection against such requisition as provided in the next succeeding section, the Commissioners will enter upon the land and cause the required work to be executed, or the required thing to be done; and that in such case the expenses incurred thereby will be recovered from the persons who are required in such requisition to execute such work or do such thing.

Now a mere glance at the notice which I have quoted in extenso will show that the provisions of Cl. (2), S. 359 have not

been complied with. The learned advocate who opposes the reference has urged that the last sentence of the notice is a sufficient compliance with Cl. (2), S. 359. I am afraid I cannot accept that contention. The last sentence says :

> Failing compliance, proper legal action shall be taken against you in due course.

So the action to be taken is against the person on whom the notice was to be served, and the only thing that could be done against that person was to prosecute him under the provisions of the Municipal Act. The other alternative that if he did not do what he was being asked to do, the Commissioners would get it done themselves, was not mentioned in the notice and as in Cl. 2, S. 359 the word 'shall' is used, the observance of its provisions seems to me imperative. I agree with the learned Sessions Judge that this defect in the notice makes it illegal, and no prosecution could be based thereon.

My attention has been drawn to the case 1 C W N 244*n*,[1] in which it was held that non-mention of the second portion of the section (which corresponds to S. 359, Bihar and Orissa Municipal Act) made the notice illegal inasmuch as the mention of the second portion was imperative and no prosecution could be started for failure to comply with the requisition of such a notice. But as against that, the learned Government Pleader has relied upon the decision in 2 C W N 187*n*[2] where the case which I have just mentioned was discussed. We have not got a full report of the case. The petitioners in that case were residents within the jurisdiction of the Barrackpore Municipality and notice was issued upon them under the provisions of S. 175, Bengal Municipal Act (Act 3 of 1884), to remove a privy in their house which was considered to be a nuisance by one of the neighbours. I have already mentioned that S. 175, Bengal Municipal Act, corresponds to S. 359, Bihar and Orissa Municipal Act. When they failed to comply with that requisition a prosecution was started which ended in their conviction. It was argued, it seems, that before prosecuting the petitioners a further notice was necessary to be served upon the accused in that case. Their Lordships saw that it was not necessary to serve a second notice. A second notice only becomes necessary under the provisions of S. 175, Bengal Municipal Act, which corresponds with S. 359, Bihar and Orissa Municipal Act. I do not think that this decision in any way throws any light upon the validity or the invalidity of the notice which we have been discussing in this case. There the argument was based upon the assumption that a valid requisition under S. 175 (S. 359, Bihar and Orissa Municipal Act) was served on the accused.

I am further of opinion that the notice is very vague. It asked the manager of the Dhalbhum Estate to construct proper type of drains within one month. Now the idea of the Municipal authorities with regard to the proper type of drains may differ considerably from the idea of a proper type of drain possessed by the petitioner. If they wanted him (the accused) to repair according to their ideas, they ought to have given in the notice itself some specification to enable him to comply with the order. As to the question whether the notice which is supposed to have been served under S. 238, Bihar and Orissa Municipal Act, could have been served under that section, I am of opinion that S. 238 deals with cases of land where water stagnates and where there is no proper arrangement for drainage. Cl. (1) deals with such lands which are at a distance of 100 feet from the nearest drain ; and Cl. (2) deals with cases of land where there is no such drain near by. The learned Government Pleader urges that when the notice was served, evidently the authorities meant that there is no proper drainage of the land from which the water comes and stagnates in this drain. The very wording of the notice indicates that there were specific circumstances in their contemplation when the notice was issued by the Municipal authorities. Therefore, I have very grave doubts as to the applicability of S. 238 itself. Then arises the question as to what could have been the section under which similar notices should have been issued to the accused. For that I find that the Municipality is authorized under S. 217 to deal with the existing drains and there it would have been necessary to give specifications of the alterations ordered to be made by the notification. S. 217, Municipal Act, runs as follows :

> (1) The Commissioners may require by notice the owner or occupier of any land or building,

1. Chairman of Puri Municipality v. Kissori Lal Sen, (1897) 1 C W N 244*n*.
2. Jagadis Chandra Ganguly v. Sreenath Bose, (1898) 2 C W N 187*n*.

within a period to be specified in the notice, to do all or any of the following things: (a) to close, remove, alter, repair, disinfect or put in good order any latrine, urinal, cesspool, drain or receptacle for sewage, offensive matter or rubbish pertaining to such land, &c. (2) When requiring under sub-s. (1) anything to be provided, altered or done, the Commissioners may specify in the notice the description of the thing to be provided, the pattern to conform with which the thing is to be altered, and the manner in which the thing is to be done.

No specification has been supplied and to that extent the notice is defective even from the point of view of S. 217. The case in 11 C W N 508[3] has been referred to by the accused where it was held that if the Municipality wanted the owners of the basti within the Municipality to carry out certain improvements, they ought to have served them with a copy of the standard plan approved by the General Committee under S. 407, Calcutta Municipal Act, and pointed out to them on that plan what work they were to do. Failure to do that would make conviction illegal. The position seems to be very much like that contemplated by S. 217, Cl. (2), Bihar and Orissa Municipal Act. Mr. Manohar Lal for the petitioner has raised another point, and that is that the petitioner who happens to be the manager of the Dhalbhum Estate should not have been prosecuted because he is not the owner, strictly speaking. As against that my attention has been drawn to the definition of "owner" in S. 3, Cl. (18). Cl. (18) says: "owner" includes "(b) a manager on behalf of any such person." If that were all, there would have been no difficulty in prosecuting the manager. But we find that there is a proviso attached to the list of persons who are included in the term "owner" and that proviso runs as follows:

Provided that such manager, agent or trustee shall be liable to do anything required by this Act to be done by the owner, nor shall he be subject to any fine for omitting to do such thing, unless he has sufficient funds in his hands as such manager, agent or trustee to do such thing.

I need not express any opinion upon this part of the argument, because I find that for the purposes of this case the conviction cannot stand for the reasons given by the learned Sessions Judge and for the supplementary reasons given by me in the early portion of the judgment. I would, therefore, accept the reference, set aside the conviction and sentence, and acquit the petitioner.

P.R./R.K. *Reference accepted.*

3. Kanai Lal Jalan v. The Corporation of Calcutta, (1907) 11 C W N 508=5 Cr L J 293.

A. I. R. 1937 Patna 226

AGARWALA AND VARMA, JJ.

Emperor

v.

Nemu Singh—Accused.

Government Appeal No. 4 of 1936, Decided on 14th December 1936, against order of Sub-divisional Officer, Barh, D/- 16th July 1936.

Bihar and Orissa Opium Smoking Act (2 of 1928), S. 12 — Rules framed under R. 11—Breach of rules—Act providing no penalty for breach of rules — Rule making authority cannot impose penalty for breaches of rules—R. 11 imposing penalty is ultra vires.

Bihar and Orissa Opium Smoking Act does not itself impose a penalty for a breach of the terms of a license granted to a registered smoker nor does it expressly empower the rule-making authority to provide for such penalty. An authority on whom the rule-making power has been conferred is not authorized to create an offence and impose a penalty for a breach of the rules made under S. 12. R. 11 made under S. 12 and imposing penalty is therefore ultra vires: *Hall* v. *Nixon*, *(1874) 10 Q B 152*, *Rel. on.* [P 227 C 2; P 229 C 1]

Government Advocate—for the Crown.

Rajkishore Prasad—for Accused.

Agarwala, J. — The respondent and three others were charged before the Sub-divisional Magistrate of Barh with having committed offences against Bihar and Orissa Act 2 of 1928 which is entitled the Bihar and Orissa Opium Smoking Act of 1928. The charge against the respondent was that he was in possession of 1.1/4 tolas of prepared opium and of pipes for using prepared opium. He was also charged with having permitted his premises to be used by the three persons who were accused with him and who were unauthorized smokers. These two charges were stated to be under S. 6 and S. 7 of the Act, respectively. The three persons tried along with the respondent were charged under S. 6 of the Act with smoking prepared opium on the premises of the respondent. The learned Magistrate acquitted all the accused of all the charges. The Local Government has appealed against the order of acquittal passed in favour of the respondent only. The object of the Act, as stated in the preamble, is to regulate the smoking of opium in the province of Bihar and Orissa. S. 3 requires

the Local Government to cause a register to be prepared of all persons who are not under the age of 25 years and who are in the habit of smoking opium. S. 4 provides that any person may apply to be registered in the form and manner to be prescribed by the proper authority. By S. 2 of the Act a person whose name has been entered in the register is designated a registered smoker, and S. 5 provides that a registered smoker shall,

subject to the prescribed conditions and restrictions, be entitled, notwithstanding anything to the contrary contained in any other enactment or in any rules made under such enactment, to manufacture, possess or smoke prepared opium.

By S. 6 of the Act it is provided that any person other than a registered smoker, who smokes, uses, manufactures or has in his possession any prepared opium or any pipes, utensils or apparatus used in connexion with the manufacture or smoking of prepared opium, shall, on conviction before a Magistrate, be punished for each such offence with imprisonment for a term which may extend to one year or with fine which may extend to one thousand rupees, or both. S. 7 provides that any person who, being the occupier of any premises, permits those premises to be used by any unauthorized persons for manufacturing or smoking prepared opium, or who is concerned in the management of any premises used for any such purpose or sells or otherwise deals in prepared opium shall, on conviction before a Magistrate, be punished for each such offence with imprisonment for a term which may extend to one year or with fine which may extend to one thousand rupees or with both. It will be noticed, therefore, that by Ss. 6 and 7 of the Act the Legislature clearly creates two offences. It does not, however, purport to create any offence by S. 5 of the Act. This difference between S. 5 on the one hand and Ss. 6 and 7 on the other is still more clearly illustrated by the subsequent provisions of the Act. By S. 8 it is provided that a Magistrate who imposes a fine under S. 6 or S. 7 may direct the offender to be imprisoned in default of the payment of the fine for a term which may extend to six months and that such imprisonment shall be in excess of any other imprisonment to which he may have been sentenced. S. 9 authorizes the confiscation of prepared opium in the case of a conviction under S. 6. S. 11, which relates to the trial of offences under the Act, provides :

No offences punishable under Ss. 6 and 7 shall be tried by any Court inferior to that of a Magistrate of the Second Class.

This section also therefore neither provides for nor contemplates a trial of anything that may be done or not done under S. 5 of the Act. S. 12, however, authorizes the Local Government to make rules for the purposes of carrying into effect the provisions of the Act, and, without prejudice to the generality of this provision, it empowers the Local Government to make rules to regulate or provide for the authority by whom and the manner in which the register of smokers has to be prepared, the form and contents of the register, the form of application and the manner in which such applications shall be submitted, and, lastly, the conditions and restrictions subject to which a registered smoker may manufacture, possess or smoke prepared opium. It is noticeable that the Act does not provide for any penalty for the breach of the conditions and the restrictions referred to in the last mentioned provision of S. 12, namely the conditions and restrictions subject to which a registered smoker may manufacture, possess or smoke prepared opium.

It is conceded by the learned Government Advocate before us that the respondent committed no offence under S. 6 or S. 7 of the Act. Under S. 12, the Local Government have framed the Bihar and Orissa Opium Smoking Rules of 1928, which were published under Notification No. 694, dated 16th January 1929. The rules provide for the form and manner in which applications for registration are to be made and the procedure to be followed on such applications and for the maintenance of the register. R. 10 contains the conditions and restrictions subject to which a registered smoker may manufacture, possess or smoke prepared opium. Sub-r. (1), R. 10 prohibits a registered smoker from manufacturing or possessing at one time for his personal use more than half a tola in weight of prepared opium. Sub-r. (2) provides that if a registered smoker intends to change his place of residence permanently he shall, before leaving the district in which he is registered, report such change to the Collector of that district. Sub-r. (3) provides that if a registered smoker has changed his place of residence permanently he shall within 30 days of such change produce a certified copy of his registration before the Collec-

tor of the district in which he has taken up his residence. R. 11 is in the following terms :

Any registered smoker who does not comply with any of the conditions prescribed in R. 10, shall, on conviction before a Magistrate, be punished, (a) for breach of sub-r. (1) of the said rule with imprisonment for a term which may extend to one year or with fine which may extend to one thousand rupees, or with both ; (b) for the breach of sub-r. (2) or sub-r. (3) of the said rule for a term which may extend to six months or with fine which may extend to two hundred rupees.

There is also a provision for the infliction of further imprisonment in default of payment of any fine that may be imposed for breach of sub-rr. (a) and (b). The question for decision in this appeal is whether R. 11 of the rules is ultra vires. As has already been indicated, the Act does not itself impose a penalty for a breach of the terms of a license granted to a registered smoker nor does it expressly empower the rule-making authority to provide for such penalty. The question, therefore, is whether an authority on whom the rule-making power has been conferred is authorized to create an offence and impose a penalty for a breach of the rules. We have not been able to find any reported cases exactly on the point in the decisions of the Courts in India, but we have been referred to two cases decided in England. The first of these is (1874) 10 Q B 152.[1] The facts which gave rise to that case were as follows :

Local Boards were empowered by 21 & 22 Vict., C. 98, to make bye-laws with respect to levels and the construction of new streets, the structure of walls of new buildings, sufficiency of ventilation and with respect to the drainage of buildings, etc., and were further authorized to provide for the observance of the bye-laws by enacting therein such provisions as they might think necessary as to the giving of notices, as to the deposit of plans and sections by persons intending to lay out streets or to construct buildings and as to inspection by the Local Board and as to the power of the Local Board to remove, alter or pull down any work begun, or done in contravention of the bye-laws. The sixth bye-law framed under the power thus conferred, required that a person proposing to put up a new building should give notice to a surveyor of the Board and it was further provided that the notice should be given 14 days before the work began. The sixth bye-law concluded with the following paragraph. :

Any person who shall erect any new building without giving such notice, and delivering such plans and sections as aforesaid, or without having the said plans and sections approved of by the Local Board, or in anywise contrary to plans and sections which have been approved of by the Local Board, shall be liable for each offence to a penalty of 40*s*.

A question arose whether the Local Board acted within its powers providing for a penalty of a breach of the bye-laws. It was held that the bye-law was intra vires. In the course of his judgment in that case Mellor, J. referred to 33 L J M C 227[2] and (1866) 4 H & C 523,[3] in which cases it was held that an authority on whom had been conferred power to make rules had no power to create offences and impose penalties for those offences. The learned Judge, however, stated that he was unable to see the reasons for this decision and expressed his own view that a bye-law with a penalty for disobedience must necessarily be the mode of carrying out the Act and, therefore, the bye-law was intra vires. Lush and Quain, JJ. also delivered judgments agreeing with Mellor, J. It is to be observed, however, that S. 34 of 21 & 22 Vict., C. 98 provided that that Act and 11 & 12 Vict., C. 63 were to be read together as one Act and S. 115 of 11 & 12 Vict., C. 63 expressly gave power to impose reasonable penalties not exceeding £5 for any breach of the bye-laws. The next case was (1877) 3 Q B 379[4] which arose under the Elementary Education Acts (33 & 34 Vict., C. 75 and 36 & 37 Vict., C. 86). These Acts impose a penalty for the offence of personating any one entitled to vote at the election of a School Board, but do not provide for the offence of personation at the voting for a resolution for application for a School Board. An order in Council purporting to be made under these Acts, however, imposed a penalty upon any one guilty of the latter offence. It was held to be ultra vires by Mellor, J. and Lush, J. who had taken part in the decision in (1874) 10 Q B 152.[1] Mellor, J. said in the course of his judgment :

1. Hall v. Nixon, (1874) 10 Q B 152=44 L J M C 51=32 L T 87=23 W R 612.

2. Young v. Edwards, (1864) 33 L J M C 227=11 L T 424.

3. Hattersley v. Barr, (1866) 4 H & C 523=12 Jur (N S) 894=14 L T 565=14 W R 864.

4. Queen v. Sankey, (1877) 3 Q B 379=47 L J M C 96.

We should be proceeding against all the recognized principle of construction, if without express authority, we were to extend the power of the School Board Commissioners, so as to enable them to make personation an offence without a direct statutory authority so to do;

and Lush, J. said :

I certainly cannot think we are justified in holding upon any principle of construction that such words convey by implication or give a legislative power to create an offence which the statutes have refrained from doing. They may have no meaning at all for aught I know, but certainly we cannot construe words of an ambiguous meaning as conveying a power to create a new offence.

In the first of these two cases, therefore, there was in existence a statutory provision authorizing the rule-making authority to impose a penalty for breach of its bye-laws, and the second case is a direct decision that without statutory authority there is no power to create an offence and impose a penalty for it. In my view, in the present instance, therefore, R. 11, Bihar and Orissa Opium Smoking Rules, is ultra vires and the respondent has committed no offence for which he is liable to imprisonment or fine. The appeal is dismissed.

Varma, J.—I agree.

B.D./D.S. *Appeal dismissed.*

A. I. R. 1937 Patna 229

AGARWALA AND JAMES, JJ.

Mt. Bibi Zubaida and *another* — Plaintiffs—Appellants.

v.

Mohan Ram Sahu and *others* — Defendants—Respondents.

Appeal No. 161 of 1933, Decided on 26th November 1936, from decision of Sub-Judge, Arrah, D/- 27th April 1933.

Specific Relief Act (1877), S. 42 — Further relief — Injunction — Possession — *A* selling mortgaged property of *B* in execution of mortgage decree—*B's* wife and mother bringing suit against *A* for declaration that decree is not binding on them and that property is is not saleable as being wakf property — Injunction prayed for shortly after admission of plaint for staying execution proceedings refused — Subsequently *A* getting possession of property — Plaint in suit not amended for prayer of delivery of possession—Suit held rightly dismissed as no consequential relief prayed—But plaintiff held should be given opportunity to amend plaint and pay court-fee.

Certain mortgaged property was put to sale in execution of a mortgage decree obtained by *A* against *B*. A suit was brought by *B's* wife and mother for a declaration that the decree was not binding on them and that the mortgaged property could not be sold as it was wakf property. Subsequently plaintiffs applied for an injunction staying further proceedings in execution. The injunction was refused by the Court on the ground that the suit was purely declaratory and no consequential relief was prayed. Subsequently possession was given to *A*, the decree-holder, on account of the happening of certain events. The Court dismissed the suit in the end as the plaintiffs did not pray for injunction in the plaint or apply subsequently for recovery of possession. On appeal:

Held: that the declaration originally prayed for could not be given partly because it would have been utterly infructuous unless it was attended by a permanent injunction and partly because the absence of a prayer for such an injunction barred the suit under the provisions of S. 42, Specific Relief Act. [P 231 C 1]

Held also : that the absence of a prayer for recovery of possession in the altered circumstances would equally render the suit inadmissible, since if a decree should be obtained it would be infructuous. The suit was therefore rightly dismissed as no consequential relief was prayed for: *39 Cal 704* and *A I R 1929 Cal 422*, *Rel. on*; *A I R 1933 All 488* and *35 All 487 (P C)*, *Expl.* [P 231 C 1, 2]

Held further: that the plaintiff should be given an opportunity of amending the plaint and paying court-fee on the valuation of the property of which recovery is sought. [P 232 C 2]

Harians Kumar—for Appellants.

Sarjoo Prasad and *R. K. Sinha* — for Respondents.

James, J.—The respondents obtained a decree on the basis of a mortgage bond against Shah Abdul Ghani of Sasaram, which they were about to put into execution, when a suit was instituted by the wife and mother of Abdul Ghani praying for a declaration that the mortgaged property was wakf property which could not be sold in execution of a decree, and for a declaration that the decree was not binding on the plaintiffs. Before the defendants of the suit had entered on their defence, the plaintiffs prayed for an injunction staying further proceedings in execution. The injunction was refused by the Subordinate Judge on the ground that the suit was purely declaratory and as the plaintiffs had not prayed for any consequential relief, they could not properly apply for an injunction. The plaintiffs appealed to the High Court from this order. While their appeal was pending, the Subordinate Judge called upon the plaintiffs to pay *ad valorem* court-fee; but he subsequently came to the conclusion that as the injunction had been refused on the ground that the suit was purely declaratory, court-fee could hardly be exacted on the ground that the suit was not (merely declaratory?). In their appeal to the High Court against the interlocutory order refusing the injunction the plaintiffs obtained an interim stay of execution proceedings; but subsequently the decree-holders were permitted to pro-

ceed with the execution on their depositing four hundred rupees as security against a possible loss to be suffered by the plaintiffs of this suit from their loss of possession.

The miscellaneous appeal in the High Court was ultimately dismissed for default; but in the meantime the deposit had been made; the money had been withdrawn by the plaintiffs, and delivery of possession had been given to the decree-holders. The Subordinate Judge taking up the suit for disposal held that the plaintiffs must fail in consequence of the provisions of S. 42, Specific Relief Act. That section provides that any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying his title to such character or right, and the Court may make therein a declaration that he is so entitled; but it provides that no Court shall make such declaration where the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so. The Subordinate Judge found that the plaintiffs could by their original plaint have applied for an injunction, or they could later have applied for recovery of possession; but that since they had failed to do so, their suit must be dismissed. The plaintiffs appeal from that decision.

The learned advocate for the appellants argues in the first place that the plaintiffs ought not now to be required to pray for recovery of possession of this property, because at the time when the suit was instituted their possession had not been disturbed; and the Subordinate Judge in dealing with the case ought to have regard to the state of affairs at the time when the suit was instituted and not to matters which have happened afterwards. He suggests that for a suit of this kind the plaintiffs need pray for nothing more than a mere declaration, relying upon the decision of the Allahabad High Court in 55 All 791,[1] and on that of the Judicial Committee in 40 I A 182.[2] In 55 All 791[1] the Allahabad High Court decided only that for a plaint which may be considered to be like the plaint in the present case, the court-fee payable was ten rupees, since nothing was asked for in the plaint but a declaration. In the course of their judgment, the learned Judges remarked on the view taken up by other High Courts that a prayer for a declaration that a certain decree is null and void against the plaintiffs is really a prayer for obtaining consequential relief by cancellation of the decree, and they admitted that there was something to be said for such a view, because in substance the object of the plaintiff in such a case is to frustrate a decree which has been passed against him and to nullify it. They decide however that where nothing but a declaration is asked for in the plaint, a higher court-fee cannot be demanded on the ground that the plaintiff ought to have asked for something else. In 40 I A 182[2] the suit had been instituted praying for declarations that decrees in two pre-emption suits were not binding against the plaintiffs, with a prayer for setting aside the decree in one instance, but with no prayer of that nature regarding the second decree. The Court of the Judicial Commissioner of Oudh had dismissed the suit in appeal on the ground that the failure in the second instance to pray for a consequential relief rendered the whole suit ineffective. The Judicial Committee set aside the decision of the Judicial Commissioner's Court decreeing the suit and granting consequential relief in respect of both the previous decrees. This was a suit originally instituted for a declaration with consequential relief; and it could not be properly held to have been barred by the provisions of S. 42, Specific Relief Act, which only bars suits in which no consequential relief is claimed at all. The suit is clearly one instituted by the plaintiffs for a declaration of their legal character and their right as to property, such as could be entertained under S. 42, Specific Relief Act, if it were not open to the plaintiffs to claim any other consequential relief. But S. 42 prohibits the making of such a declaration where the plaintiff being able to seek further relief than a mere declaration of title, omits to do so and the matter which has to be examined in a suit of this nature is whether there is any other relief which the plaintiff should have claimed which he has omitted to claim.

As Sir Lawrence Jenkins remarked in 39 Cal 704,[3] in dealing with a case which

1. Sri Krishna Chandra v. Mahabir Prasad, A I R 1933 All 488=149 I C 198=55 All 791=1933 A L J 673 (F B).
2. Partab Singh v. Bhabuti Singh, (1913) 35 All 487=21 I C 288=40 I A 182=16 O C 247 (P C).
3. Deokali Koer v. Kedar Nath, (1912) 39 Cal 704=15 I C 427=16 C W N 838.

bore in its facts some resemblance to the case now before us, the Courts should be astute to see that plaints presented for declaration conform to the terms of S. 42, Specific Relief Act. In that case the purpose of the plaintiff was to render a decree ineffective; but the only prayer was for a declaration, which was followed after the plaint had been admitted by a prayer for an interlocutory injunction. In the present case the plaintiffs themselves indicated the consequential relief which they had omitted to claim, although they could have claimed it, by a similar prayer for an interlocutory injunction shortly after the admission of the plaint. In A I R 1929 Cal 422,[4] it was observed that such a declaration with a relief in the shape of a permanent injunction would be infructuous, because the Court in which the decree is under execution would be in no way bound by a declaration made by a different Court as to the character of the decree under execution before it. The learned Subordinate Judge would have therefore been justified in dismissing the suit on the ground that it was barred by the proviso to S. 42, Specific Relief Act, owing to the fact that there was no application for a permanent injunction; but by the time the Subordinate Judge, came to deliver judgment, possession had been delivered so that an injunction against the executing Court would have had no effect. The Subordinate Judge, in view of this fact, held that the plaintiffs ought to have amended their plaint by adding a prayer for recovery of possession. The learned advocate for the appellant suggests that in coming to his decision, the learned Subordinate Judge should have taken no notice of what might have happened after the institution of the suit; but when the Subordinate Judge held, as he held rightly, that he could not have given the declaration originally prayed for, partly because it would have been utterly infructuous unless it was attended by a permanent injunction, and partly because the absence of a prayer for such an injunction barred the suit by the provisions of S. 42, Specific Relief Act, he was entitled also to remark that the absence of a prayer for recovery of possession in the altered circumstances would equally render the suit inadmissible, since if a decree should be obtained it would be infructuous. The suit was rightly dismissed by the learned Subordinate Judge as barred by the provisions of S. 42, Specific Relief Act.

The plaintiffs, in spite of the provisions of S. 42, Specific Relief Act, would have been entitled to institute a suit of this nature and to succeed on it if they waited until the provisions of R. 100, O. 21 became applicable, but in that event a decision in their favour in the suit would have had the effect of setting aside the decision of the executing Court. When they applied for a temporary injunction, the Subordinate Judge should have at once remarked the attempted change in the nature of the suit and he should have required payment of ad valorem court-fee as in a suit for a declaration with consequential relief. The suit in the present instance does not fail because ad valorem court-fee was not paid. It fails because there was no prayer for consequential relief as required by S. 42, Specific Relief Act; but it is manifest that the prayer for consequential relief was omitted in order to avoid the liability for payment of ad valorem court-fee. It was at this stage, when the attempt was made to change the nature of the suit, that the Subordinate Judge should have demanded ad valorem court-fee, and not at a later stage after he had by his order frustrated the plaintiffs' attempt to change the suit into one of a nature on which ad valorem court-fee was payable. If this appeal were dismissed the effect would be that the suit would stand dismissed and no amendment could be made in the plaint. The plaintiffs may be given an opportunity of amending their plaint, but before this is permitted they must pay the costs of the defendants of the original suit and of this appeal. If this is done, the plaint amended and court-fee paid on the valuation of the property of which recovery is sought within three months from the date of receipt of the record by the Subordinate Judge the plaintiffs may proceed with their suit which otherwise will be dismissed. Let the record be returned to the Subordinate Judge forthwith.

Agarwala, J.—I agree.

K.B./A.L. *Case remanded.*

4. Sailendra Nath Bose v. Charu Chandra Bannerji, A I R 1929 Cal 422=118 I C 341=50 C L J 257.

* A. I. R. 1937 Patna 232

WORT AND AGARWALA, JJ.

Mohamad Yahia and *another* — Defendants—Appellants.

v.

Mt. Bibi Soghra, Plaintiff and *another*, Defendant—Respondents.

Appeals Nos. 179 and 194 of 1935, Decided on 2nd October 1936, from original decree of Sub-Judge, Patna, D/- 18th September 1935.

*** (a) Civil P. C. (1908), O. 32, R. 7 and O. 23, R. 3—Scope — Whether particular matter is subject matter of or relates to suit is primarily question of fact, depending upon circumstances of each case — Matter not strictly subject matter of suit may relate to or have reference to suit if it forms part of consideration—Suit for account—Agreement by plaintiff to take only her share of income in presence of vakils in consideration of her giving up her right to an account from her brother who managed it is one relating to suit and thus subject matter of suit.**

Whether a particular matter is the subject matter of or relates to a suit is primarily a question of fact depending upon the circumstances of each case. Although a matter is not strictly the subject matter of a suit it may relate to or have reference to the suit if it forms part of the consideration: *22 Mad 508* (*P C*) and *A I R 1921 Cal 202*, *Rel. on.* [P 233 C 2]

In a suit by a plaintiff against defendants of whom one was a minor, a compromise was arrived at, whereby the plaintiff, in consideration of her giving up her right to an account of the whole property from the defendant who managed it, for which in fact she had sued, agreed in order to facilitate enjoyment, to take her share of the income from only some villages out of the whole property and it was agreed between the parties that, in case no agreement could be arrived at on reference to the vakils, the parties had a right to obtain partition from the Court :

Held : that the arrangement arrived at to 'facilitate management' being in consideration of the plaintiff's giving up her right to an account was one having reference to the suit within the meaning of O. 32, R. 7 and was therefore the subject matter of the suit within the meaning of O. 23, R. 3, Civil P. C. [P 234 C 1]

*** (b) Registration Act (1908), Ss. 17 (2) (vi) and 49—Compromise decree — Exchange of shares in immoveable property between co-owners does not require registration** (*Obiter*).

Obiter.—Where under a compromise decree there has been an exchange of shares in immoveable property amongst co-owners, such compromise does not create or extinguish title in immoveable property so as to affect it. Such exchange is not a transfer of immoveable property within the meaning of the Transfer of Property Act, and it does not therefore require registration : *25 Cal 210*, *Rel. on.* [P 234 C 2]

(c) Specific Relief Act (1877), S. 21—Scope —Agreement under compromise in suit for allotment of shares on reference to two vakils —Agreement in substance is one to submit to arbitration — Such agreement cannot be specifically enforced — Exceptions in section only bar suit with regard to any subject agreed to be referred to arbitration.

Where in a suit a compromise is arrived at between the parties whereby allotment of shares is agreed to be made on reference to two vakils, the agreement in substance amounts to one for submission to arbitration and such a contract cannot be specifically enforced under the section. Where there is a contract to refer to arbitration any subject, the exceptions to the section only bar a suit with regard to such subject. [P 235 C 1, 2]

S. M. Mullick, *Syed Ali Khan* (in No. 179), *Manohar Lal*, *S. M. Hafeez* and *A. H. Fakhruddin* (in No. 194) — for Appellants.

Manohar Lal, *S. M. Hafeez*, *A. H. Fakhruddin*, *K. Husnain*, *H. R. Kazimi*, *Jafar Imam* (in No. 179), *S. M. Mullick*, *Syed Ali Khan*, *K. Husnain* and *H. R. Zazimi* (in No. 194)—for Respondents.

Wort, J.—These are two appeals, one by the first two defendants and the other by the plaintiff, against the decision of the Subordinate Judge in an action for partition of certain shares inherited by the parties from their father Maulavi Muhammad Rafiuddin. The Subordinate Judge dismissed the suit against defendant 3 holding that a compromise decree upon which this suit was based was not binding on him, he being a minor at the time when the agreement was entered into. The Subordinate Judge gave a decree against the two remaining defendants. Defendants 1 and 2 appeal against this decision, and it is contended on their behalf by Mr. Sushil Madhab Mullick that having dismissed the suit against one of the defendants the suit could not proceed and should have been dismissed as a whole. The plaintiff appeals against the decision contending that the Judge was wrong in dismissing defendant 3 from the suit. Defendant 3, respondent, by his advocate, contends that the decision dismissing him from the suit was right and also supports the other defendants' contention that the suit should have been dismissed.

Maulavi Muhammad Rafiuddin died on 18th September 1919 leaving him surviving three sons and two daughters by his first wife, three sons and one daughter by his second wife, and his widow. The property inherited by the family consisted of a share in 148 villages in the Patna, Gaya and Monghyr districts. The widow, his second wife, Mt. Bibi Asiran, inherited 2 annas and his six sons and three daugh-

ters the balance of the 14 annas, two-fifteenths going to each of his sons and one-fifteenth to each of his daughters. After Maulavi Refiuddin's death, that is, in October 1919, the widow, Mt. Asiran, made a gift of her 2 annas interest in her late husband's property to all the children including her step-children.

It appears that disputes arose between the parties and the lady, having repented of her gift, brought an action, suit No. 17 of 1920, to set aside the deed of gift. This suit was compromised in December 1920, on the terms that the gift as regards one and a half annas should stand and the plaintiff, Mt. Bibi Asiran, should retain one half-anna. The defendants of this suit were minors at the time. In June of 1930 this half-anna share of Mt. Bibi Asiran was transferred to her sons, defendants 1 to 3 of this suit. In 1931 Mt. Bibi Soghra, the daughter, instituted a suit, No. 27 of 1931, against her mother and three brothers to have the compromise of December 1920 set aside on the ground that the agreement of compromise had been brought about by collusion between her guardian and mother. This suit was also compromised on 25th April 1935. The terms were as follows : the half-anna share which was retained as a result of the compromise of the 1920 suit should be divided into seven parts, one part to go to the plaintiff, Mt. Bibi Soghra, and six parts to defendants 2 to 4 in that suit who are defendants 1 to 3 in the present suit; for "facility of enjoyment" it was agreed that the plaintiff's share of the property including her share in the $\frac{1}{2}$ anna, her share in the $1\frac{1}{2}$ annas and her share of the remaining 14 annas of her father's interest should be taken from 25 villages in the Monghyr district, excluding certain named villages of the other districts. The plaintiff was to have a right to select from which of the 25 villages her share was to come. The method of working this out was that the jama should be ascertained from the survey khatian, partition khatian, and the schedule prepared under the road cess return, also from the three years' village papers of Maulavi Abdulla Saheb, and the village papers of the parties, and the partition should take place according to the jama thus ascertained. This was to be done in the presence of two named vakils. On failure of the parties to carry out this agreement it was further provided that they should be entitled to obtain a partition by the Court. Another term of the agreement was that the plaintiff gave up her right to an account from her eldest brother, defendant 1 in this suit. The Judge in the Court below has held that the agreement, apart from the terms relating to the $\frac{1}{2}$ anna share, did not form the consideration for the settlement of the dispute in the suit, and this part of the compromise thus being beyond the scope of the suit was not binding on the minor defendant. A decree having been passed on the compromise the question is whether the minor defendant was bound.

The first point for consideration is whether, as the Judge in the Court below has held, the terms of the compromise relating to the method of enjoyment or partition related to the subject matter of the suit. Mr. Manohar Lal, who appears on behalf of the plaintiff-appellant, contends that the agreement as to the shares apart from the 2 annas share, was a matter which had "reference to the suit" within the meaning of O. 32, R. 7 and "the subject matter of the suit" within the meaning of O. 23, R. 3. This matter has been discussed in a large number of cases in the Indian High Courts in which the question arose whether the compromise should be registered under the Registration Act, and the substance of those decisions is, that whether a particular matter is the subject matter or relates to the suit, is primarily a question of fact depending upon the circumstances of each case ; that although a matter not strictly the subject matter of a suit, may relate to or have reference to the suit if it forms part of the consideration.

The leading case on this matter is the decision of the learned Judges of the Madras High Court in 22 Mad 508:[1] *see also* the decision of Rankin, J., a decision of a single Bench in 48 Cal 1059.[2] It is impossible to lay down any definite rule, as it is clear the question whether the matter is the subject matter of the suit must depend primarily upon the circumstances of each case. It should be noted that the action of 1931 was in the first place a claim for accounts against the eldest brother, who it appears had been collecting the rents of the villages ; and

1. Pranal Anni v. Lakshmi Anni, (1899) 22 Mad 503=26 I A 101=7 Sar 516 (P C).
2. Shashi Bhusan Shaw v. Hari Narain Shaw, A I R 1921 Cal 202=66 I C 705=48 Cal 1059 =25 C W N 990.

one of the terms of the compromise was that that claim was relinquished. The account related not only to the ½ anna share but also to the 1½ annas and the share of the 14 annas which the plaintiff had inherited from her father. It therefore cannot be said that that part of the compromise which related to the method of the enjoyment of the shares of the parties was outside the scope of the suit. In one form or another the suit related to the whole 16 annas. Although there was no question of a partition in any form in the suit of 1931, there was no reason why as a consideration of her giving up her claim to the account, that the parties should not enter into an arrangement by which the lady was restricted to certain villages for the collection of her share. It would be in my judgment straining the terms of the compromise itself, to hold that this arrangement which was described as an arrangement for the "facility of management," was not the consideration and therefore had reference to the suit within the meaning of O. 32, R. 7, and strictly therefore the subject matter of the suit within the meaning of O. 23, R. 3. It is unnecessary therefore to consider whether S. 147, Civil P. C., which is said to have been a paraphrase of O. 16, R. 21 of the Rules of the Supreme Court in England, affects the matter. But whatever view may be taken of that section there can be no doubt that on its true construction it does not abrogate the general law that a minor cannot enter into a binding contract, nor can a guardian enter into a contract on his behalf. It is not forgotten that a guardian, with the leave of the Court, may bind a minor by compromise of a suit so far as the compromise deals with matters in issue in the case.

Had it been necessary to hold that the so-called agreement to partition was beyond the scope of the suit I am of the opinion that there are indications in the decision of their Lordships of the Privy Council in 46 I A 240,[3] that so far as the matter was outside the scope of the suit it was a question of contract and no more. Holding the view that I do with regard to that part of the compromise which deals with the method of enjoyment, it is unnecessary to consider whether under the amendment of S. 17 (2) (vi), Registration Act, it was necessary to register the decree as a condition precedent to its being enforced. Shortly stated the new sub-section requires registration in the case of a decree which comprises or relates to immoveable property other than that which is the subject matter of the suit. S. 49 prohibits an unregistered document being received in evidence if it "affects" immoveable property. But the most that can be said of the relevant part of the compromise is that it effects, in a limited way, an exchange of shares. But it is pointed out that it does not affect the property within the meaning of the Registration Act, as it neither creates nor extinguishes title. Even if it were otherwise, it would not be an exchange, as it is at the most an exchange between co-owners, and therefore not a transfer of immoveable property within the meaning of the Transfer of Property Act: *see* the case in 25 Cal 210.[4]

The only substantial point which is left in this case is the question whether the suit is maintainable. After the failure of the parties to carry out the agreement an application was made to the Court for execution of the decree. The executing Court decided that as the parties were attempting to partition the property, execution could not proceed as there was no provision in the Civil Procedure Code for effecting partition in execution proceedings. That Court further held that as the claim for partition was extraneous to the subject matter of the suit, it could not be enforced in the execution proceedings, but that it was necessary to bring a separate suit. No appeal was preferred from this order which was made on 19th December 1933. It is contended by Mr. Manohar Lal in the plaintiff's appeal that the question of the remedy open to the plaintiff, whether in execution or by a separate suit, is res judicata. In the circumstances I think it unnecessary to decide that point. The compromise related to two matters as we have seen: first, an agreement as to the half anna share of the mother under the former compromise and secondly an agreement as to the method of enjoyment of the respective shares of the parties as to the half anna share and and one and half annas share and the share they inherited from their father. So

3. Hemanta Kumari Debi v. Midnapur Zamindari Co., A I R 1919 P C 79=53 I C 534=46 I A 240=47 Cal 485 (P C).

4. Gyannessa v. Mobarakennessa, (1898) 25 Cal 210=2 C W N 91.

far as the first part was concerned the rights of the parties were defined by the agreement to divide up the share and nothing remained to be done. Had the parties disregarded the agreement in this regard, an action might lie according to the facts. And had one of the co-sharers, a member of the family or any other of the co-sharers, been minded to bring an action for partition by metes and bounds, the Court might have acted on the agreement, so far as regards the parties to it were concerned, as a convenient basis of allotment.

As regards the second item: on failure of the parties to carry out that part of the agreement the question arises as to what was the remedy open to them. It was pointed out during the course of the argument that the claim in this suit was framed in such a manner as to claim a partition by metes and bounds. The plaintiff asked for a separate takhta. Mr. Manohar Lal contends however that that is not what was asked for, and neither the parties nor the Court considered that to be the nature of the claim. I think that argument is well founded, as it is clear that had the parties or the Court understood that to be the nature of the claim, the action would have failed on the ground that not only were the other co-sharers of Maulavi Muhammad Rafiuddin not joined, but the other members of the family were not on the record of the case, and it would be impossible to proceed to partition by metes and bounds without joining all persons interested in the 148 villages. It is argued that what was asked for in the compromise was a 'mauzawar partition,' and there is a petition before us to amend the plaint in conformity with that claim. To claim a partition is to claim a partition by metes and bounds for the formation of separate takhtas for the parties' interests. This the plaintiff, it is said, does not claim in this suit as we have seen. Such rights as the plaintiff has in this case, are sound in contract, and a failure on the part of the defendants to perform their part of the contract entitles the plaintiff either to specific performance or damages. The facts relating to the performance of the agreement are that the arbitrators were prepared to act as was the plaintiff, but defendants 1 and 2 did not produce their papers.

Now this agreement, whatever be its form, is in substance nothing more than a submission to arbitration. The allotment is to be made in the presence of two named vakils. They are not so called but in fact they are arbitrators. By S. 21, Specific Relief Act, such a contract cannot be specifically enforced. They are exceptions to this rule in S. 21 and they are with regard to the provisions of the Arbitration Act of 1899 and the provisions of the Civil Procedure Code, Sch. 2. The exceptions apply to those cases in which a submission to arbitration is a bar to a suit with regard to any subject which the parties have agreed to refer. There is no question in this case whether the submission is a bar to the suit as it is (as I have decided) an action to enforce the submission to arbitration. That agreement cannot be specifically enforced. As the claim in this case is for specific performance as the only remedy open to the plaintiff, although not so described, the action in my opinion is misconceived and must fail. The plaintiff was entitled, in the absence of defendants 1 to 3, to proceed with the matter and an allotment arrived at in the absence of the defendants in the circumstances would certainly have been binding on them. The appeal of defendants 1 and 2 succeeds and the plaintiff's appeal fails. The appellants 1 and 2 and respondent 3 are entitled to their costs in this Court and in the Court below. It follows that the suit is dismissed with costs throughout.

Agarwala, J.—I agree.

W.D./A.L. *Order accordingly.*

A. I. R. 1937 Patna 235

MOHAMAD NOOR, J.

Mt. Dulhin Shyam Sunder Koer — Defendant—Petitioner.

v.

Mt. Sheorachan Kuer — Plaintiff — Opposite Party.

Civil Revn. No. 297 of 1936, Decided on 23rd November 1936, from order of Small Cause Court Judge, Patna, D/- 8th April 1936.

Co-sharer—Exclusive possession—Right of compensation arises on exclusion from enjoyment of his share in defiance of his claim — No such right arises when he does not resist exclusive possession by another.

The right to claim compensation is confined to cases where one co-sharer appropriates the common land by excluding and ousting the other co-sharer from the enjoyment of his proper share

in it or where he brings into his own use the entire land in defiance of the claim of his co-sharer. A co-sharer is not however entitled to compensation where the other co-sharer has used the land without opposition or resistance from the former. [P 236 C 2]

A suit by a co-sharer plaintiff was brought against the other co-sharer for compensation for using and occupying lands which were their common property. There was oral evidence adduced by the plaintiff that the employees of the defendant were asked to divide produce of her share in the bakasht lands, but that was not done and a demand for partition of the plaintiff's share was made :

Held : that the claim for partition or bakasht was not a claim for out and out partition of the village. What the plaintiff really wanted was that there should be such an arrangement between the parties that both of them might cultivate their proportionate area separately. The village amlas were authorized to make this arrangement. It was not the duty of the plaintiff to follow the defendant wherever he might have been in order to obtain his right from him. If the amlas of the defendant, in spite of the demand of the plaintiff, cultivated the entire area, the defendant was answerable for this act of his agent whereby the plaintiff was excluded. Hence the defendant was liable to pay compensation to the plaintiff as he held the possession over the bakasht lands in defiance of the plaintiff's claim thereto and to her exclusion from the same : *A I R 1928 Cal 216* and *A I R 1933 Pat 616, Rel. on*; *18 Cal 10 (P C)*; *23 Cal 799* and *A I R 1924 P C 144, Ref.* [P 237 C 1]

C. P. Sinha and *Baldeo Sahay* — for Petitioner.

Raj Kishore for *Dasu Sinha* — for Opposite Party.

Order. — This application is directed against a decree of the Small Cause Court Judge of Patna in a suit instituted by the plaintiff opposite party for recovery of compensation from the petitioner for using and occupying lands which are the common property of the parties. Various pleas were raised by the defendant in bar of the action. The learned Judge has overruled most of them and passed a modified decree. The defendant has filed this petition for revision under S. 25, Provincial Small Cause Courts Act. The only point urged before me is that on the facts of the case no decree could be passed. It is contended that it is open to a co-sharer to bring portions of common land in his own use and as long as his user does not amount to exclusion or ouster of his co-sharer the latter has no right to claim compensation or ask for accounts. Reliance is placed upon a single Judge decision of this Court in A I R 1933 Pat 616.[1] This decision is based upon a decision of the Calcutta High Court in 55 Cal 396[2] in which Page, J. explained some of the decisions of the Privy Council, e. g. 18 Cal 10,[3] 23 Cal 799[4] and 29 C W N 34.[5] In the last-mentioned case their Lordships of the Judicial Committee have observed :

Where lands in India are so held in common by co-sharers, each co-sharer is entitled to cultivate in his own interests in a proper and husband-like manner any part of the lands which is not being cultivated by another of his co-sharers, but he is liable to pay to his co-sharers compensation in respect of such exclusive use of the lands. Such an exclusive use of lands held in common by a co-sharer is not an ouster of his co-sharers from their proprietary right as co-sharers in the lands.

In 55 Cal 396[2] the Calcutta High Court held that the right to claim compensation is confined to cases where one co-sharer appropriated the common land by excluding and ousting the other co-sharer from the enjoyment of his proper share in it; or, in other words, where he brought into his own use the entire land in defiance of the claim of his co-sharer. This view was adopted by the learned Judge of this Court in A I R 1933 Pat 616.[1] The attention of the learned Judge in the Court below was drawn to the various decisions above referred to, but he held that in this particular case the appropriation of the entire land by the defendant was in defiance of the right of the plaintiff and in spite of her. James, J. in the Patna case held that a co-sharer is not entitled to compensation where the other co-sharer has used the land without opposition or resistance from the former. In this case the learned Judge in the Court below says as follows :

There is oral evidence on behalf of the plaintiff to the effect that in the month of Poos 1337 Fasli on her behalf the employees of the defendant were asked to divide produce of her share in the bakasht lands, but that was not done, and in those circumstances demand for partition of the plaintiff's one anna share in the bakasht land was made in the month of Jeth or Asarh 1337 Fasli. I accept that evidence as correct. In view of that position and my finding on point No. 4, in my opinion

1. Shiva Narain Mahton v. Chandra Sekhar Prasad Singh, A I R 1933 Pat 616=150 I C 251.
2. Chandra Kishore Chakravarty v. Biseswar Pal, A I R 1928 Cal 216=109 I C 747=55 Cal 396=32 C W N 291.
3. Watson & Co. v. Ram Chund Dutt, (1891) 18 Cal 10=17 I A 110=5 Sar 535 (P C).
4. Robert Watson & Co., Ltd. v. Ram Chand Dutt, (1896) 23 Cal 799.
5. Midnapore Zamindary Co., Ltd. v. Naresh Narayan Roy, A I R 1924 P C 144=80 I C 827=51 I A 293=29 C W N 34=51 Cal 631 (P C).

the defendant since Asarh 1337 Fasli held possession over the bakasht lands in defiance of plaintiff's claim thereto and to her exclusion from the same.

In view of this finding there is no merit in the contention of the petitioner. It was, however, argued on his behalf that this finding is not supported by the evidence on the record, because the oral evidence shows that the demand for partition was made from the amlas of the defendant and not from the defendant, and that the amlas were not in a position to accede to the claim for partition made by the plaintiff and therefore there was no resistance to the claim of the plaintiff by the defendant. In my opinion, the claim for partition of bakasht was not a claim for out and out partition of the village. What the plaintiff really wanted, and which has been held to be a fact by the Court below, was that there should be such an arrangement between the parties that both of them might cultivate their proportionate area separately. The village amlas must be held to be authorized to make this arrangment. It was not the duty of the plaintiff to follow the defendant wherever he might have been in order to obtain his right from him. If the amlas of the defendant in spite of the demand of the plaintiff cultivated the entire area, the defendant is answerable for this act of his agents whereby the plaintiff was excluded. I reject this application with costs: hearing fee one gold mohur.

K.B./A.L. *Application dismissed.*

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* A. I. R. 1937 Patna 237

WORT AND AGARWALA, JJ.

Maharaj Kumar Ram Ranbijaya Prasad Singh—Plaintiff—Appellant.

v.

Harihar Prasad Singh and *another*—Defendants—Respondents.

Appeal No. 16 of 1934, Decided on 24th November 1936, from appellate decree of Dist. Judge, Shahabad, D/- 22nd August 1933.

*** Transfer of Property Act (1882), Ss. 2 and 36—Apportionment of rent—Apart from S. 36 rent does not accrue from day to day—Plaintiff under compromise entitled to rent accruing after 20th July—Kist falling due on 29th September—Defendant recovering rent from tenants before 20th July in advance—Suit by plaintiff to recover rent—Rent accruing up to 29th September after 20th July could not be apportioned as S. 36 did not apply owing to S. 2 of the Act—Plaintiff held entitled to whole kist rent as it accrued on date of kist, i. e., 29th September—Suit held governed by Art. 62 or Art. 120, and not by Art. 109, Limitation Act.**

A compromise between the plaintiff and the defendant provided that the plaintiff would be entitled to all rents and profits accruing in respect of the properties as from 20th July 1928. A kist of rent fell due on 29th September 1928 but the defendant had already collected the rent in advance from the tenants prior to the date of compromise, i. e., 20th July 1928. A suit was brought by the plaintiff to recover the rents:

Held: that rent did not accrue from day to day in India and therefore it did not accrue until the date of kist of September 1928. The rent up to 29th September from 20th July could not be apportioned because in view of S. 2, T. P. Act, S. 36 of the same Act did not apply to the case. The plaintiff was therefore entitled to the whole amount of the kist which the defendant recovered in advance: *De Nicols* v. *Saunders*, *(1870) 5 C P 589* and *10 Cal 860 (P C)*, *Rel. on.* [P 238 C 2; P 239 C 1]

Held further: that the suit was governed by Art. 62 or Art. 120 but not by Art. 109, Limitation Act. [P 239 C 1]

S. M. Mullick, *Sundar Lal* and *B. P. Sinha*—for Appellant.

Khurshed Husnain, *Mahabir Prasad* and *Harians Kumar*—for Respondents.

Wort, J.—This appeal depends upon the construction of a compromise before their Lordships of the Judicial Committee of the Privy Council, a compromise dated 20th July 1928. By that compromise certain property was to be transferred to the plaintiff-appellant (the appellant here being the appellant before the Privy Council), and it was provided that the appellant

should be entitled to all rents and profits accruing in respect of those properties as from the 20th day of July 1928.

It is upon the words "all rents and profits accruing," after the date mentioned, that the appeal depends. It would appear from the facts found in this case that the kist in question was that of 29th September 1928, but it would appear that the respondents had collected that rent in advance from the tenants prior to the date of the compromise, i. e., 20th July 1928. The learned Judge in the Court below, for reasons which it is unnecessary to mention, dismissed the plaintiff's claim.

Two questions arise: first, whether the plaintiff is entitled to the whole; and secondly (a matter depending upon the question of apportionment), if not the whole, whether the plaintiff is entitled to a part of the claim. I should have stated that the main claim together with interest was Rs. 4,264-14-6. It is contended by Mr. Sushil Madhab Mullick on behalf of

the plaintiff-appellant (as I understand his argument) that the words "all rents and profits accruing in respect of those properties" which we have to construe, are descriptive and that therefore he, under the agreement being entitled to the rents in any event from the tenants, would be entitled to those sums which have been collected by the defendant in advance. The point is in a small compass, and by the argument of the learned advocate appearing on behalf of the appellant, depends very largely upon a question decided in (1870) 5 C P 589.[1] The facts there were somewhat different and the question arose in an action by a tenant against his immediate landlord for damages for wrongful distress. It would appear that after the assignment which was by way of mortgage, the assignor had collected rent in advance from the tenant. No notice was given to the tenant of the assignment by way of mortgage, and it was in those circumstances that the assignee put in a claim for the rent which the tenant had already paid to the assignor. The fact which distinguishes that case from the present was that the collection by the assignor was after the date of the assignment, and Willes, J., in delivering the judgment of the Court stated that in the circumstances, apart from the question of notice, had the collection been made before the date of the assignment, it would have been a complete discharge of the tenant. But the relevance of the case depends upon certain observations of the learned Judge with regard to S. 10, 4 Anne, C. 16. The learned Judge made this observation :

> These cases (referring to certain Common law cases) depend upon a rule of general jurisprudence not confined to choses-in-action, though it seems to have been lost sight of in some recent cases, viz. that if a person enters into a contract, and without notice of any assignment, fulfils it to the person with whom he made the contract, he is discharged from his obligation ; that is a rule which is declared rather than enacted by 4 Anne, C. 16, S. 10.

And then he made this observation with regard to the payment of money in advance :

> That statute did away with the necessity for attornment, but protected the tenant in cases where he had paid the rent due from him before notice of the assignment ; this provision of the statute, however, clearly applies to the fulfilment of an obligation to pay rent imposed by the lease. There has been no such payment here, for payment of rent before it is due is not a fulfilment of the obligation imposed by the covenant to pay rent, but is, in fact, an advance to the landlord, with an agreement that on the day when the rent becomes due such advance shall be treated as a fulfilment of the obligation to pay the rent.

Section 53, Bihar Tenancy Act, which applies to this case, provides that :

> Money rent payable by a tenant shall be paid in four equal instalments falling due on the last day of each quarter of the agricultural year.

It is therefore argued by Mr. Sushil Madhab Mullick, that when the words 'accruing after 20th July 1928,' were used, the parties were referring to the date of the kist, that is to say, that rent which accrued after that day should be paid by the tenant, and accrued in the sense used meant the date upon which the payment fell due ; and, relying upon the words of Willes, J., it is contended that in spite of the payment which might in certain circumstances have been a full discharge of the tenant although in fact the payment had been made the rent still accrued due after 20th July 1928 and that therefore the plaintiff was entitled to recover this sum from the defendants. The case has all the more strength in India by reason of the fact that apart from S. 36, T. P. Act, in India it is clear that rent does not accrue from day to day. There are a number of authorities which have pointed out that S. 36, T. P. Act, is the only statutory provision in India relating to the apportionment of rent and I think it is quite clear that by S. 2 of that Act S. 36 does not apply to this case.

We are therefore in the position of having to deal with rent which, although it had been paid, did accrue after 20th July 1928. The only question that remains is whether, under the agreement, the plaintiff was entitled to recover it from the defendants. There are authorities in India particularly the decision in 11 I A 59,[2] which speaks of an action of this kind as an action in which the plaintiff attempts to follow sums which are in fact due to him in the hands of the defendants, The case is more particularly relevant on the question of limitation to which I shall in a moment refer. But in my judgment on a plain reading of this compromise, assuming as we must that the parties were contracting with the full knowledge of the law, that there is an agreement and

1. De Nicols v. Saunders, (1870) 5 C P 589=39 L J C P 297=22 L T 661=18 W R 1106.

2. Gooroo Das Pyne v. Ram Narain Sahoo, (1883) 10 Cal 860=11 I A 59=4 Sar 548 (P C).

an undertaking by the defendants to pay those sums (if they had already collected them) to the plaintiff in so far as they are rents which accrued due after 20th July 1928. In my judgment the observations of Willes, J., in the case to which I have already referred, do apply to this case, and the conclusion at which I arrive is that this rent accrued after 20th July, although in fact there had been (to use the words of Willes, J.) an advance to the defendants which might in certain circumstances have been a complete discharge as against the defendants. So far as the question of the amount which the plaintiff is entitled to recover is concerned, I have already indicated the view I hold by stating that rent does not accrue from day to day in India and therefore it did not accrue until the date of the kist of September 1928. There, therefore, can be no question of any diminution of the amount which the plaintiff claims.

So far as the question of limitation is concerned, it was variously contended that Art. 62 applied, or that Art. 109 applied, or in the alternative, as Mr. Mullick contends, Art. 120. I think it impossible to hold that Art. 109 applies for the very simple reason that that article refers to profits of moveable property which belonged to the plaintiff and which has been wrongfully received by the defendants, which this is not. It cannot be said that these sums received by the defendants prior to 20th July were wrongfully received: it cannot be that case. So far as Arts. 62 and 120 are concerned, it seems to me on the facts of this case and for the consideration which I have stated, that it matters not whether it is Art. 62 or Art. 120. Art. 62 is for money payable by the defendant to the plaintiff for money received by the defendant for the plaintiff's use. On the view I take as to the expression "accruing" used in the compromise it did not accrue till the end of September 1928 and, therefore, in any event, the plaintiff's action is within time. Naturally if Art. 120 applies the plaintiff's action is equally within time. For those considerations I am of the opinion that the decision of the learned Judge in the Court below is erroneous and the action of the plaintiff should have succeeded. I would therefore set aside the decision of the Court below and decree this appeal with costs. The plaintiff is entitled to judgment for Rs. 2,941-7-3 with interest at the rate of 6 per cent. per annum throughout.

Agarwala, J.—I agree.

K.B./A.L. *Appeal allowed.*

A. I. R. 1937 Patna 239

MOHAMAD NOOR AND MADAN, JJ.

Official Trustee of Bengal and *another* —Objectors—Appellants.

v.

Basdeo Bhagat and *others*—Petitioners —Respondents.

Appeals Nos. 104, 105 and 126 of 1935, Decided on 13th October 1936, from original order of Sub-Judge, Jamtara, D/- 10th January 1935.

Civil P. C. (1908), S. 50—Judgment-debtors dying during execution—Court which has not passed decree cannot proceed with execution against legal representatives without fresh order from Court passing decree.

If a judgment-debtor dies during execution, it is irregular for the Court which has not passed the decree to proceed with the execution against the representatives of the deceased judgment-debtor, without fresh order from the Court which passed the decree, as under S. 50, the application for such execution is to be made to the Court which passed the decree: *A I R 1928 P C 162, Rel. on.*

[P 241 C 1]

Sultan Ahmad, S. N. Bose, J. C. Sinha (in 104) and *Santa Prasad* (in 105 and 126)—for Appellants.

Santa Prasad (in 104) *Sultan Ahmad, B. N. Mitter, S. N. Bose, Jadubans Sahay* and *J. C. Singh* (in 105 and 126)—for Respondents.

Mohamad Noor, J. — These three appeals arise out of a proceeding taken before the Subordinate Judge of Jamtara in the Santal Pargana for execution of two decrees for costs passed by the Privy Council. It appears that Maharaja Ram Ranjan Chakravarty of Hetempur instituted before the Subordinate Judge of Dumka a mortgage suit against the Ghatwal of the Handwe Estate. The suit was transferred to the Court of the Subordinate Judge of Bhagalpur. During the pendency of the suit the Maharaja died and his four sons, Kumar Satyaniranjan Chakravarty, Mahima Niranjan Chakravarty, Sada Niranjan Chakravarty and Kamla Niranjan Chakravarty, who are described in the decree of the trial Court as executors of the estate of the Maharaja, were substituted as plaintiffs in his place. The suit was decreed.

There were two appeals in this Court against the decree, one on behalf of the mother of the Ghatwal and the other on behalf of his widow. They were dismissed by this Court and the matter was taken up to the Privy Council. There the mortgage suit was entirely dismissed on the ground that the Handwe Estate being a Government Ghatwali was not alienable. The judgment of their Lordships is reported in 3 Pat 183.[1] The defendants were awarded costs against the plaintiffs. Later on there was an application for review before their Lordships which was also rejected and again there was a decree for costs. These two decrees are respectively dated 28th November 1923 and 26th January 1926. These decrees, at the instance of Basdeo Bhagat and others, who are respondents in Appeal No. 104 of 1935, and appellants in Appeals Nos. 105 and 126 of 1935, and who had attached the two decrees in execution of their own decree, were transferred for execution to the Court of the Subordinate Judge of Jamtara on 3rd April 1928.

After the required papers were forwarded to that Court, two out of the four sons of the Maharaja of Hetempur, who were judgment-debtors in the Privy Council decrees, namely, Mahima Niranjan and Kamla Niranjan, died, the former on 2nd October 1929, and the latter on 6th May 1931. Application for execution on behalf of the attaching creditors for execution of the Privy Council decrees was filed before the Jamtara Court on 17th June 1931. It was against the two surviving sons of the Maharaja and also against the Official Trustee of Bengal as trustee of the estate of the deceased Mahima Niranjan and Biswa Niranjan, the son of Kamla Niranjan. Various objections to the execution of the decrees were raised on behalf of the Official Trustees of Bengal and Biswa Niranjan, the chief of them being that the execution could not be taken against them as they were personal representatives of the deceased judgment-debtors and did not represent the estate of the Maharaja which was represented by the surviving executors of his estate.

Arguments were heard by Mr. Sen, the Subordinate Judge, in these objections on 22nd April 1932, but judgment was not delivered by his successor till 10th January 1935. In the meantime the other two sons of the Maharaja also died, Satya Niranjan on 23rd August 1933, and Sada Niranjan on 4th December 1933. An application was made on behalf of the decree-holders (attaching creditors) for bringing Brahma Niranjan and Braj Bala Debi, son and widow respectively of Satya Niranjan, and Pankajini Debi, widow of Sada Niranjan, on the execution record. Notices were issued and various objections to the execution were made on their behalf also, the most important of them being that they could not be proceeded against in the Jamtara Court.

Mr. Radha Raman Ghosh, who in the meantime had succeeded Mr. Sen as Subordinate Judge of Jamtara, heard arguments on the objection of the representatives of Satya Niranjan, and Sada Niranjan and by one judgment dated 10th January 1935 disposed of the objections of the Official Trustee of Bengal and Biswa Niranjan and also of the representatives of Satya Niranjan and Sada Niranjan. He disallowed the objection of the Official Trustee of Bengal and Biswa Niranjan, but allowed that of the representatives of Satya Niranjan and Sada Niranjan, holding that they could not be substituted in the Jamtara Court. Appeal No. 104 of 1935 is directed against that part of the order by which the objection of the Official Trustee and Biswa Niranjan was disallowed. Appeal No. 105 of 1935 is on behalf of the decree-holders (the attaching creditors) against that part of the order by which the learned Subordinate Judge refused to order the substitution of the names of the representatives of Satya Niranjan and Sada Niranjan on the ground that he had no power to do so and that such application should be made before the Court which passed the decree and in this particular case before the learned Subordinate Judge of Bhagalpur whose duty it is to execute the decrees of the Privy Council. It appears that after the order refusing the substitution of the representatives of Satya Niranjan and Sada Niranjan was passed the attaching creditors wanted to proceed against the remaining judgment-debtors only. This was disallowed and as the decree-holders took no further steps in the case the learned Subordinate Judge dismissed the application for execution on 1st April 1935 and Appeal No. 126 of 1935 is directed against this dismissal. Now

1. Satya Narayan Singh v. Satya Niranjan Chakravarty, A I R 1924 P C 5=79 I C 825=51 I A 37=3 Pat 183 (P C).

most of the objections taken on behalf of the Official Trustee and Biswa Niranjan had by the time the judgment was delivered become infructuous. The chief objection of these two was that execution could only proceed against the surviving executors and not against them who were the personal representatives of the deceased executors. But by that time the surviving executors were also dead.

It is now conceded by all those who appeared on behalf of the representatives of the deceased sons of the Maharaja of Hetempur that they are in possession of his estate and do now represent the estate. The only point urged on behalf of the appellant in Appeal No. 104 of 1935 which is also involved in Appeal No. 105 of 1935 is whether the learned Subordinate Judge of Jamtara could execute the decree after the judgment-debtors against whom the certificate for execution was granted by the Bhagalpur Court were dead, that is to say, whether he could proceed with the execution against the representatives of the deceased judgment-debtors. Reliance has been placed on the decision of their Lordships of the Privy Council in 32 C W N 790.[2] In that case their Lordships pointed out the change which was introduced in 1877 in the Civil Procedure Code where the words "to the Court which passed the decree" were added. These words were not in the earlier Code of 1859. Their Lordships have held that it is irregular for the Court which has not passed the decree to proceed with the execution against the representatives of a deceased judgment-debtor as under the provisions of S. 50, Civil P. C., the application for such execution is to be made to the Court which passed the decree. Their Lordships have, however, held that if the judgment-debtor waived the objection or acquiesced in execution, the proceedings are not void because there is no want of jurisdiction. In my opinion the learned Subordinate Judge has rightly pointed out that the questions of acquiescence or of waiver can only arise when steps have been taken for execution and the Courts are called upon to decide whether the steps taken should stand or should be set aside. We are at a stage when no execution has been issued. When it is brought to the notice of the Court that a certain procedure is irregular, and when the proceedings can be regularised by applications to the proper Court, there is no reason why the Court should allow the irregular proceeding to continue. The learned advocate for the decree-holders (attaching creditors) has, however, urged that there was an acquiescence or waiver on the part of the judgment-debtors and therefore they are not entitled to raise this objection. Now, so far as the representatives of the judgment-debtors who died after this filing of the execution petition are concerned, namely those of Satya Niranjan and Sada Naranjan, they had definitely and specifically objected that execution could not proceed against them in the Jamtara Court. So far as the other two persons are concerned, namely the Official Trustee and Biswa Niranjan, it is true that they did not specifically raise this question before the lower Court. But they raised various objections to the execution and it cannot be said that they allowed the execution to proceed and waived the objection or acquiesced in execution. The objection was specifically mentioned in their grounds of appeal to this Court. We see no reason why we should allow the irregular proceedings to continue.

The result, therefore, is that Appeal No. 104 of 1935 is allowed only on the ground that execution could not be taken in the Jamtara Court without a fresh order by the Bhagalpur Court and that the decree-holder, if he be so advised, should take steps before that Court. The other objections on behalf of the appellants which have been disallowed by the learned Subordinate Judge were not pressed before us. On the same ground Appeal No. 105 of 1935 is dismissed, and so also is Appeal No. 126 of 1935 as the execution cannot proceed without a fresh order of transfer by the Bhagalpur Court. Under the circumstances of the case we make no order for costs. At the hearing of the appeal the appellants of 104/35 wanted to place before us some more papers which, though not formally on the record of the present proceedings, are connected with them, as Court papers. This was objected to on behalf of the decree-holders. In view of our finding it is not necessary to refer to those documents and no order need be passed on the petition of the appellant of Appeal No. 104 of 1935.

Madan, J.—I agree.

S.C./D.S. *Order accordingly.*

2. Jang Bahadur v. Bank of Upper India, Ltd., A I R 1928 P C 162=109 I C 417=55 I A 227 =32 C W N 790=3 Luck 314 (P C).

A. I. R. 1937 Patna 242

AGARWALA AND VARMA, JJ.

Ram Saran Jha—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. No. 564 of 1936, Decided on 23rd December 1936, against order of Sess. Judge, Darbhanga, D/- 17th August 1936.

Sugarcane Act (1934), S. 7—Bihar and Orissa Sugarcane Rules, R. 18—Word 'whoever' in R. 18 is not restricted to purchaser of sugarcane — Jamadar weighing sugarcane on behalf of factory, taking illegal gratification—Factory purchasing sugarcane at minimum price fixed by Government—Jamadar held rightly convicted inasmuch as his act of taking illegal gratification prevented sugarcane growers from getting full minimum price for their cane as fixed by Government.

The object of the Act is to secure to the sugarcane growers a fair and minimum price for their produce, by regulating the price at which sugarcane should be purchased by or for factories. [P 244 C 1]

The opening word 'whoever' in R. 18 is not restricted in any way to the actual purchaser of cane alone. [P 244 C 1]

A jamadar who used to weigh sugarcane at the weigh-bridge on behalf of the factory was in a position to delay the weighing of the cane brought by sugarcane growers to the factory or to prevent its delivery by not delivering in time or by not delivering at all to them the purjis authorizing the weighman to weigh and receive the cane; and the jamadar taking advantage of his position took illegal gratification from some of the growers before distributing the purjis to them and weighing their cane and thus prevented them from getting the minimum price for their cane, as fixed by Government. The jamadar was prosecuted under R. 18 and convicted:

Held: that inasmuch as the factory was purchasing the sugarcane from the growers at the minimum rate fixed by the Local Government, the act of the jamadar, whose duty it was to perform some act enabling the growers to perform their contract with the purchaser, in taking illegal gratification from them prevented the sugarcane growers from receiving the full minimum rate fixed and hence he was liable under the rule. The jamadar was therefore rightly convicted. [P 244 C 1, 2]

S. N. Sahay and *A. K. Banarji*—for Petitioner.

Asstt. Govt. Advocate—for the Crown.

Agarwala, J.—The petitioner, who is employed as a jamadar by the Sakri sugarcane mill at their weighbridge station at Benipur, was charged with a breach of R. 18 of the Bihar and Orissa Sugarcane Rules, 1934. He was convicted and sentenced to pay a fine of Rs. 300 or in default to undergo simple imprisonment for one month. The rule under which he has been convicted is one of the rules framed in pursuance of S. 7, Sugarcane Act of 1934. By its preamble that Act is declared to be an Act for regulating the price at which sugarcane intended to be used in the manufacture of sugar may be purchased by and for factories for the purpose of assuring to sugarcane growers a fair price for their produce. S. 3 empowers the Local Government to declare any area to be a controlled area for the purpose of the Act and to fix a minimum price at which surgarcane may be purchased in any controlled area when intended to be used in the manufacture of sugar. S. 5 of the Act is in the following terms:

Whoever, in any controlled area purchases any sugarcane intended for use in a factory at a price less than the minimum price fixed therefor by notification under sub-s. (2) of S. 3, or in contravention of any prohibition made under sub-s. (3) of S. 3, shall be punishable with fine which may extend to two thousand rupees.

Section 7 empowers the Local Government to make rules for the purpose of carrying into effect the objects of the Act. Sub-s. (3) of S. 7 empowers the Local Government to provide for a fine not exceeding two thousand rupees to be imposed for a breach of some of the rules. It was not suggested in this case that R. 18 is not one of the rules for breach of which the Local Government is empowered to provide for the infliction of a fine. The Local Government of Bihar and Orissa have framed rules under the provisions of S. 7 of the Act and those rules are entitled the Bihar and Orissa Sugarcane Rules, 1934. R. 18 is in the following terms:

Whoever, in circumstances, where it would amount in effect to an attempt to evade the provisions of S. 5 of the Act, accepts or obtains, or agrees to accept or attempts to obtain from any person, for himself or for any other person, any gratification, consideration, bonus, set off, luck money or any other such money whatever, other than legal remuneration, as a motive or reward for weighing or purchasing sugarcane or for making payment therefor or for showing or forbearing to show in connexion with the purchase and weighment of or payment for sugarcane, favour or disfavour to any person shall, on conviction, be liable to a fine which may extend to one thousand rupees.

It is under this rule that the petitioner has been convicted. It is necessary to state the procedure followed by the sugarcane factory which employed the petitioner in order to understand what his position was *vis a vis* the sugarcane growers. It appears that growers of sugarcane desiring to sell their

produce to this factory intimate their desire while the crop is still growing and the factory send one of their officers, called the cane assistant, to inspect the crop and form an estimate of the probable amount of the crop. This estimate, with the name and address of the grower, is entered in a list maintained by the factory. This list, in English and in two of the vernacular languages, is suspended at the factory's weighbridge. When the crop has been harvested the grower delivers it at the weighbridge where it is weighed and paid for. But before it is possible for the grower of the cane to have it weighed it is necessary for him to produce to the man in charge of the weighbridge what has been called a purji. This purji is in effect a copy of the entry relating to the particular grower in the list already referred to, that is to say, it is an authority to the weighman to receive from a particular person a certain amount of sugarcane on behalf of the factory. It was the duty of the petitioner to make up these purjis and distribute them to the persons whose crops had been assessed by the cane assistant. He was, therefore, in a position to delay the weighing of the cane when brought in the factory or to prevent its delivery altogether by not delivering in time or not delivering at all a purji which would authorise the weighman to weigh and receive the cane.

The charge against the petitioner is that taking advantage of this position he has been in the habit of demanding payments for himself before making out and delivering the purjis to the persons entitled to them. The charge in the case relates to three cultivators from whom he is said to have taken Re. 1, Rs. 10 and Rs. 4, respectively. It may be mentioned that the amounts thus levied by the petitioner for his own benefit resulted in the growers of sugarcane receiving about 5 per cent. less than the minimum price fixed by the Government for the period and in the controlled area to which the charge relates. The three persons with whom we are concerned in the present case are Banarsi Purbey, Ramkishun Purbey and Jainarain Purbey. From Ex. 3/23 it appears that the minimum rate fixed by Government in the present instance for the period from 16th December 1935 until the end of that year was five annas three pies a maund. From 1st January the rate was reduced to five annas a maund. Between 18th January 1936 and 23rd January of that year, Banarsi Purbey delivered at the factory 126 maunds of cane, the minimum price of which was Rs. 39-6-0, and there is no dispute that this amount was actually paid to him by the factory. But before he delivered this amount he had had to obain purjis from the petitioner and for these purjis he had had to pay the petitioner Rs. 10. For the sum thus illegally extorted the petitioner received five purjis, each of which entitled the weighman to receive six carts of sugarcane from him. Banarsi Purbey deposed that it was in Aghan, that is (to) say, December 1935, that he paid to the petitioner Rs. 10 for the purjis. In the month of December 1935, between 21st and 26th Banarsi Purbey also delivered at the weighbridge 133 maunds and 20 seers of sugarcane and received payment at the then minimum price of five annas three pies a maund, that is to say, Rs. 43-12-9. This was the amount to which he was entitled to and which he actually received. So that during the months of December and January Banarsi Purbey received from the factory Rs. 83-2-9 as the proper price of the sugarcane which he delivered to the factory. But out of that price he had had to pay the petitioner Rs. 10. Banarsi Purbey, however, had not ultilised all the five purjis which he obtained from the petitioner.

From 21st to 26th December 1935, Ramkishun Purbey delivered to the factory 120 maunds and 10 seers of cane at the minimum price of five annas three pies and received as payment the proper amount, namely Rs. 39-7-3. He also, before being able to have his cane weighed at the weighbridge, had had to pay to the petitioner Rs. 4 for two purjis entitling him to deliver six carts of cane. This payment, he said, had been made in Aghan, that is to say, December 1935. Between 21st January 1936 and 23rd January 1936 Jainarain delivered 59 maunds and 10 seers of cane at the weighbridge and received payment of Rs. 18-8-3 at the then minimum rate of five annas a maund. He states he had, before having his sugarcane weighed, had to pay one rupee to the petitioner for a purji entitling him to deliver three carts of cane. The question that arises is whether the petitioner is a person who is liable to the penalty mentioned in R. 18. It is contended that the petitioner is not a purchaser of cane and

that R. 18 must be read with S. 5 and that, so read, its operation is restricted to purchasers of cane. As is indicated by the preamble to the Act the object of the Act is to secure to sugarcane growers a fair price for their produce and the method adopted by the Legislature to achieve this end is to regulate the price at which sugarcane, intended to be used in the manufacture of sugar, may be purchased by or for factories. S. 5 penalises a person who purchases sugarcane in any controlled area for use in a factory at less than the price fixed by the proper authority. But it is obvious that the object of the Legislature in securing the minimum price to the cane grower would be frustrated if some one, not the actual purchaser but whose duty it was to perform some act enabling the grower to perform his contract with the purchaser, were in a position to extract from the cane grower any amount which would have the result of depriving him of the full minimum price for his cane. Bearing this in mind, it is not difficult to understand that the Local Government, in exercise of the rule-making power conferred upon them by S. 7 for the purpose of carrying into effect the objects of the Act, intended to prevent the objects of the Act being frustrated in the manner indicated above and that R. 18 is designed for that purpose.

The opening word of the rule 'whoever' is not restricted in any way to the purchaser of cane and I see no reason why the generality of the expression should be restricted in the manner contended for by learned counsel for the petitioner. What has to be seen is whether by demanding gratification or other payment the petitioner prevented the cane growers from receiving the full benefit of the minimum price fixed for their produce. As I have shown above the three cane growers with whom we are concerned, like all other cane growers dealing with the factory, were unable to receive the full minimum rate for their produce because the petitioner insisted on a payment to him before their cane was weighed. Provided the factory was buying cane from them at the minimum rate, and not at any rate in excess of the minimum rate, it follows that the cane growers were not receiving the benefit of the full minimum rate. It was contended by learned counsel for the petitioner that there was no evidence that the factory was buying merely at the minimum rate, and he relied on a document on the record for the purpose of showing that for at least one period, namely in November, the factory was buying at the rate of $5\frac{1}{2}$ as., and he contended that, in the absence of proof by the prosecution that the factory paid the three persons with whom we are concerned at the bare minimum rate, it was not possible to hold that the payments to the petitioner had had the effect of depriving the growers of the full minimum rate. From the suppliers' accounts maintained by the factory and produced by the defence, it is clear however that the rates actually paid to Banarsi, Jainarain and Ramkishun were at the minimum rates prescribed by the Local Government in exercise of the powers conferred on them by S. 3 of the Act. The fact that 5 annas 6 pies was paid in the month of November is explained by the fact that that was the minimum rate prescribed by the Local Government in that month: *vide* Notification No. 2119-D, dated 11th November 1935. It is clear therefore that in the view we take of the scope of R. 18, the petitioner is guilty and the conviction was rightly recorded against him.

Before leaving this application however it is, I think, desirable to comment on the gross carelessness with which the prosecution in this case was conducted in the lower Court. The Government notifications fixing the minimum rate for the periods with which we are concerned were not filed by the Public Prosecutor until the close of the case for the defence. No attempt was made by the prosecution to prove that the rates paid to the three persons with whom we are concerned were the minimum rates permitted by the notifications. But for the fortuitous circumstance that the defence filed the factory's suppliers' accounts, the prosecution must have failed for want of this proof. Since however those accounts are on the record and have been proved in due course by the defence the Court cannot ignore them. It is merely to this circumstance that the prosecution owes the fact that this charge does not fail, and not to the vigilance and assiduity of the Public Prosecutor. I would dismiss this application, maintaining the conviction and sentence.

Varma, J.—I agree.

K.B./A.L. *Application dismissed.*

A. I. R. 1937 Patna 245

FAZL ALI AND ROWLAND, JJ.

Beni Mahto and *another* — Decree-holders — Petitioners.

v.

Chaturgun Sao — Objector — Opposite Party.

Civil Revn. No. 118 of 1936, Decided on 23rd December 1936, from order of Munsif, Palamau, D/- 15th February 1936.

Civil P. C. (1908), O. 21, R. 58; O. 38, R. 8 —Scope—Attachment before judgment— Objection to such attachment need not be made before judgment — It can be entertained even in execution proceedings.

An objection under O. 38, R. 8 to attachment of property attached before judgment need not be made before judgment as there is nothing in the rule to show that the claim must be preferred before judgment. Such objection even though preferred under O. 21, R. 58, in proceedings in execution of the decree can be entertained by the Court, the procedure to be followed in objection under O. 38, R. 8 or in objection under O. 21, R. 58, in respect of claim to property attached in execution being the same: *38 Cal 448, Ref.*

[P 245 C 2]

Baldeva Sahay—for Petitioners.

Ragho Saran Lal—for Opposite Party.

Rowland, J.—The petitioners brought a suit for money on 11th March 1934, and obtained an order for attachment before judgment. Some property was attached on 17th March 1934. Decree was obtained on 4th September 1934, and the petitioners applied for execution on 7th August 1935, against the property already attached. Notice was issued under O. 21, R. 66, Civil P. C., and the opposite party, on 24th September 1935, preferred a claim to the property which the Munsif entertained, purporting to act under O. 21, R. 58, Civil P. C., and allowed. The point taken in this aplication is that the Munsif had no jurisdiction to entertain under O. 21, R. 58 a claim in respect of property which had not been "attached in execution of a decree". This property was attached before judgment, and it is said any claim to it ought to have been preferred under O. 38, R. 8 and should have been so preferred before the judgment was pronounced. Once the suit has been decreed no claim under this rule can be entered.

At the hearing before us it was suggested for the opposite party that once a decree has been passed and execution taken property attached before judgment should be deemed to have been attached in execution. This seems to me to be a very debatable proposition. I would prefer to approach the matter from another angle. First, I would point out that neither in O. 21, R. 58, nor in O. 38, R. 8 are there any words conferring on a third party owner of property the right to make a claim. What both these rules say is that "where any claim is preferred" certain procedure shall be followed. It seems to me that neither of these rules create any right in the party but by implication they both recognize the right of any owner of property to say "This is mine". This right does not need to be created by statute. It is there. If there was a lacuna in the Code, that would not take away the right of an owner of property in his property. Secondly, Mr. Baldeva Sahay's ingenious argument for the petitioners ignores the fact that O. 38, R. 8 gives directions as to procedure "where any claim is preferred to property attached before judgment". There are no qualifying words limiting its application to a claim preferred before the judgment. The language of the rule is general and provided the attachment was before judgment a claim preferred at any time is within the language of the rule. The Court was, therefore, within its duty in investigating the claim

in the manner hereinbefore provided for the investigation of claims to property attached in execution of a decree for the payment of money;

that is to say under O. 21, R. 58 and succeeding rules. This view is supported by 38 Cal 448.[1] Therefore the Munsif was entitled to deal with the claim under O. 21, R. 58. It was, of course, within his power to refuse investigation under the proviso to R. 58 (1) if he considered "that the claim or objection was designedly or unnecessarily delayed." But as pointed out in the Calcutta decision just cited, there was nothing unreasonable in the claimant's conduct if he waited until there was an actual threat to his property and preferred his claim then. It is not necessary for any person who has a claim to property attached before judgment to prefer a claim at that stage though he may do so if he wishes under the provisions of O. 38, R. 8. His failure to do so, however, does not necessarily amount to any negligence which would justify his subsequent claim being dismissed under the proviso to O. 21, R. 58 (1). I would

1. Basiram Malo v. Kattyayani Debi, (1911) 38 Cal 448=10 I C 305=15 C W N 795.

dismiss the application with costs : hearing fee two gold mohurs.

Fazl Ali, J.—I agree. In my judgment O. 38, R. 8, Civil P. C., fully covers the present case. In the first place this rule makes it clear that a claim preferred in regard to property attached before judgment will be entertained in the same manner as a claim preferred in regard to property attached in execution of a decree ; and, secondly, there is nothing in this rule to show that the claim must be made before the decree is passed. Once the right to prefer a claim is recognized it will evidently be an undue curtailment of that right to hold that it will not be entertained unless it is preferred before the decree is passed. The claimant may prefer to wait until the decree is passed, for the suit may be dismissed and the attachment will then cease ipso facto. Thus the effect of this rule seems to be that the claim will have to be investigated whether it is preferred before or after the decree. In the present case it was preferred after the decree and it cannot be rejected merely because the petition of the claimant purported to be one under O. 21, R. 58. If, the claimant has a right to have his claim investigated, the right cannot be denied even if it be supposed that he has quoted a wrong section.

K.B./A.L. *Application dismissed.*

A. I. R. 1937 Patna 246

ROWLAND, J.

Ramchandra Prasad—Petitioner.

v.

Emperor — Opposite Party.

Criminal Revn. No. 554 of 1936, Decided on 24th November 1936, from order of Offg. Addl. Sess. Judge, Muzaffarpur, D/- 22nd September 1936.

(a) Criminal P. C. (1898), Ss. 342 and 540— Court taking additional evidence under S. 540 after conclusion of defence evidence— Accused need not be examined again under S. 342.

Where the accused had already been examined at the proper time on close of the prosecution case and subsequently after the close of the defence evidence the Court took additional evidence under S. 540 :

Held : that it was not necessary to re-examine the accused under S. 342 : *A I R 1924 Pat 764, Rel. on ; A I R 1922 Pat 158 ; A I R 1921 Pat 11* and *A I R 1925 Pat 414, Ref.* [P 247 C 1]

(b) Criminal P. C. (1898), S. 540 — Scope and object.

Section 540 is expressed in the widest possible terms and the intention is not to limit the discretion of the trying Court in any way. At the same time the Courts ought to remember that the purpose of S. 540 is not to enable one party or the other to fill up the gaps in his case and to improve it by new matter at a late stage but to enable the Court to act in the interest of justice when it considers such action necessary.

[P 247 C 2]

(c) Criminal Trial—Appellate Court cannot order partial re-trial.

A partial re-trial cannot be directed by the appellate Court. It can either direct a complete re-trial or call for further evidence to be placed before itself : *A I R 1916 Pat 219, Rel. on.*

[P 247 C 2]

Manohar Lal and *K. N. Maitra*—for Petitioner.

Asst. Government Advocate — for the Crown.

Order. — The petitioner is a person against whom proceedings have been taken under S. 107, Criminal P. C., on the ground that he is acting in a manner likely to cause a breach of the peace by refusing to pay and encouraging others to refuse to pay tolls demanded by the Bettiah Raj estate in respect of Raxaul bazar. The Raj, it appears, claims a right to realize not only tolls on transactions of sale taking place in the bazar, but also tolls on goods imported to and exported from the bazar area, and it is stated that the right to realize tolls on transactions of sale has not been and is not being disputed or interfered with ; but the contest is only regarding the additional claim to realize tolls on export and import. If that is so the distinction is not clearly brought out in the judgments of the Courts below, and the question requires examination as to whether the facts are as represented here.

The Court of first instance passed an order requiring the petitioner to furnish security for keeping the peace. Before the Additional Sessions Judge, apart from the merits, some objections to the procedure were taken. Among these was an objection to the order of the Magistrate dated 21st May 1936, after the case for the prosecution, the examination of the accused, the examination of defence witnesses and cross-examination of defence witnesses had all been concluded, directing at the instance of the Court Inspector that two witnesses be re-called and one fresh witness called and certain fresh documents be called for. The witnesses were examined and the documents put in evidence on 1st June, the

Magistrate purporting to act under S. 540, Criminal P. C. The accused had already been examined and the Magistrate did not examine him again under S. 342. The Sessions Judge thinks that this omission vitiates the trial. He relies on the case in 6 P L J 174[1] which is not an authority for that proposition. 6 P L J 174[1] was one in which there had been an omission to examine the accused. The case which laid down that examination of the witnesses at an early stage was no substitute for their examination at the proper stage, that is at the close of the prosecution, was 6 P L J 644.[2] That case, however, has been dissented from in a subsequent decision, 4 Pat 488,[3] where it has been laid down that whenever the legality of a trial is challenged on the ground that the provisions of S. 342, Criminal P. C., have not been complied with, the test is whether there has been prejudice to the accused by reason of the absence of judicial questions and whether the defect is cured by S. 537 of the Code.

In the present case the accused had been examined at the proper time on close of the prosecution case and subsequently the Court took additional evidence under S. 540. This is exactly the position which came before a Bench of this Court in 3 Pat 1015[4] when it was held that it was not necessary to re-examine the accused person under S. 342. The learned Judge was in error, therefore, in holding that the trial was vitiated by the failure to examine the accused again. What the learned Judge should have considered was whether the additional evidence which the Magistrate admitted as under S. 540 had been properly admitted or not. If he thought that this evidence had been properly admitted, he should have decided the case on the merits on the entire evidence. If he thought that it was not properly admitted, it was open to him to exclude it from consideration and to decide the case on the remainder of the evidence, that is to say such evidence as was on the record when the defence case closed on 21st May. There has been some discussion here as to whether the terms of S. 540, Criminal P. C., are wide enough to cover what has been done in this case. It seems to me that S. 540 is expressed in the widest possible terms and the intention is not to limit the discretion of the trying Court in any way. At the same time the Courts ought to remember that the purpose of S. 540 is not to enable one party or the other to fill up the gaps in his case and to improve it by new matter at a late stage, but to enable the Court to act in the interest of justice when it considers such action necessary, so that the question for the learned Sessions Judge would be whether in the state of the evidence as it stood on 21st May the Magistrate exercised his discretion properly in admitting additional evidence; and if the learned Sessions Judge thinks the answer to that question should be in the negative, it will be open to him to act accordingly. The order of the Sessions Judge directing a partial retrial can certainly not be supported for the reasons given in 1 P L J 99.[5] The appellate Court could either direct a complete retrial or call for further evidence to be placed before itself. It would merely harass both parties to order a complete retrial. I shall set aside the order of the learned Additional Sessions Judge and direct that he re-admit the appeal before himself and hear it and dispose of it according to law.

S.C./D.S. *Order set aside.*

1. Gulam Rasul v. Emperor, A I R 1921 Pat 11 =61 I C 715=22 Cr L J 427=6 P L J 174= 2 P L T 390.
2. Mitarjit Singh v. Emperor, A I R 1922 Pat 158=63 I C 825=22 Cr L J 697=6 P L J 644 =2 P L T 520.
3. Syed Mohiuddin v. Emperor, A I R 1925 Pat 414=86 I C 459=26 Cr L J 512=4 Pat 488= 6 P L T 154.
4. Prayag Gope v. Emperor, A I R 1924 Pat 764 =82 I C 284=25 Cr L J 1276=3 Pat 1015= 5 P L T 571.
5. Gajanand Thakur v. Emperor, A I R 1916 Pat 219=35 I C 508=17 Cr L J 332=1 P L J 99.

Advocate High Court
Jammu & Kashmir
Srinagar.

A. I. R. 1937 Patna 247

DHAVLE AND VARMA, JJ.

Ram Chandra Bhagat and *others*—Defendants—Appellants.

v.

Lala Jagdeshwari Prasad and *others*, Plaintiffs and *others*, Defendants—Respondents.

Appeal No. 1143 of 1933, Decided on 18th November 1936, from appellate decree of Dist. Judge, Darbhanga, D/- 5th July 1933.

Transfer of Property Act (1882), Ss. 19 and 24 — Husband by taksimnama providing "interest shall devolve upon *B* or his legal heir on death of my wife"—Death of *B*

during lifetime of widow—Interest in favour of *B* held was contingent and came to end on his death before widow's death—Sale by *B* of widow's property would not affect right of reversioner over property on death of widow.

A husband by taksimnama provided as follows: 'The property shall devolve upon *B* or his legal heir and *B* or his legal heir shall become the absolute owner of my property on the death of my wife.' *B* during the widow's lifetime sold the widow's property and died during the lifetime of the widow. The reversioner brought a suit for possession of the property:

Held: that the interest in favour of *B* was contingent and not vested and came to an end on his death during the lifetime of the widow. The sale made by him during the widow's lifetime therefore would not affect the reversioner's right over the property after the death of the widow.

[P 249 C 1, 2]

Sultan Ahmad, *Murari Prasad* and *Rameswar Misra*—for Appellants.

A. B. Mukherji, *H. P. Sinha* and *Akhoury Chandra Sekhar Sinha*—for Respondents.

Dhavle, J.—This is an appeal by the defendants-first party in a suit for recovery of possession of certain properties that were given to one Mt. Jaiwanti Kuar for a life estate under a taksimnama executed in 1870 by her husband Bajrangi Sahay. Jaiwanti Kuar died in June 1924, and the claim of the principal plaintiff was that upon that event he was entitled to the properties under the taksimnama. The defence (so far as is material in the appeal) was that this property a share of two annas 13 gandas odd in Khochkipur, old Tauzi No. 2508, had been purchased in execution of a mortgage decree obtained by a predecessor in title of the defendants first party in a suit to which Jwala Prasad (father of the principal plaintiff) and Chandrika Prasad (brother of Jwala Prasad) were parties; and that the execution sale had therefore conveyed not merely the life interest of the mortgagor but the entire interest in the property to the auction-purchaser, leaving nothing for the plaintiff to take on the death of the widow. This defence was overruled by the trial Court, and the same view was taken by the lower appellate Court.

Sir Sultan Ahmad, who appears on behalf of the appellants, has contended before us that what passed in the execution sale must be determined from the sale certificate, and that as this sale certificate refers to the property itself and not merely to Mt. Jaiwanti Kuar's interest in it, the entire interest in the property passed under the execution sale. That Jaiwanti Kuar had only a limited life interest in the property is not disputed, nor is it disputed that she could not have mortgaged more than her life interest in the property: there was no pretence that the mortgage was for any legal necessity so as to bind her successors. Stress, however, is laid on the fact that Jwala Prasad and Chandrika Prasad were impleaded in the mortgage suit and did not set up their title to the property on the death of Mt. Jaiwanti Kuar. But it was plainly not in respect of this title that they had been impleaded in the suit. Para. 4 of the plaint in the mortgage suit sets out that Badrinath (father of Jwala Prasad and Chandrika Prasad) had, subsequently to the execution of the mortgage, purchased the interest of Mt. Jaiwanti Kuar in execution of a money decree, and that therefore the sons of Badrinath who had died before the institution of the mortgage suit were impleaded. It is clear that in these circumstances the reversionary title (as it is often called) to the property on the death of Jaiwanti was not drawn into controversy at all in the mortgage suit. It is true that the sale certificate does not speak of the life interest of Jaiwanti Kuar in the property; but it is obvious that the mortgage suit, even if Jwala Prasad and Chandrika Prasad were impleaded as defendants in it, could not operate to enlarge the interest of the mortgagor, regarding the extent of which there is no doubt whatsoever. The paramount title is sometimes submitted to the decision of the Court in a mortgage suit; but that question does not ordinarily arise, and it does not appear that it either arose or was pronounced upon in the mortgage suit of the predecessor-in-title of the defendants. It seems to me, therefore, that the sale certificate on which the appellants rely, does not give them any larger interest than the mortgagor Mt. Jaiwanti Kuar possessed, and as that interest has come to an end by reason of her death, the appellants are not entitled to keep the property against the principal plaintiff who is clearly entitled to it under the terms of the taksimnama.

The learned advocate for the plaintiffs-respondents has also endeavoured to support the decree of the lower Court in respect of this property by raising a point which also arises in connexion with his cross-objection which relates to another property. This property was sold in 1903

by Mt. Jaiwanti Kuar, Jwala Prasad and Chandrika Prasad. The trial Court held that notwithstanding the fact that Jwala Prasad and Chandrika Prasad were parties to the sale deed, the title of the plaintiff to this property on the death of Mt. Jaiwanti Kuar was not affected. The lower appellate Court, however, took the view that the taksimnama had conferred a vested interest upon Badrinath and that, therefore, the absolute right to the property had passed under the sale deed by reason of Jwala Prasad and Chandrika Prasad joining in it. The learned District Judge came to this conclusion in view of the provision of S. 19, T. P. Act, which provides that :

> Where on a transfer of property an interest therein is created in favour of a person . . . on the happening of an event which must happen, such interest is vested, unless a contrary intention appears from the terms of the transfer.

In order to see whether this provision of the law has any application at all, we have to turn to the terms of the taksimnama. As regards the properties that were placed at the disposal of Mt. Jaiwanti Kuar under that deed for her lifetime, the deed provides that on the death of Mt. Jaiwanti Kuar those properties "shall devolve upon my nephew Babu Badrinath aforesaid, or his legal heir." Later on, it provides :

> Be it noted that Babu Badrinath aforesaid, or his legal heir, shall as absolute owner, generation after generation, remain in possession . . . . of all the properties . . . . in the possession of my wife Mt. Jaiwanti Kuar, which he will get on her death.

If this were an absolute gift to Badrinath, subject to the life interest of Mt. Jaiwanti Kuar, S. 19 would undoubtedly apply and Badrinath would undoubtedly have a vested interest in the property which, as the section in effect provides, would not be defeated by his death before succeeding to the property. But the interest created is not in favour of Badrinath, or of Badrinath and his heirs, but of Badrinath or his legal heir, and we find the author of the taksimnama employing the same phraseology as regards his cremation and sradh, which he says is to be performed "by the hand and under the management of the said Babu Badrinath, or of his legal heir." This makes the intention of the author of the taksimnama perfectly clear. The property is to be taken on the death of Mt. Jaiwanti Kuar by Badrinath, if he should then be alive, or by such legal heir of his as may then be alive, just as the sradh also is to be performed by Badrinath if he should be alive at the death of the author of the taksimnama, or by such legal heir of his as may then be living.

The case really comes within the principle of S. 24, T. P. Act; an interest is created in respect of such person or persons as shall be surviving at the death of Mt. Jaiwanti Kuar. Now, Jwala Prasad and Chandrika Prasad, who joined Mt. Jaiwanti Kuar in executing the sale deed of 1903, had at that time no vested interest in the property. They did have a contingent interest which, however, was defeated by their deaths before the death of Mt. Jaiwanti Kuar. The principal plaintiff takes the property on the death of Mt. Jaiwanti Kuar in his own right under the taksimnama, and it is clear that this title of his cannot be affected by anything that Jwala Prasad and Chandrika Prasad may (except for legal necessity, which is not the appellants' case) have done in the lifetime of Mt. Jaiwanti Kuar. The cross-objection of the plaintiff, therefore, in respect of this property which was the subject matter of the sale deed of 1903 must be allowed, and the order of the lower appellate Court set aside and that of the trial Court restored. The nature of the interest created by the taksimnama in the events that have happened in favour of the plaintiff is thus also another answer to the appellants' claim that the sale in execution of the mortgage decree operated to convey the entire property, because Jwala Prasad and Chandrika Prasad were impleaded in the suit. Quite apart from the fact, to which I have already referred, that their paramount title, if any, viz., the reversionary title, was not put in controversy at that time, they had no power to convey the interest that only accrued to the principal plaintiff on the death of Mt. Jaiwanti Kuar, while their own interest, which was contingent, came to an end with their deaths before the death of Mt. Jaiwanti Kuar. I would, accordingly, dismiss this appeal and allow the cross-objection with costs throughout.

Varma, J.—I agree.

P.R./D.S. *Appeal dismissed.*

A. I. R. 1937 Patna 250

DHAVLE AND VARMA, JJ.

Baldeo Prasad and *another*— Plaintiffs —Appellants.

v.

Akhouri Hirambo Narain Singh and *another*—Defendants—Respondents.

Appeal No. 1126 of 1933, Decided on 5th November 1936, from decision of Sub-Judge, Shahabad, D/- 18th July 1933.

Bihar and Orissa Public Demands Recovery Act (4 of 1914), Ss. 25 and 26—*B* and *D* owning three properties in equal shares — *B* and his transferee *G* not parties to certificate proceedings against *D* — Sale of properties in certificate execution against *D* does not pass interest of *B* and *G* — Suit by *B* and *G* for mere declaration without consequential relief is proper and not barred under S. 42, Specific Relief Act, their possession not being disturbed— Suit held also not bad for misjoinder of plaintiffs and causes of action, as cause of action for both *B* and *G* arose on date of certificate sale.

Two brothers *B* and *D* owned equal shares in three properties. *B* transferred his half-share in two items of properties to *G*. *C*, the certificate-holder, in execution of his certificate against *D*, brought the properties to sale and purchased them himself. On the date of the sale *B* alone put in an objection petition against the attachment but it was summarily rejected and the sale was held. *B* and *G* then brought a suit for declaration that their share in the properties was not affected by the sale. After the filing of the suit possession was taken by *C*, the certificate auction-purchaser of the properties. *B* was found to be separate from *D* by the trial Court and the finding was not assailed in first appeal :

Held: that, inasmuch as the possession of plaintiffs was not disturbed before the date of suit, and as by mere sale, their interests did not vest in the purchaser, as understood by S. 26 of the Act, the plaintiff's suit, even though merely declaratory, was not barred by S. 42, Specific Relief Act, as no consequential relief could have been asked by them when the suit was filed : [P 251 C 1, 2]

Held also : that the cause of action for the suit arose on the date of the certificate sale and not on the date when *B*'s objection was dismissed, as their interest did not pass by the mere sale of the properties. Even though *B* had parted with his half-share in two properties, the half-share in the properties was completely owned by *B* and *G* and so their interest was in jeopardy when the certificate sale took place. The suit therefore was not bad for misjoinder of parties and causes of action : *26 All 606, Ref.* [P 251 C 2]

B. P. Sinha—for Appellants.

D. N. Varma—for Respondents.

Dhavle, J.—This appeal must, I think, be allowed. It arises out of a suit brought by the two appellants, Baldeo and Ghura, for a declaration that they were entitled to a half-share in certain properties, and that that share was not affected by a certificate sale of 5th June 1931, held at the instance of defendant 1 against defendant 2 as the certificate-debtor. Plaintiff Baldeo is a brother of defendant 2 and had conveyed his half-share in two out of the three properties in suit to Ghura. He still filed a petition of objection to the attachment of the three properties in the certificate proceedings ; but this objection was dismissed and the properties were brought to sale and purchased by defendant 1. The substantial defence to the suit appears to have been that Baldeo and defendant 2 were joint in status, that defendant 2 was the head of the joint family, and that the debt in respect of which defendant 1 resorted to the certificate Court, was binding on both the brothers constituting the joint family. This defence was negatived by the trial Court and was not revived in the lower appellate Court. It was also urged on behalf of the defence that the suit was not maintainable as framed. In the trial Court the objection on behalf of the defence was put in this way that Ghura could not maintain the suit, because he had not put in any objection before the certificate officer. It was also argued that the suit was barred under S. 42, Specific Relief Act, because the defendant auction-purchaser had taken out delivery of possession. As regards this last, it is conceded before us that the delivery of possession took place not before but after the institution of the suit. The contention that Ghura could not join in the suit because he had made no claim under O. 21, R. 58, Civil P. C., as it was put in the trial Court, was negatived by that Court.

The learned Munsif also found in favour of the plaintiffs, as I have already indicated, as regards Baldeo being separate in status from defendant 2 and being entitled to a moiety in the three properties out of which he had conveyed his moiety in two properties to Ghura. The suit was accordingly decreed. Defendant 1 appealed, and the only ground that was pressed in appeal was that the two plaintiffs were not entitled to maintain this declaratory suit. The learned Additional Subordinate Judge observed that Baldeo, having on his own showing sold his moiety in two of the properties, had no right to put in a claim regarding them, and that therefore there was a misjoinder of plaintiffs and causes of action, Ghura's cause of action for a declaration of his title arising when the

properties went out of his possession by the dakhaldehani that followed the sale. The learned advocate for the respondents concedes, after looking into the papers, that none of the properties in suit had gone out of the possession of the plaintiffs at the date the suit was instituted, and it is clear that the learned Additional Subordinate Judge has proceeded on an erroneous footing altogether in giving to Ghura a cause of action that was not in existence at the date of institution of the suit. What made it necessary for the two plaintiffs to bring the suit for the declaration of their title was the certificate sale of 5th June 1931. The certificate-debtor, as I have already stated, was defendant 2. S. 26, Public Demands Recovery Act 1914, provides that :

> Where property is sold in execution of a certificate there shall vest in the purchaser merely the right, title and interest of the certificate-debtor at the time of the sale, even though the property itself be specified.

As the plaintiffs were neither of them a party to the certificate proceedings, it is obvious that their interest in the three properties in suit had not and has not even now vested in defendant 1 as the purchaser at the certificate sale. As he had also not yet taken out delivery of possession, all that it was apparently necessary for the two plaintiffs to do was to obtain the declaration for which they sued : *cf.* 26 All 606.[1] It has been urged that though Baldeo may have been entitled under S. 25, Public Demands Recovery Act, to bring a mere declaratory suit, S. 42 Specific Relief Act, made it impossible for Ghura to do the same; but the learned advocate was not able to suggest what further relief Ghura could have asked for when the certificate sale could not under S. 26 have passed his interest in the properties and no attempt was yet made to disturb his possession, even though it is a fact that he had not put in any claim or objection before the Certificate Officer. The learned advocate has laid stress on the statement in para. 4 of the plaint that the cause of action for the suit arose on 5th June 1931, when the petition of objection was rejected by the Certificate Officer. If this is taken literally, there would not be a misjoinder of causes of action, but all that would happen would be that Ghura would be without any cause of action at all, in view of the fact that he was no party to the petition of objection (which was rejected by the Certificate Officer) or indeed to the certificate proceedings themselves. But the plaint must be read as a whole. In para. 3 of the plaint it is stated that the petition of objection being summarily rejected, the sale was held on that very date, defendant 1 being the purchaser. The principal element in the cause of action whether of Baldeo or of Ghura was obviously the certificate sale notwithstanding the limited phraseology of para. 4 of the plaint.

The lower appellate Court fell into an error not only in assigning to Ghura a non-existent cause of action but also in dismissing Ghura's claim on the ground of misjoinder. O. 1, R. 9, Civil P. C., provides that:

> No suit shall be defeated by reason of the misjoinder or non-joinder of parties, and the Court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it.

That applies in terms to the trial Court, no doubt, but S. 99, Civil P. C., provides that:

> No decree shall be reversed . . . . on account of any misjoinder of parties or causes of action . . . not affecting the merits of the case or the jurisdiction of the Court.

The finding of the trial Court that Baldeo was separate from defendant 2 and was not responsible for the debt taken by defendant 2 from defendant 1 (or the Co-operative Society whose liquidator he is at present) not having been assailed before the Additional Subordinate Judge when he heard the appeal, it is impossible to uphold the order of the lower appellate Court so far as it dismissed Ghura's claim on the ground that he was wrongly joined in the suit. It is true that his was a derivative title—and true also that at the time Baldeo made his objection before the Certificate Officer it was Ghura and not Baldeo that had the title to a moiety in two of the properties—but it is not as if Baldeo and Ghura were strangers to each other, and the moiety that was put in suit—the half-share in the three properties—was completely owned between Baldeo and Ghura and was put in jeopardy by the certificate sale obtained by defendant 1. On the merits, therefore, defendant 1 had no case in the lower appellate Court, and the learned Subordinate Judge ought to have dismissed the appeal. I would, accordingly, allow this appeal, reverse the decree of the lower appellate Court and restore that of the trial Court with costs

1. Ganga Ghulam v. Tapeshri Prasad, (1904) 26 All 606=1904 A W N 138.

to the appellants in all Courts. There was a cross-objection on behalf of respondent 1, which is not pressed and must also be dismissed.

Varma, J.—I agree.

K.B./A.L. *Appeal allowed.*

A. I. R. 1937 Patna 252

MOHAMAD NOOR, J.

Kukur Singh—Appellant.

v.

Baijnath Singh and *others*—Respondents.

Appeal No. 787 of 1934, Decided on 11th January 1937, from appellate decree of Sub-Judge, 1st Court, Saran, D/- 1st February 1934.

Limitation — Suit by *A* for recovery of possession of plot based on sale deed of 1912 —Sale of same plot by vendor to *B* in 1930— —Suit dismissed by Court as barred by limitation—Plot incapable of possession by actual user—Plot attached in execution against vendor but released by *A* in 1918— No proof of continuous act of possession by vendor or *B*—*A*'s title held continued till interference with possession by *B* and suit held wrongly dismissed.

A plot was sold by the vendor to *A* in 1912. The same plot was again sold by the vendor to *B* in 1930. *A* brought a suit for the recovery of possession of the plot the same being interfered with by *B*. The Court held that *A* was not in possession of the plot within 12 years of the suit and dismissed it. The plot was incapable of actual user. It was once attached in 1918 in execution of a decree against the vendor, but *A* released it under O. 21, R. 58, Civil P. C. There was no proof of continuous act of possession by the vendor or by *B*:

Held : that the suit was not time-barred as the title acquired by *A* by the sale deed of 1912 must be held to have continued till the interference with his possession by *B*. [P 253 C 1]

Ganesh Sharma—for Appellant.

Harnarayan Prasad—for Respondents.

Judgment.—This appeal arises out of a suit instituted by the appellant for recovery of possession of 2 kathas 3 dhurs of land being Cadastral Survey plot No. 156 and Revisional Survey plot No. 309. This plot admittedly belonged to Mt. Morbansi Kuar (original defendant 2 and now defendant 4). In 1912 during her minority the plaintiff took a sale of some land from her through Parbhu Narain Singh who was her guardian appointed by the District Judge. The sale deed, in the schedule of property conveyed, mentions this plot with its complete description, namely that there were a neem tree and a well standing thereon. It is admitted that this plot does contain a neem tree and a well. Later on at the time of the Revisional Survey which was some time in the year 1920, though other plots covered by the sale deed were recorded in the name of the plaintiff, plot No. 156 was not so recorded, rather it was recorded in the name of Morbansi Kuar. Later on, in 1930, the defendants took a sale from Morbansi Kuar, and in that sale deed also among other lands the plot in dispute is mentioned as having been transferred to them. Thus both the parties claim this plot through defendant 2. The plaintiff relies upon a sale in his favour in the year 1912, while the defendants claim this land through a sale from her in the year 1930. The defendants denied the plaintiff's title and asserted that this plot was not conveyed to the plaintiff by the guardian of Morbansi Kuar. In fact there seems to be some faint suggestion that the mention of this plot in the sale deed of the plaintiff was a later interpolation without the knowledge of the vendor. The simple question was whether the disputed land was actually sold to the plaintiff in the year 1912 and whether the plaintiff's suit was barred by limitation. Both the Courts below have dismissed the suit and the plaintiff has preferred this second appeal.

As I have said, it is not disputed that in the list of the properties conveyed to the plaintiff by Morbansi Kuar through her guardian the Cadastral Survey plot No. 156 which is in dispute is clearly mentioned. The learned Subordinate Judge has simply mentioned the suggestion of the defendant that this plot was inserted later on without the knowledge of the vendor. This observation of the learned Judge is based on no evidence whatsoever. A man's title cannot be thrown away on pure suspicion and imagination. The learned advocate for the respondents has contended that the fact that plots Nos. 155 and 156 have been mentioned within one boundary, while other plots were separately mentioned, shows that there was an interpolation. The reason why plots 155 and 156 have been mentioned together is obvious. The description of the property in the sale deed of the plaintiff is kita by kita. As these two plots are within one boundary and at one place they have been mentioned at one place, but

there is the description that it contains a neem tree and a well. There is slight difference in the area but it is immaterial on the face of clear mention of the number of the plot and the description and boundary. I have carefully examined the deed which is in Urdu script (with which I am familiar) and I do not find any sign of interpolation. Be that as it may, the learned Subordinate Judge has not definitely found it to be an interpolation but has simply expressed what was suggested to him on behalf of the defendants. The main ground on which the Courts below have dismissed the suit is one of limitation. They have held that the plaintiff has failed to prove possession within twelve years of the suit. It was suggested on behalf of the plaintiff that as the land was incapable of actual user, the plaintiff can avail himself of the presumption that title follows possession. The point was urged before the learned Subordinate Judge but he has said that as the land contains a neem tree it was capable of exercise of possession. I am unable to understand how one can prove possession of a land which has a neem tree on it. Neem is not a fruit-bearing tree. The use of its leaves is for medicinal purposes and the twigs are used for tooth-brushes. Strangers are generally allowed to take leaves and twigs without restriction by the proprietors of the trees. This also is the case with wells. It is a matter of common knowledge that village wells, except in very exceptional circumstances, are allowed to be used by the villagers without restriction. There is no definite finding of the learned Subordinate Judge that there was a continuous act of possession by Morbansi Kuar or by the defendants which destroyed the plaintiff's title. Therefore in the absence of any evidence to the contrary, the title which was acquired by the plaintiff by the deed must be held to have continued till the interference with his possession as alleged by him.

There is one fact more which is of importance. It appears that in execution of a decree against Mt. Morbansi Kuar this plot among other plots of land was attached, and the present plaintiff filed a claim under O. 21, R. 58, Civil P. C. That objection was allowed. This was in the year 1918, six years after the sale in favour of the plaintiff. Now, this release of the property from attachment under orders of the Court though not binding upon Morbansi Kuar so as to bring her within the purview of O. 21, R. 63 of the Code, inasmuch as it was not an order against her, is certainly an instance in which the plaintiff claimed a right in a case in which Morbansi Kuar was a party as a judgment-debtor, and no doubt the release of the plots covered by the sale deed of 1912 must have been known to her. Taking all the circumstances into consideration in my opinion plaintiff's suit has been wrongly dismissed. I allow the appeal and decree the plaintiff's suit with costs throughout. Leave is asked to appeal under the Letters Patent which is refused.

S.C./D.S. *Appeal allowed.*

A. I. R. 1937 Patna 253

ROWLAND, J.

Gupteswar Missir and *another* — Plaintiffs—Petitioners.

v.

Radha Mohan Missir and *others* — Defendants—Opposite Parties.

Civil Revn. No. 503 of 1936, Decided on 6th January 1937, from order of Munsif, Arrah, D/- 14th September 1936.

(a) Transfer of Property Act (1882), Ss. 83 and 84—Refusal of tender—Refusal by mortgagee to accept it in full satisfaction—Mortgagor can withdraw such amount under S. 84—Mere fact of deposit does not merge the money into mortgaged property unless accepted by mortgagee in full satisfaction.

When a mortgagor deposits the mortgage money into Court under S. 83 of the Act and the mortgagee accepts such deposit in full satisfaction then the mortgage becomes extinguished. But if the mortgagee refuses to accept it in full satisfaction then the mortgagor can withdraw subsequently the money so deposited in view of S. 84 of the Act. The mere fact of making a deposit or tender does not merge the money in the mortgaged property and the money does not cease to be the property of the mortgagor: *A I R 1924 Pat 41*; *25 All 179*; *36 Cal 840 (P C)* and *29 Mad 232, Rel. on*; *A I R 1923 Mad 533, Disting.* [P 254 C 2; P 255 C 1; P 256 C 1]

(b) Civil P. C. (1908), O. 21, R. 15—Duty of Court—*K* and *G* bringing suit for redemption—Alienees from *K* and *G* of their right, title and interest in mortgaged property added as parties in appeal to High Court — Decree passed in favour of all of them—Subsequent application by *K* and *G* for execution of cost incurred by them dismissed—*K* and *G* held entitled to execute decree as to costs under O. 21, R. 15—It is duty of Court to protect interest of other persons jointly interested in execution of decree by *K* and *G*.

K and *G* brought a redemption suit against the mortgagee. While an appeal to the High Court was pending certain persons purchased the right, title

and interest of *K* and *G* in the mortgaged property and were added as parties in the appeal. A decree was passed by the High Court in favour of all including *K* and *G*. Subsequently *K* and *G* applied for payment to themselves the costs incurred in the litigation but the Court rejected their prayer. On revision :

Held : that as the names *K* and *G* appeared as decree-holders in the High Court's decree, *K* and *G* could claim the costs incurred in the litigation under O. 21, R. 15. The Court should have allowed *K* and *G* to execute the decree after protecting the interest of the remaining decree-holders. [P 256 C 2]

G. P. Singh and *B. N. Rai* — for Petitioners.

B. N. Mitter and *Harians Kumar*—for Opposite Parties.

Order.—This revision application is a sequel to a lengthy litigation, the object of which was to redeem certain property held in usufructuary mortgage by Bamdeo missir, Jhakar Sah and Kamala Prasad Misra. The original principal of the mortgage was Rs. 300, and the plaintiffs Iswar Dutt and his sons Kamta Prasad Missir and Gupteswar Missir tendered this amount to the mortgagees who, however, claimed that a larger sum was due. A deposit was made under S. 83, T. P. Act, of the sum of Rs. 300 on 1st June 1927. Notice was served, but the mortgagees did not agree to accept the amount tendered in full satisfaction of their mortgage debt so that proceeding was infructuous. Iswar Dutt then instituted a title suit claiming redemption which on his death was prosecuted by his sons in his place. The suit was instituted in 1927 and the litigation continued through appeal and second appeal to the High Court. During its pendency Radha Mohan Missir and Bansidhar Missir, on 19th March 1934, purchased in execution of a money decree the right, title and interest of Kamta Prasad and Gupteswar in the mortgaged property and thereafter were permitted to be added as appellants in the second appeal then pending in the High Court. The final decision was that the plaintiffs were entitled to redeem on payment of Rs. 300. In the meantime Kamta Prasad and Gupteswar had entered into two simple mortgage transactions in 1929 and 1933 respectively by which they had mortgaged this property to Ramdahin Missir and others who in July 1936 asked to be permitted to redeem the mortgage of the defendants by depositing Rs. 300. The Court allowed them to make a deposit provisionally and the money so deposited by them is still in Court: but on 11th August 1936 the Court after hearing the pleaders, ordered that the defendants mortgagees should take the Rs. 300 which had been deposited by Iswar Dutt under S. 83 and not the Rs. 300 which had been deposited by Ramdahin and others. Against this order Kamta Prasad and Gupteswar objected that the Rs. 300 deposited under S. 83 was their money and they were entitled to a refund of it and that the redemption money of Rs. 300 was to be paid by the persons to whom the interest in the mortgaged property had passed. The Court rejected this contention and directed the mortgagees to draw the Rs. 300 which had been deposited under S. 83. This order along with that of 11th August 1936 is the subject matter of the present application in revision.

It is contended that when Radha Mohan and others bought the equity of redemption in 1934 they bought the right to pay the mortgage and get the property and not the right to get the property without paying the mortgage. On the other hand, Mr. Mitter for the opposite party contends that by the auction sale of 19th March 1934 there passed to his clients whatever rights Kamta Prasad and Gupteswar had both in the mortgaged property and in the suit. The petitioners further object to the order of the Munsif in so far as it rejects the prayer for payment to Kamta Prasad and Gupteswar of the costs incurred by them up to 14th September 1934, when the purchasers of the equity of redemption got themselves added as appellants in the record of the High Court. To this contention again Mr. Mitter's answer is that his clients purchased in March 1934 all the interests of Kamta Prasad and Gupteswar in the litigation as well as in the property.

I shall take first the question regarding the Rs. 300. The implication of the view taken by the Court below and supported by Mr. Mitter is that this Rs. 300 has already been absorbed in reduction of the mortgage debt and is no longer a separate asset distinct from the mortgaged property. There is difficulty, however, in holding that this is the effect of the making of a deposit under S. 83, T. P. Act. No doubt if the mortgagee accepts the money deposited or tendered in full satisfaction the result follows that the mortgage is extinguished ; but if he does not do so, then it is clear from S. 84 that the

mortgagor who has made a deposit can subsequently withdraw the money deposited or any part thereof. That makes it clear that by the mere fact of making a tender or a deposit the money has not ceased to be property of the mortgagor and has not become merged in the mortgaged property in any way. This is fully in agreement with the view taken in A I R 1924 Pat 41.[1] Here the mortgagor on refusal of his tender applied to withdraw the money deposited. The mortgagee then changed his mind and expressed himself as willing to accept the money in deposit in full discharge of the mortgage debt. It was held that the money was the property of the mortgagor and when he demanded its return the Subordinate Judge had no jurisdiction to order it to be paid to the mortgagee. That sufficiently establishes the position when a tender has been made and has not been accepted and no suit has as yet been instituted. But it is suggested that the position in some way may have been changed by the fact of the mortgagor having instituted a suit for redemption. Whether such a consequence could ensue if the prayer in the plaint was for possession of the mortgaged property on the footing that the mortgage had been extinguished by the deposit of the entire mortgage money is a question I have not got to decide here because the plaint was framed otherwise. The prayer was for a decision

that the plaintiff has right to enter into possession of the zarpeshgi property on payment of Rs. 300, and

that a decree may be passed in favour of the plaintiff for recovery of khas possession of the zarpeshgi property free from encumbrance on payment of Rs. 300.

The words used on their face appear to contemplate a future payment of Rs. 300 to be made after and in pursuance of the decree. There are, however, cases in which money deposited under S. 83 has been drawn by the mortgagee, and perhaps some light may be thrown on the subject by considering those decisions although none of them is quite on all fours with the present case. In 25 All 179[2] there had been a deposit under S. 83 followed by a suit for redemption. A decree was passed for redemption on payment of an amount equal to the sum deposited. The mortgagees applied alleging, among other things, that a larger sum was due than that which the decree had declared due. During this appeal they withdrew from Court the amount which had been deposited under S. 83. It was held by the High Court that the appellants having withdrawn that amount could only draw that amount on and subject to the conditions laid down in S. 83, that is to say the acceptance of the money in full discharge and that they were disqualified from claiming that a larger amount was due. There are observations in this judgment which indicate that in the view of the learned Judges the money was not the property of the mortgagee but remained the property of the mortgagor until its acceptance by the mortgagee in satisfaction of his mortgage. A portion of the deposit had apparently been allowed by the Subordinate Judge to be attached at the instance of some creditors of the mortgagee and Stanley, C. J. and Burkitt, J. said :

How the learned Subordinate Judge conceived that he had any jurisdiction to allow such a deposit, not accepted by the mortgagees, to be attached and drawn out of Court by creditors of the mortgagees we are at a loss to understand.

In 36 I A 85,[3] it was affirmed that a creditor who draws money deposited under S. 83 can only do so in full discharge of the mortgage debt. It seems to me that it is this acceptance and this only which can convert money deposited under S. 83 from money, the property of the depositor, to the money, the property of the mortgagee. 29 Mad 232[4] follows the Allahabad decision above cited in holding that the money deposited in Court by the mortgagor is not the property of the mortgagee and is not liable to be attached by a creditor of the latter. Another decision referred to has been 47 Mad 7.[5] In this case money had been deposited under S. 83 and after the decree of the lower Court had been drawn by the defendants mortgagees, it was held there that in drawing the money they were acting in execution of their decree and not in the capacity of mortgagees accepting a deposit under S. 83, and Krishnan, J. said :

1. Mt. Ratna Kuar v. Mt. Nanhaki, A I R 1924 Pat 41=73 I C 1053=4 P L T 720.
2. Dal Singh v. Pitam Singh, (1903) 25 All 179 =1903 A W N 2.
3. Ram Chandra Marwari v. Rani Keshobati Kumari, (1909) 36 Cal 840=2 I C 935=36 I A 85 (P C).
4. Mothiar Mira Taragan v. Ahmatti Ahmed Pillai, (1906) 29 Mad 232.
5. Tadepalli Subba Rao Garu v. Sri Balusu Buchi, A I R 1923 Mad 533=72 I C 292=47 Mad 7=44 M L J 534.

Execution of a decree has never been held to estop the decree-holder from appealing from it so far as it is against him.

There seems to be a difference between the facts of this case and that in 25 All 179,[2] because in the Madras case the decree which had been passed contained a clear order that the defendants were to take out the money which had been deposited in Court, so that the taking of it was to be referred to the decree and not to S. 83, T. P. Act, which was no longer applicable. But the decree in the redemption suit between the present parties does not contain any direction that the money lying in deposit under S. 83 is to be taken by the mortgagees. Failing such a direction in the decree itself, it seems to me that the pendency of a litigation and even the passing of a decree does not affect the character or the ownership of money which had been deposited under S. 83. It does not become merged in the mortgaged property or "money in the suit" unless and until there has been acceptance of it by the mortgagee. If that is so, then the petitioners have good reason to complain of the order of the Munsif applying their money in payment of a liability which attached to property of Radha Mohan and others. It is faintly contended for the opposite party that the petitioners are estopped from objecting to the application of this money in discharge of a mortgage, because on 20th July 1936 they had presented a petition to the Court in which it is recited that the mortgagees had not withdrawn the Rs. 300 formerly deposited and that the petitioners have no objection if the mortgagees withdrew the said money. Mr. Mitter contends that this petition shows that the tender of the money was still open and claims that this entitles him to treat it as money in the suit or as money going with the mortgaged property. But the fact that the mortgagor kept the tender open does not, it seems to me, make any difference to the position which, as I have said, remains exactly where it was when the money was first tendered and must continue to remain exactly where it was until there was acceptance within the meaning of S. 83 by the mortgagee. When the plaintiff says "If the mortgagees withdraw the said money the petitioners have no objection," that does not mean that they are making any other offer beyond the original offer of the money in full discharge and conditional on its being accepted as a full discharge. But the petition itself goes on to say, "But in order to avoid a dispute, it is necessary to deposit another sum of money," and that Ramdahin Missir is ready to pay Rupees 300. This procedure is in agreement with the view which I have indicated above regarding the scope of the suit itself. The frame of the plaint, as I have said, contemplates payment of Rs. 300 to be made after and in pursuance of the decree of the Court. The Munsif, in my opinion, went beyond his jurisdiction in directing payment to the mortgagee of the amount of Rs. 300 in deposit under S. 83. This was the property of Kamta and Gupteswar and they are entitled to draw this money. As regards the deposit of Ramdahin, I have not been asked by this party to interfere with the order; but I may point out to the Munsif that S. 91, T. P. Act, gives a right to redeem among others to any person who has an interest in, or charge upon, the property mortgaged, or in or upon the right to redeem the same.

It remains to consider the second point regarding the costs. The Munsif is entirely in error when he thinks that Kamta and Gupteswar have ceased to be parties to the suit and to the litigation. Their names appear as decree-holders in the High Court's decree. Therefore, the position that has arisen is the position contemplated in O. 21, R. 15, Civil P. C. It is the duty of the Munsif under sub-r. (2) of that rule to make such order as is necessary for protecting the interest of the remaining plaintiffs if one or more and not all the plaintiffs seek to execute the decree for costs. The interference of this Court in revision is always limited to the minimum which is necessary for avoidance of miscarriage of justice, and the only order which I find it necessary to pass is that Rs. 300, which was deposited by Iswar Dutt, is to be deemed the property of Kamta and Gupteswar and they are entitled to it. It is not without their consent to be paid to the mortgagees. The petitioners will get their costs of this application : hearing fee two gold mohurs.

K.B./A.L. *Order accordingly.*

A. I. R. 1937 Patna 257

AGARWALA AND VARMA, JJ.

Mani Ram and *another*—Petitioners.

v.

Emperor — Opposite Party.

Criminal Revision No. 619 of 1936, Decided on 21st January 1937, from order of Deputy Commissioner, Hazaribagh, D/-19th August 1936.

Bihar and Orissa Mica Act (1 of 1930), Ss. 17 (2), 23 and 24—Possession of excess of mica not shown in account book—Offence under S. 17 (2) (a)—Offence is with respect to account books and not with respect to mica—Ss. 23 and 24 do not cover offence under S. 17 (2) (a) and are not therefore applicable—Accused not charged with offence of possessing mica by illicit means — Mica seized held could not be confiscated under S. 517, Criminal P. C., and in view of particular circumstances.

A person holding a license for taking out mica from a mine was found by the Mica Accounts Inspector to be in possession of some quantity of mica in excess of that in stock and which quantity was not shown in the account books required to be maintained by him. The excess mica was seized and he was prosecuted under S. 17 (2) (a) of the Act. The accused pleaded guilty and without recording any evidence he was convicted under S. 17 (2) (a). The accused applied for the return of the mica which was seized but his application was opposed on the ground that it could not be returned but it should be confiscated under S. 517, Criminal P. C. :

Held : that the complaint was chiefly for an offence under S. 17 (2) (a) for keeping wrong accounts of mica. No evidence having been recorded, the mica seized was not made an exhibit in the case. The offence was one in respect of account books and not in respect of mica found. Ss. 23 and 24 of the Act were not applicable to an offence under S. 17 (2) (a) of the Act. The accused was not charged of an offence of possessing illicit mica. In view therefore of the particular facts of the case and the offence not being in respect of the mica seized, the mica could not be confiscated under S. 517, Criminal P. C. : *Case law discussed.* [P 260 C 1, 2]

Baldeo Sahay—for Petitioners.

Asst. Govt. Advocate — for the Crown.

Varma, J.—This is a petition against an order of confiscation of a certain amount of mica under S. 517, Criminal P. C. The petitioners Mani Ram and Babulall Ram of village Chandowari, Police Station Ganwan, District Hazaribagh, are holders of mica miner's license No. 45 (G) on Jharnapahari mine. On 14th November 1935 the Inspector of Mica Accounts visited their godown and on verification of the stock of mica kept therein found that 2 maunds and 6 seers of crude mica had not been entered in the stock book but had been kept in a separate room not ordinarily used for storing mica. He seized the 2 maunds and 6 seers of mica and on the basis of his report the licensees were prosecuted under S. 17 (2) (a), Bihar and Orissa Mica Act. They pleaded guilty and were sentenced to pay a fine of Rs. 90 each or in default to suffer one month's simple imprisonment by the Subdivisional Officer of Giridih. After the disposal of the case the licensees asked for the return of the mica which had been taken into custody but there was opposition by the Inspector of Mica Accounts who asked for its confiscation. The learned Subdivisional Officer ordered the mica to be returned holding that he had no right to confiscate it under any provision of the Mica Act. The Inspector of Mica Accounts then asked for a review of the said order. The learned Subdivisional Officer sent the matter to the Deputy Commissioner of Hazaribagh as he felt he could not review his own order. The learned Deputy Commissioner then passed the order against which the petitioners have moved this Court. The petition of complaint filed by the Inspector of Mica Accounts dated 3rd February 1936 requested the Subdivisional Officer of Giridih to summon the petitioners under S. 17 (2) (a), Mica Act, to take their trial according to law. Along with the petition of complaint a copy of the inspection note of the Inspector of Mica Accounts was also attached. The learned Deputy Commissioner while dealing with the question whether the mica in question could be dealt with under S. 517, Criminal P. C., says :

In my opinion the learned Subdivisional Magistrate was wrong in holding that the mica seized by the Inspector of Mica Accounts could be dealt with only under the Bihar and Orissa Mica Act. S. 517, Criminal P. C., refers to the disposal of property regarding which any offence has been committed and certainly applies to the present case which is covered by the phrase 'regarding which any offence appears to have been committed' occurring in S. 517, Criminal P. C. One of the methods of disposal in S. 517, Criminal P. C., is confiscation. The mica in question can therefore be confiscated under that section.

The questions that we have to consider in this case are, firstly, whether the mica confiscated was a property regarding which any offence appears to have been committed when the complaint was under S. 17 (2) (a) and the conviction was also under that section, and secondly, whether it was a fit case in which confiscation

should be ordered. S. 17 (2) (a) of the Mica Act, runs as follows :

Any licensee or registered proprietor who fails to keep any account required to be kept by S. 10 or keeps an account which does not contain the particulars required by the said section or which is false in any material particular shall on conviction by a Magistrate of the First Class be punishable with fine which may extend to five hundred rupees.

In order to understand the nature of the complaint made, one will have to refer to the report of the Inspector of Mica Accounts who incorporated his report as a part of his complaint. From the examination of the accused it appears that a reference to this report was made because the learned Magistrate who examined the accused put the following question : The question was "Do you accept the statement contained in the report of the Inspector?" It also appears that his chief complaint was that the accounts were not properly kept and he gives various instances in which sometimes the stock in the godown was less than what was shown in the accounts and sometimes it was in excess. The report is dated 14th November 1935. On that date he found :

	Quantity as per stock book M. S. Ch.	Quantity actually found in the godown M. S. Ch.
Crude Mica	14 34 12	17 0 12
Cut mica (slabs)	3 35 12	3 36 0

On 29th September 1935, according to the report of the Inspector, the closing balance of crude mica should have come to 29 mds. 4 seers instead of 27 mds. 4 seers as had been noted in the stock book. On 1st October 1935, the closing balance of crude mica should have come to 33 mds. 21 seers and 8 chs. instead of 33 mds. 31 seers and 8 chs. as noted in the stock book.

On 15th October 1935 the closing balance should have come to 13 mds. 13 seers instead of 19 mds. 33 seers noted in the stock book. On 2nd November 1935 the closing balance should have been 36 mds. 28 seers only instead of 36 mds. 38 seers as shown in the accounts. In the case of cut mica again, the balance on 24th October 1935 was noted as 9 mds. 36 seers and 14 chs. The balance should have come to 9 mds. 26 seers and 14 chs. The Inspector of Mica Accounts giving these examples, along with the example which is the subject matter of the present case, found on the date of inspection an excess of 2 mds. 6 seers of crude mica. From this it is clear that the complaint of the Inspector of Mica Accounts was chiefly under S. 17 (2) (a), Mica Act, with regard to the wrong entry of accounts. Ss. 23 and 24, Mica Act are the relevant sections which deal with the seizure, detention and search of mica by any officer authorized in this behalf by the Local Government. They are as follows :

S. 23.—(1) Any officer authorized in this behalf by the Local Government may seize any mica which is removed from any place mentioned in sub-s. (1), S. 14 by a person who does not carry a pass as required by that sub-section or who does not produce such pass when required to do so, and may detain such mica at the nearest police station until the ownership thereof is established to the satisfaction of any Magistrate authorized in this behalf by the District Magistrate. (2) If the ownership of such mica is disputed or if the ownership thereof is not established to the satisfaction of the Magistrate, he shall refer the matter to the District Magistrate. If any claim made to the ownership of such mica is rejected by the District Magistrate or if no claim is made within one month from the date of detention, the mica shall be forfeited to Government: Provided that when any such claim is rejected, the claimant may, within three months of the order rejecting the claim, apply to the civil Court to set aside such order and the Court, if satisfied that such claimant is the owner of the mica, shall make an order for the delivery thereof to him.

S. 24.—(1) Whether any officer authorized in this behalf by the Local Government has reason to believe that an offence punishable under Cl. (a), (b), (c) or (d), sub-s. (1), or Cl. (b), sub-s. (4), S. 17, or sub-s. (1), S. 18 has been or is being committed in respect of any mica and that such mica is to be found in any building or place, and that a search warrant cannot be obtained without affording the offender an opportunity of concealing or removing such mica, he may after recording the grounds of his belief, at any time by day or night, enter and search such building or place and seize any mica found therein, in respect of which he has reason to believe that any offence referred to in this sub-section has been or is being committed. Provided that no police officer whose rank is lower than that of an Inspector of Police shall be authorized to exercise the powers conferred by this section.

(2) Every officer seizing any mica under this section shall: (a) prepare a list of the mica so seized and deliver a copy thereof signed by him to the person found in possession of such mica; (b) enclose the mica seized in a package and place on such package a mark indicating that the mica therein contained has been seized; and (c) as soon as may be after such seizure, make a report thereof to the Magistrate having jurisdiction to try the offence on account of which such seizure has been made.

(3) Upon receipt of any such report the Magistrate shall with all convenient despatch take such measures as may be necessary for the arrest and trial of the offender and the disposal of the property according to law.

The power of seizure and search referred to in S. 24, Mica Act, relates to

offences punishable under Cl. (a), (b), (c) or (d), sub-s. (1), or Cl. (b), sub-s. (4), S. 17, or sub-s. (1), S. 18. Neither of these two sections refer to S. 17 (2) (a). From a perusal of S. 17 (1) and the relevant sub-section it appears that S. 17 (1) deals with cases in which persons are held liable for being in possession of mica or for selling mica without proper authority. It is also clear that these sub-sections do not apply to an offence committed under S. 17 (2) (a). Now the question is whether S. 520 read with S. 517, Criminal P. C., can be utilized for the purpose of confiscating the mica found in the possession of a person holding a proprietor's license in excess of the amount shown in his account book. Mr. Baldeo Sahay appearing on behalf of the petitioners urges that S. 517, Criminal P. C., does not apply inasmuch as the origin of possession in this case was not unlawful, and secondly, that even if it did, it was not a case in which confiscation should have been ordered. S. 517, Criminal P. C., refers to any property or document produced before a Court or in its custody or regarding which any offence appears to have been committed or which has been used for the commission of any offence. An offence has been defined in the Criminal Procedure Code as any act or omission made punishable by any law for the time being in force; it also includes any act in respect of which a complaint may be made under S. 20, Cattle Trespass Act, 1871: S. 4, Cl. (c), Criminal P. C. Therefore, if the other conditions are satisfied, I see no objection to steps being taken under S. 517, Criminal P. C.

Mr. Baldeo Sahay then refers to various instances in which orders under S. 517 were held to be invalid. In 9 C W N 597[1] the accused was convicted under S. 182, I. P. C., for having given false information charging one *B* with the theft of some ornaments. The ornaments had been found upon search in the accused's own premises. Whilst convicting the accused the Magistrate passed an order consfiscating the ornaments. This order was set aside by the High Court and in course of their judgment their Lordships observed that the object of the section is to enable the Magistrate to direct property to be given to some person to whom it appears to belong or to allow it to continue in the possession of *B*, the person in whose possession it was found or to make some order of that character.

In 34 Cal 986[2] it was held that a printing press could not be said to have been used for the commission of the offence of sedition inasmuch as the offence was in the publication and not printing, the press being a remote instrument. In this case the prosecution alleged that the press was used for the publication of seditious matters. In 31 I C 827[3] a habitual thief was found to be in possession of some property which he claimed to be his own and the Magistrate ordered the confiscation of the property. Their Lordships of the Madras High Court held that as there was no finding that an offence had been committed or that it appeared from the record that an offence had been committed with respect to the property, the order of the Magistrate was wrong.

The learned Assistant Government Advocate on behalf of the Crown urges that under S. 17, Cl. (4), Mica Act, the Inspector of Mica Accounts has authority to seize the mica and after seizure, if it was produced before the Court or was in the custody of the Court, the Court could pass any order it thought fit. On that point, I am afraid, the *B* materials on record are inconclusive. The mica no doubt was seized by the Inspector of Mica Accounts, but the order-sheet does not show that it was made a material exhibit in the case and it could not have been so because no evidence was led in the case.

The only material upon which the learned Assistant Government Advocate relies is an application on behalf of Mani Ram and Babulal Ram, dated the 15th April 1936, where they alleged that 2 maunds and 6 seers of crude mica was seized and "is in custody". This expression may mean that it was in the custody of the Inspector of Mica Accounts, but the more important argument advanced by the Assistant Government Advocate is that the two maunds and 6 seers of mica was a property in regard to which an offence under S. 17 (2) (a), Mica Act, was committed because, he says, if this excess

1. Lakshmi Narayan Dutt v. Inspector Ureagan, (1905) 9 C W N 597=2 Cr L J 273.

2. Abinash Chandra Bhattacharjee v. Emperor, (1907) 34 Cal 986=11 C W N 1046=6 C L J 754=6 Cr L J 293.

3. Govindaraja Padayachi v. Emperor, A I R 1916 Mad 839=31 I C 827=16 Cr L J 811.

quantity was not there the account could not have been found to be false or wrong. But from the wording of S. 17 (2) (a) it is clear that the offence it deals with is the offence of keeping wrong accounts and from the report of the Inspector of Mica Accounts it also appears that sometimes the account showed the mica to be in excess of the amount entered and sometimes to be less than the amount entered. So it is clear that an offence under Section 17 (2) (a) when committed is in respect to the account book and not in respect to the excess amount of mica found.

He has referred to two or three cases. In 51 Mad 606[4] their Lordships of the Madras High Court held that property regarding which an offence had been committed included within its meaning moveable property regarding the possession of which a quarrel or a fight is begun whatever may be the offence that might ultimately be committed in the course of the quarrel or the fight. Here the quarrel was with regard to some boats and nets and it was with regard to this property that the offence had been committed. There is no difficulty in understanding that case. In 151 I C 735[5] certain books belonging to the accused, who were convicted under S. 121-A, Penal Code, were seized foom their possession as they supplied materials for writing articles which came under the purview of S. 121-A, Penal Code. In the course of the judgment it was observed:

> It is obvious that these works would be works which would supply the material on which the accused could write the articles on Russia which are among the activities of which he had been found guilty.

It appears to me that this decision has gone a little beyond what is contemplated in S. 517, Criminal P. C. Instances may be cited in which the Courts have held that certain property was a property with regard to which an offence was committed and there were such with regard to which an offence was not committed. Just to have one more example, I refer to the case 1 Cr L J 38,[6] where the pony, harness and cart of the accused who was convicted under S. 279, Penal Code, were held to be property which would not be dealt with under S. 517, Criminal P. C. In dealing with the question whether the discretionary power of confiscation vested in the Court should be exercised in the present case or not, the learned Deputy Commissioner came to the conclusion that he should exercise this power after making the following observation:

> The circumstances of the present case leave no manner of doubt that the mica in question was obtained by illicit means, and this appears to be a fit case in which the discretionary power given by the section should be exercised.

There is no evidence on the point as no evidence was led in the case, and secondly, from the nature of the complaint and the question put to the accused, it is clear that they were not asked to meet a charge of having obtained mica by illicit means. Considering the circumstances of the present case, the offence of which the accused were convicted and the finding of the Deputy Commissioner that the mica was a property with regard to which an offence was committed, I am of opinion, in view of the reasons given above, that on the particular facts of this case the order of confiscation was not proper. I would therefore set aside the order of the learned Deputy Commissioner and restore the order of the Magistrate who ordered the mica to be returned to the accused.

Agarwala, J.—I agree.

K.B./A.L. *Order accordingly.*

4. Sheik Dawood v. Velayuda Sommanottl, A I R 1928 Mad 194=108 I C 65=29 Cr L J 322=51 Mad 606=54 M L J 312.
5. Philip Spratt v. Emperor, A I R 1934 All 207 =151 I C 735=35 Cr L J 1389=1934 A L J 425.
6. Emperor v. Ilahi Baksh, (1904) 1 Cr L J 38= 4 P L R 1904.

A. I. R. 1937 Patna 260

ROWLAND, J.

Mogal Jan Khan—Judgment-debtor—Petitioner.

v.

Mt. Mehdi Begum — Decree-holder—Opposite Party.

Civil Revn. No. 464 of 1936, Decided on 12th January 1937, from order of Munsif, Gaya, D/- 5th September 1936.

Civil P. C. (1908), O. 21, R. 90 (1) (as amended by Patna High Court in 1936)—Applicability — Application made in 1935—Application dismissed but restored in appeal —Amendment coming in force after restoration — Court directing applicant to make deposit—New rules held, did not apply to application already admitted—Deposit 'with the application' required by amended rule held was impossible for applicant after date of amendment when application was made before date of amendment.

The proviso to R. 90, Cl. (1) is that 'no application to set aside a sale shall be admitted' unless certain conditions are fulfilled. That applies to every occasion on which admission of an application is sought after the date of coming into force of the rule. It cannot apply to applications which have been already admitted before the rule came in force. The rule, therefore, forbids a Court to admit an application but cannot have the effect of setting aside the previous admission of an application. The rule orders the applicant to deposit 'with his application' a certain amount. But where the application is made in 1935, it is physically impossible for him after 1st March 1936, to deposit any amount with his application. The law is never deemed to order the impossible where such a construction can be avoided. Therefore, the applicant is not bound to fulfil the conditions in proviso (1) to R. 90, Cl. (1).

[P 261 C 1, 2]

M. Rahman — for Petitioner.

Khurshaid Husnain and *H. R. Kazimi* — for Opposite Party.

Order.—This is an application in revision by a judgment-debtor who applied under O. 21, R. 90, Civil P. C., to set aside a sale of his properties. The date of the sale was 16th September 1935, and the date of his application was 20th September 1935. It was at one stage dismissed but was restored by order of the District Judge on appeal. After its restoration and the return of the record to the Munsif's Court, that officer, observing that the amended rules of Sch. 1, Civil P. C., have been brought into force on 1st March 1936, and that by those rules an applicant was required by O. 21, R. 90 (1) (b) to deposit with his application 12½ per cent. of the sale price or other security fixed by the Court, directed the applicant to make such a deposit. The applicant protested, and this application in revision is presented on the substantial ground that this provision of the rule does not apply to the applicant and cannot be enforced against him.

In my opinion the application must succeed on this ground : the proviso to R. 90, Cl. (1) is that 'no application to set aside a sale shall be admitted' unless certain conditions are fulfilled. That applies to every occasion on which admission of an application is sought after the date of coming into force of the rule. It cannot apply to applications which have been already admitted before the rule came into force. In other words, the rule forbids a Court to admit an application but cannot have the effect of setting aside the previous admission of an application. Another consideration is that the rule orders the applicant to deposit 'with his application' a certain amount. When he made his application in September 1935, it was physically impossible for him after 1st March 1936, to deposit any amount with his application. The law is never deemed to order the impossible where such a construction can be avoided. Therefore, the applicant was not bound to fulfil the conditions in proviso (1) to R. 90, Cl. (1), and the Munsif had no jurisdiction to insist on his doing so. At the hearing another point was raised, namely, that the present Munsif has special powers up to Rs. 2,000 only, and the amount of the decree is beyond those powers. This is a matter which ought to be raised in the Court of first instance. I am not in a position to deal with it, here, because the exact valuation of the original suit has not been stated.

If the present Munsif in fact has not pecuniary jurisdiction, he may make a reference to the District Judge for an appropriate order transferring the proceedings to another Court. Let the record be sent down to the Court below. The applicant will get his costs : hearing fee one gold mohur.

S.C./D.S. *Application allowed.*

A. I. R. 1937 Patna 261

DHAVLE AND VARMA, JJ.

Beni Madho Lal—Plaintiff—Appellant.

v.

Janki Pandey and *others* — Defendants — Respondents.

Appeal No. 1269 of 1933, Decided on 17th November 1936, from appellate decree of Dist. Judge, Shahabad, D/- 8th August 1933.

Mortgage—Personal covenant—Mortgagors in dakhali-rehan deed promising to pay loan by certain date and in case of non-payment agreeing to put creditors in possession as dakhali-rehandars until payment—Deed also providing for personal liability of mortgagors in case of their failure to give possession—Mortgage held was anomalous and created personal liability — Assignee of mortgagee was entitled to get decree under O. 34, R. 6, Civil P. C.

In a dakhali-rehan deed, the mortgagors stated that they had taken a loan which they expressly promised to pay by a certain date. It was next stipulated that in the event of non-payment, the creditors would be put in possession of certain property as dakhali-rehandars until payment. There was a further stipulation that if the creditors, through any act done by the mortgagor or in any manner failed to get possession over the

property, they should be at liberty to realize the principal with interest from the person and properties of the mortgagors or from the rehan property in any manner they liked :

Held : that the mortgage was of an anomalous kind and the rights and the liabilities of the parties to it were to be determined by their contract, as evidenced in the deed. As the deed created a personal liability, the assignee of the mortgagee was entitled to get a decree under O. 34, R. 6, Civil P. C. against the mortgagor personally. [P 262 C 1, 2]

B. P. Sinha—for Appellant.

S. N. Roy—for Respondents.

Dhavle, J.—This appeal must clearly be allowed. The question was whether the appellant is entitled to a decree under O. 34, R. 6, Civil P. C. The mortgagees first brought a suit to enforce what purports to be a dakhali-rehan deed. We understand that, that suit was dismissed by the trial Court on the ground that the usufructuary mortgagees had been given possession of the property. This view was overruled in appeal in 1924 and a decree was made in favour of the mortgagees on the ground that they had not been put into possession of the mortgaged land as stipulated. In execution of this decree the mortgaged property was put to sale, but even this did not satisfy the mortgage dues. The plaintiff, who had taken an assignment of the mortgage decree and had been proceeding in execution, thereupon applied for a decree under O. 34, R. 6 of the Code, and the mortgagors resisted the application in the trial Court on the ground of limitation, and on the further ground that as assignee the plaintiff or applicant was not entitled to obtain a decree under O. 34, R. 6. These objections were overruled by the trial Court. The mortgagors then appealed, and in appeal a different point altogether was taken, viz., that "a personal covenant is not created or implied by a usufructuary mortgage". The learned District Judge gave effect to this contention in the face of the terms of the bond in suit and was of opinion that the decree obtained by the mortgagees was not strictly a mortgage decree but at best a charge decree.

The learned advocate, who appears for the appellant, has pointed out that even if it were a charge decree, O. 34, R. 15, Civil P. C. would entitle the appellant to obtain a decree under R. 6 of that Order. The dakhali-rehan deed has been placed before us. It begins by stating that the mortgagors have taken a loan which they expressly promise to pay by a certain date. It is next stipulated that in the event of non-payment the creditors will be put in possession of certain property as dakhali-rehandars until payment. There is a further stipulation that if the creditors through any act done by the mortgagors or in any manner fail to get possession over the said land, they shall be at liberty to realize the principal with interest "from our person and properties or from the rehan property in any manner they like". The learned District Judge failed to give full effect to this stipulation and treated the applicant as if his rights were no greater than those of a usufructuary mortgagee pure and simple, if as much. The mortgage before us is of an anomalous kind, and the rights and liabilities of the parties to it must be determined by their contract as evidenced in the mortgage deed. The learned District Judge curiously enough had great doubts whether the bond in suit created any mortgage at all, but the repeated mention of the rehan property and the provision that the mortgagees shall be put in possession as dakhali-rehandars are more than sufficient to displace any such doubt.

The learned advocate for the respondents has endeavoured to support the decree of the lower appellate Court by urging that a usufructuary mortgagee who obtains a decree under S. 68, T. P. Act, is not entitled to a decree under O. 34 R. 6, against the mortgagor personally. As I have already said, however, we have in the present case to deal with the parties on the basis of the contract entered into by them. This contract clearly entitles the mortgagees in the contingencies that have happened to recover the balance of their loan from the person and properties (even apart from the mortgaged property) of the mortgagors. I would, therefore, allow this appeal with costs of all Courts and give to the appellant the decree that he applied for, under O. 34, R. 6, Civil P. C.

Varma J.—I agree.

B.D./D.S. *Appeal allowed.*

A. I. R. 1937 Patna 263

FAZL ALI AND DHAVLE, JJ.

Samarendra Kumar Chakarvarti and *another*—Appellants.

v.

Emperor — Opposite Party.

Criminal Appeal No. 177 of 1936, Decided on 18th September 1936.

(a) Criminal Trial—Determination of age of girl—Ossification is not indispensable test.

Although ossification is an important test for determining the age, yet having regard to the practical difficulties which would attend the application of this test, it cannot be said that ossification is an indispensable test for determining the age of a girl. [P 267 C 2]

(b) Penal Code (1860), S. 361—Lawful guardianship—Conception of dual guardianship is not repugnant to law—Formal declaration of trust is not necessary to constitute lawful guardianship—Person acquiring lawful control over minor in circumstances implying trust can be lawful guardian—Entrustment can be proved by oral evidence and conduct of parties and surrounding circumstances—Though karta of joint Hindu family may not be lawful guardian of minor, very slight evidence is enough to show that he is in fact guardian of minor brought up under his care.

The conception of dual guardianship is by itself not repugnant to law and a minor may have more than one guardian of his person. The guardianship of the mother does not cease therefore while the minor is in the possession of another person who has been lawfully entrusted with the care and custody of the minor by the mother. [P 268 C 2; P 269 C 1]

A person can be regarded as having been lawfully entrusted with the care and custody of a minor within the meaning of the explanation to S. 361, Penal Code if he has acquired control over the minor lawfully and in such circumstances as would imply trust even though he may not have been formally entrusted with the care and custody of the minor by a third person as, e. g., in the case of unclaimed orphans and illegitimate infants abandoned by their mothers : *24 Mad 284, Foll.*; *A I R 1919 Pat 27 (FB), Doubted.* [P 269 C 2]

The entrustment as required by the Explanation to S. 361 may be proved not only by oral evidence but also by surrounding circumstances and the conduct of the parties concerned. [P 270 C 1]

Even though a person would not necessarily be the lawful guardian of a minor within the meaning of S. 361 by the mere fact of his being a karta, very slight evidence of the consent of the natural guardian would be required to prove that the karta of the family was in fact the guardian of a minor who is being brought up under his care. [P 270 C 1]

(c) Criminal Trial—Re-trial — Powers of High Court—Defect in Judge's charge to jury—High Court has power to set aside conviction or order re-trial when failure of justice is caused.

The power of setting aside convictions and ordering a new trial for any error or defect in the Judge's charge to the jury will be exercised by the High Court only when the Court is satisfied that the accused has been prejudiced by the error or defect or that a failure of justice has been occasioned thereby : *5 W R Cr 80, Foll.* [P 271 C 2]

(d) Practice—Arguments.

Any arbitrary and undue curtailment by the Court of the parties' right of argument is to be deprecated. [P 273 C 1]

(e) Criminal Trial—Trial by jury—Retrial cannot be ordered unless charge to jury is defective in material particulars—So also it cannot be ordered unless matters which counsel would have placed before jury have not been so placed.

Although it cannot be denied that for the proper administration of justice the parties should be allowed a full and unrestricted right of addressing the jury, yet it cannot be overlooked that the summing up of the case by the Judge in his charge to the jury plays a very important part in a jury trial. In cases where the accused is undefended or where he is defended by an incompetent counsel or is too poor to engage the services of a competent lawyer, his case cannot generally be adequately placed before the jury by means of argument. If however in such cases the Judge has properly charged the jury, the mere fact that the case has not been adequately argued on behalf of the accused cannot, by itself, be a good ground for ordering a re-trial. On the same principle a re-trial should not be ordered, unless it can be shown that matters which counsel would have placed have not been placed before the jury or that the charge of the Judge is defective and erroneous in material particulars. [P 273 C 2; P 274 C 1]

(f) Criminal Trial — Conviction—Principal offence and its abetment—Accused cannot be convicted of both—In certain exceptional cases abettor can be treated as principal under S. 34, Penal Code.

In cases where the commission of the offence is abetted by aid and conspiracy, the abettor may be treated as a principal under S. 34 of the Penal Code; but it would be illogical to hold that a man is guilty of both the principal offence and of its abetment. [P 274 C 1,2]

M. Yunus and *Naqui Imam*—for Appellants.

Asst. Govt. Advocate—for the Crown.

Fazl Ali, J.—The appellants were tried before the Additional Sessions Judge of Shahabad and a jury of five for offences under Ss. 366 and 363, I. P. C. There were two additional charges against the appellant K. K. Ali under Ss. 366 and 363 read with S. 109. The jurors unanimously returned a verdict of guilty on all these charges and the learned Sessions Judge having accepted the verdict of the jury has sentenced the two appellants under S. 366 to undergo rigorous imprisonment for a period of six years each and to pay a fine of Rs. 500 or in default to undergo further rigorous imprisonment for two more years. He has passed no separate sentence on K. K. Ali under S. 363 read with S. 109 or 366 read with S. 109.

The gravamen of the various offences with which the appellants were charged

consisted in the kidnapping of a minor girl named Basanti Devi. According to the evidence adduced by the prosecution this girl was about 14 years of age on 4th July 1935 when these offences are said to have been committed, and she used to live with her mother and three brothers in a two-storeyed rented house in mohalla Karmontola in the town of Arrah. Of her three brothers Ketaki Ranjan Mukherjee, the eldest was a schoolmaster and the other two Annada and Kumar, whose ages are stated to be 23 and 20, respectively acted as insurance agents. On the other hand the first appellant K. K. Ali was at the time of the occurrence employed as a Sub-Inspector of Detective Police at Arrah, while the second appellant (Samarendra Kumar Chakravarti or Samaresh) was working as a fitter in an electrical company. These appellants and one Kiranbala sister of second appellant also lived in Karmantola in a two-storeyed rented house between which and the house occupied by Ketaki Ranjan Mukherjee only a one-storyed house intervened. There has been some controversy between the parties as to the relationship between K. K. Ali and Kiranbala, but it seems to me to be fairly clear that Kiranbala was the wife of K. K. Ali and Samaresh was his brother-in-law. It appears that sometime in February or March 1935 the appellant K. K. Ali took out an insurance policy for Rs. 2,000 through Kumar, and while the negotiations for this transaction were in progress, Annada and Kumar on the one hand and the accused persons on the other met and visited each other at their respective houses on several occasions. In course of time both K. K. Ali and Samaresh became acquainted with Basanti Devi also who is said to have paid several visits to the house of K. K. Ali, these visits being arranged mostly by Kiranbala. It is also alleged by the prosecution that both the appellants used to meet Basanti at her house sometimes secretly and sometimes openly between March and April and on 4th July. However that may be, in May 1935 there happened an important incident which made the elder members of Basanti's family alive to the necessity of keeping a watch on her movements. As the school was closed for the summer vacation Ketaki Ranjan left for Calcutta and he was followed a few days later by Annada with their mother. Annada was however absent only for a few days and when he returned he found that one night Basanti was missing from her room on the first floor, and while searching for her he noticed K. K. Ali slipping out of the house through the entrance door and Basanti hastily re-entering her room. Basanti being questioned eventually confessed that she had been in the company of K. K. Ali downstairs and so on the following day Kumar sent a telegram to Ketaki which was to the following effect: "Dada hopeless, come with mother."

What is stated by Annada and Kumar in their evidence is that, in fact Annada was not ill, but they had to couch the telegram in the words already stated in order to induce Ketaki to return to Arrah immediately and to avoid any reference to the unpleasant incident. Ketaki returned to Arrah two or three days later and from his evidence it appears that one night he was roused from sleep and saw Samaresh, his sister, and Ali standing on the open roof of their house and flashing a torch in the direction of his own house. Ketaki states that when he woke up he remonstrated with the appellants but Ali assumed a threatening attitude. This is not the only occasion on which a torch light is said to have been flashed by the appellants, it being stated in evidence that they had done so on previous occasions also. But whether these incidents about the flashing of the torchlight actually happened as alleged by the prosecution or are to be regarded as mere embellishment to the main story as suggested by the defence, there can be no doubt that a serious incident happened on 4th July. On that day Basanti Devi left her house at night and was subsequently recovered from the house of K. K. Ali at about midnight. The prosecution case which is strongly supported by the evidence of Basanti herself is that in pursuance of an arrangement between her and the two appellants the latter knocked at the front entrance door of the house, and on hearing the knock she came out and went away with them. Her case is that the previous arrangement between her and the appellants was that she should leave her house for good that night and that she acceded to the proposal owing to the inducement which had been from time to time held out to her by the appellants and Kiranbala that she would be happily married to Samaresh. She has further stated in her evidence that the

accused had planned to take her away to Calcutta that very night, but the plan was frustrated by the appearance of Ketaki Ranjan at the house of Ali with a number of other persons with the result that K. K. Ali was compelled to return Basanti to him. Ketaki Ranjan himself has stated that he had heard the knock at his door and when he went to open the door he found it chained from outside and thereupon he and his brothers finding that Basanti was not in the house proceeded at once to Ali's house and questioned him about Basanti. Ali at first denied her presence in his house but later on after the arrival of a number of other persons who lived in the locality they somehow got inside the house (it is said that somebody from inside the house opened the entrance door and so they could enter the house) and finally discovered Basanti in one of the rooms on the first floor.

A few days later, Ketaki Ranjan left for Calcutta and put Basanti in charge of his first cousin Sudhir who had a house in Serpentine Lane. His object in removing Basanti to Calcutta was to arrange a suitable marriage for her, but as he could not succeed in doing so he returned to Arrah. Meanwhile Basanti sent a letter addressed both to Ali and Samaresh in which she entreated Samaresh to start at once for Calcutta "treating the letter as telegram and take her away," it being proposed in the letter that they should meet at the Sealdah station. Samaresh readily responded to this letter and on the evening of 27th July when both Ketaki and Sudhir were absent from the house, Basanti disappeared. For some days Ketaki could not trace Basanti though it is said that Sudhir had found a letter in an open envelope which showed that someone had come from Arrah and met Basanti at the Sealdah Railway Station on the previous evening. On 10th August 1935 Ketaki found Basanti with Samaresh and his sister near the overbridge at the Arrah Railway Station and after some altercation with Samaresh, Ketaki succeeded in bringing his sister to his house. Basanti however was found missing again on 13th August. Ketaki now made up his mind to inform the authorities without delay and accordingly, on 18th August 1935, after taking legal advice, he appeared at the house of the District Magistrate of Shahabad and made a complaint against the two appellants for kidnapping his minor sister. The District Magistrate, after examining Ketaki on solemn affirmation, ordered the Subdivisional Officer to make an inquiry under S. 202, Criminal P. C. On 19th August 1935 the Sub-Divisional Officer himself went to the house of K. K. Ali with a search warrant and recovered Basanti from his house. At that time in the course of her examination Basanti stated that she was 21 years of age; that she had been in love with Samaresh and that on the 20th Sravan she had been married to him at Calcutta. The Sub-Divisional Magistrate thereupon remanded Basanti to the local sub-jail and she remained there until about the end of the month and then she was released on bail. Later on the Sub-divisional Officer being satisfied that a prima facie case had been made out against both the accused, recommended to the District Magistrate that they should be proceeded against. The two appellants were accordingly summoned and after a preliminary inquiry under Ch. 18, Criminal P. C., they were committed to the Court of Sessions.

As the defence version has been rejected by the jury it is unnecessary to dwell upon it at any length, but it may be briefly stated that according to the appellants Basanti was not below 16 but well above that age and that she and Samaresh had been duly married in Calcutta. Appellant 2, Samaresh, also produced in the Court below a number of letters written by Basanti to prove that she had been passionately in love with him and as to the incident of 4th July the case of the appellants was that Basanti had been turned out of her house by her mother and brothers who did not wish her to associate with Samaresh, that she had taken shelter in the house of K. K. Ali while a religious ceremony (Milad Sharif) was in progress and that K. K. Ali had ultimately prevailed upon her brother Ketaki to take her back to his house. From these brief statements of the respective cases of the parties it must be clear that one of the questions which the jury had to decide was whether the prosecution had established that Basanti was under 16 years of age. The evidence adduced by the prosecution on this point may be divided under three heads: (1) the opinion of the doctors by whom the girl had been examined; (2) the statements of her brothers and other relations who were competent to depose as to

her age; and (3) her horoscope (Ex. 21) which was proved by P. Ws. 25 and 29, which shows that Basanti was born on 9th Asarh 1328 corresponding to 23rd June 1921.

Now, one of the contentions raised on behalf of the appellants before us is that the learned Judge has while dealing with the question of age in his charge to the jury made certain important omissions. It is said in the first place that the learned Judge should have drawn the attention of the jury to two important statements made by Basanti in her evidence, one of which was to the effect that her brother Ketaki was about 17 or 18 years older than herself and the other to the effect that Annada, her second brother, was 6½ years older than her. Ketaki has stated in his evidence that he is 36 years of age and it is argued that if it is a fact that he was 17 or 18 years older than Basanti, it follows that she was 18 or 19 years of age at the time of the trial. Similarly it is argued that Annada being 6½ years older than Basanti, her age could not be less than 16 according to her own statements. On the other hand, the learned Assistant Government Advocate contends that inasmuch as Basanti herself was never asked in her cross-examination what she thought Ketaki's age to be, it would be unfair to draw the inference which is sought to be drawn by the learned counsel for the defence. It is also pointed out by him that some of the statements made by Basanti herself show that she had no accurate idea of the relative age of her brothers. For example, when Basanti was questioned as to the difference between her age and that of Kumar and Annada she stated: "Annada is 6½ years older than myself. Kumar is 5 or 5½ years older than myself." Now if these statements are true, Annada would be about a year or a year and a half older than Kumar, but Basanti herself when asked about the difference between the ages of Ananda and Kumar stated "Annada is 3 or 3½ years older than Kumar." These passages which have been taken from Basanti's deposition do show that her statements as to the difference between her age and the age of Ketaki and Annada may not have been quite accurate and it is just possible that the learned Judge taking the same view did not refer to these statements when he was summing up the case to the jurors. His failure to do so, therefore, cannot be regarded as a misdirection and still less a misdirection of a serious nature. We have, however, only his heads of charge before us. Judging by the time he took to charge the jury, his actual summing up could hardly have been confined to the heads of charge to the exclusion of all matters that he considered relatively unimportant. Besides there was nothing to prevent the advocate appearing for the accused in the trial Court from drawing the attention of the jury to these statements and it is also not to be presumed that the jurors themselves who had heard the evidence would not have taken into consideration all the material statements of Basanti.

The second omission on the part of the learned Judge is said to have consisted in his not properly directing the jury as to the value of ossification in determining the age of a particular person. Now it appears that Basanti was examined by the Civil Surgeon, the Assistant Surgeon and two lady doctors, namely Mrs. Maitra and Miss A. Begum. The Civil Surgeon and the Assistant Surgeon based their opinion partly upon their own examination and partly upon the examination of the two lady doctors. The result of these examinations disclosed that she had 28 teeth, was 4 feet 9 or 11 inches in height and 6 stone 8 pounds in weight; her breasts were fully developed and her armpit and pubic heirs were half inch long and of light dark colour. On these data, the medical witnesses expressed the opinion that Basanti was about 14 years of age. The accused persons challenged the evidence of the Civil Surgeon, the Assistant Surgeon and Mrs. Maitra on the ground that they were all Bengalis and the evidence of Miss A. Begum on the ground that she had deposed under the threat of a proceeding which either had been or was going to be instituted against her on the allegation that she had visited the gaol at the instance of the accused and without any authority from the officers concerned to find out the age of Basanti. They accordingly moved the Court that Basanti might be examined by another lady doctor of a different district and that arrangement might be made for an *X*-ray examination of her bones at Patna in order to determine the stage of ossification. Basanti, however, was not agreeable to either course and the Court recorded an order to the effect that as it had no autho-

rity under the law to compel a person's medical examination against her will, no action could be taken on the petition filed by the accused. The medical witnesses, however, were fully cross-examined on behalf of the accused as to the value of ossification as a test for determining the age of a person and they all admitted that it was one of the important tests for determining the age, the Civil Surgeon stating in his evidence as follows :

> To a certain extent ossification is considered as one of the true tests for the purposes of judging the age. It may differ within a certain limit. This depends upon many factors, e. g., diseases of constitutions, bones, etc., and it may vary within certain period.

The learned Judge summarized the evidence of these doctors in his charge to the jury in these words :

> That in their opinion, though each of the tests applied by the Civil Surgeon would not in itself be a reliable test of the age . . . . . there are the items to be noted generally in the ascertainment of age and that reliable opinion of the girl's age can be formed from the combined result of observation of all these items without nccessarily waiting for ossification to confirm such opinion.

The learned Judge then observed as follows :

> The trend of this cross-examination has been to show that ossification is not only one of the chief tests but the most reliable test for determining age. . . . . No authority was filed in Court with a view to show that ossification is an indispensable test or that it is above all other tests the most important test for determining the age of the girl.

As counsel for the appellants has cited some passage from certain well known treatises on medical jurisprudence, I will briefly refer to these passages. The opinion expressed by Lyon is "that ossification is perhaps the most accurate method of arriving at age" (Lyon's Medical Jurisprudence, Edn. 9, page 85). Again Modi states that :

> Ossification is an important additional sign for determining the age until ossification is completed, for skigraphy has now made it possible to determine even in living persons the extent of ossification.

Taylor while dealing with the question of estimating age from one year to puberty states as follows :

> When the teeth commence to erupt they form the most reliable means for the estimation of age of a child from about the age of six months to puberty.

Then he adds :

> It is possible by X-ray examination to corroborate such evidence from the ossification of the bones (Taylor's Medical Jurisprudence, Edn. 8, page 167).

These opinions however must be read subject to an important qualification. In some of the books of medical jurisprudence we find tables showing the periods of life at which centres of ossification appear in bones ; but these tables have been taken from European authorities and, apart from the fact that no authoritative table has been prepared in India, various authors have taken care to emphasise the fact that the figures in the tables must not be taken too rigidly but only as implying an average. Thus on a perusal of these authorities, although it may be recognized that ossification is an important test for determining the age, yet having regard to the practical difficulties which would attend the application of this test, it cannot be said that the learned Judge was in the circumstances of the case far wrong in stating that it had not been shown that ossification was an indispensable test for determining the age of a girl. Learned counsel for the defence also raised two other minor points on the question of age and these are as follows : (1) that the learned Judge while telling the jurors that along with other circumstances of the case they might apply the results of their own observation of the girl for coming to a finding as to Basanti's age should have warned them not to attach too much importance to their own observation and (2) that the learned Judge, while discussing the evidence of those relations of Basanti who had come from Bengal to prove her horoscope, should have pointed out that these relations could not have had a personal knowledge of the age of Basanti, because Ketaki had deposed in his evidence that his family had been domiciled in Chapra for more than five generations. Now, the answer to the first point is that the learned Judge did not ask the jurors to base their opinion about Basanti's age solely upon their observation but told them to apply the result of their observation along with other circumstances in the case. As to the second point, it is sufficient to say that there is ample evidence on the record to show that Ketaki and other members of his family had been visiting Bengal from time to time, that his father was in Calcutta when he died and that Basanti was born in the house of his maternal uncle in the district of Nadia.

Counsel for the appellants also contended that the learned Judge's charge to the jury was deficient on the question of criminal intent. Under S. 361 an offence

would be committed if a minor girl is kidnapped with one of two criminal intents : (1) that she may be compelled to marry any one against her will; or (2) that she may be forced or seduced to illicit intercourse. In the present case, the actual charge drawn up against the accused was that they had kidnapped Basanti with intent to seduce her to illicit intercourse. The point which is urged on behalf of the appellants is that there are indications in the evidence that Samaresh intended to marry Basanti and as there are also indications that Basanti herself was willing to marry him, the accused could not possibly be charged with having intended to marry her against her will. The learned counsel for the appellant, thus contends that this aspect of the case should have been placed before the jury and they ought to have been asked to consider whether the intention of the accused being what the appellants suggested it to be, the charge drawn up against them could be sustained. On a reference to the heads of charge it appears that the learned Judge after explaining the law to the jurors formulated certain questions for their decision and in the fourth and the fifth questions he asked them to consider whether it had been established that the alleged kidnapping or abduction of Basanti had been committed with the intention or knowledge specified in S. 366. As however, the prosecution had elected to charge the accused with having kidnapped the girl with intent to seduce her to illicit intercourse, the question before the jury was whether this charge had been established or not and it cannot be said that the circumstances upon which the accused found their argument were not substantially before the jury. I will now refer to two very important questions which have been raised in the case, these being (1) that there is a lacuna in the prosecution evidence on the question of guardianship and (2) that counsel for K. K. Ali was greatly hampered in placing his case fully before the jury. Both these questions require serious consideration and they will have to be dealt with at some length.

Under S. 361 it is incumbent on the prosecution to prove that a girl under 16 years of age was taken or enticed out of the keeping of her lawful guardian without his or her consent. The Explanation to the section states that the words "lawful guardian" include any person lawfully entrusted with the care or custody of such minor or other person." Now, in this case according to the prosecution there were two lawful guardians of Basanti, namely her mother and her eldest brother Ketaki, and the charge which has been drawn up against the accused specifically states that she was kidnapped from the lawful guardianship of both these persons. At the trial, Basanti's mother was not produced, but only her eldest brother Ketaki was examined, and the learned Judge in his charge to the jury, though he stated at several places that the case for the prosecution was that Basanti had been kidnapped from the keeping of both the guardians, stated at one place at least that what the jury had to consider was whether Basanti had been removed from the guardianship of Ketaki. Upon these facts the following contentions have been raised on behalf of the appellant: (1) that a dual guardianship such as has been set up in this case is an anomaly and that in law both Ketaki, and his mother could not be the guardians of Basanti at the same time; (2) that there is no evidence whatsoever on the record that Ketaki had been lawfully entrusted with the care and custody of Basanti in the sense in which the expression has been used in S. 361; (3) that the prosecution not having produced the mother of Basanti as a witness in the case and there being no evidence that Basanti had been removed without her consent, one of the important elements of the charge had not been made out and the conviction under Ss. 363 and 366 cannot be sustained. (4) that there was a serious misdirection on the part of the learned Judge when he told the jury that what they had to decide was whether Basanti had been kidnapped from the keeping of Ketaki alone.

Now, so far as the first point is concerned I should like to observe that the conception of a dual guardianship is by itself not repugnant to law and it is not difficult to conceive of cases where there may be more than one guardian. If any judicial authority is needed for this proposition it will be found in 24 Mad 284,[1] in which it was pointed out that the guardianship of the father did not cease while a minor was in the possession of another

1. Jagannadha Rao v. Kamaraju, (1901) 24 Mad 284=2 Weir 458=10 M L J 405.

person who had been lawfully entrusted with the care and custody of such minor by the father. Again there is nothing in law to prevent the father or the mother of a minor, who may be his or her lawful guardian for the time being, from entrusting lawfully the care and custody of such minor to more than one person at a time. Let us now consider whether the position taken up by the prosecution in this case was really inconsistent. Now, it is not denied that the mother was in fact the lawful guardian of Basanti at the time of the alleged occurrence and it has also not been disputed that Ketaki, as eldest son of Basanti's mother, was the managing member of the family. There is evidence to the effect that his younger brothers used to make over all their earnings to him; that all the expenses of the family were defrayed by him and that he was responsible for the maintenance, education and marriage of all the junior members of the family. The argument put forward on behalf of the appellants is that he could not be treated as the lawful guardian of Basanti, because there is no evidence of the entrustment to him of the care and custody of the minor as contemplated by S. 361, I. P. C., and to support his own interpretation of the expression "lawfully entrusted" as used in this section, counsel for appellant 1 relies upon the decision of the Full Bench in 4 P L J 74.[2]

In that case it was held that the word "entrust" means the giving, handing over, or confiding of something by one person to another and that the Explanation to S. 361 contemplated a declaration of trust by a person competent to make such a declaration conveying, handing over and confiding a minor to the care and custody of another in whom confidence and trust is imposed. Atkinson, J., who delivered the leading judgment in that case, also expressed the view that for an "entrusting" within the meaning of the Explanation to S. 361 there must be necessarily three persons, namely (1) the person imposing the confidence or trust, (2) the person in whom the trust is imposed and (3) the person constituting the subject matter of the trust. Mr. Yunus who appears on behalf of appellant 1 contends that when the evidence adduced in the case is read in the light of this decision it will be found that there is no evidence of entrustment in this case.

Now, with great respect to the learned Judges who decided that case, I would venture to say that in my opinion, they have taken a much more rigid view of the section than what the words of the section warrant and I doubt if the section contemplates either a formal declaration of trust or that there must necessarily be three persons in order that a person may be lawfully entrusted with the care and custody of a minor. I think that a person should be regarded in the eye of the law as having been lawfully entrusted with the care and custody of a minor, if he has acquired control over the minor lawfully and in such circumstances as would imply trust even though he may not have been formally entrusted with the care and custody of the minor by a third person Let us suppose that a person finds an unclaimed child wandering about, and out of humanitarian motives takes charge of the child and brings him up. It may be questioned whether it cannot be said that by the circumstances under which he took charge of the child he should be deemed to have been lawfully entrusted with the care and custody of the minor child even though his parents never formally entrusted him with such care and custody. A similar position would arise in the case of unclaimed young orphans and illegitimate infants abandoned by their mothers. We doubt whether the law could have ever contemplated that if such children are kidnapped from the custody of the person with whom they have been living and who has brought them up, the offence of kidnapping would not be committed. Such being, at present, the inclination of my mind as well as that of my learned brother we would have referred the matter to a larger Bench if we thought that the decision of the Full Bench would in any way affect the decision of the present case. In my opinion, however, the present case may well be decided under the principles enunciated in that decision. In the present case the mother being alive she could create a trust in favour of her eldest son and the only question is whether there is evidence of such trust being created. Now in this connection reference may be made to the following passage in the judgment of Atkinson, J:

> Neither the declaration of trust itself nor its acceptance need be necessarily in writing. It is

2. Mt. Kesar v. Emperor, A I R 1919 Pat 27=49 I C 481=20 Cr L J 161=4 P L J 74 (F B).

sufficient if the declaration is verbally made and given; or if it arises from a course of conduct consistent only with the existence of such antecedent declaration; and accepted verbally or by necessary implication arising from the conduct of the party so entrusted with the duty imposed.

This view was endorsed by Manuk, J., who was also a party to the decision in these words :

However that may be, I am of opinion that even as the law now stands such "entrustment" as the section requires may be inferred in the absence of proof of an express declaration, written or oral, from a well-defined and consistent course of conduct governing the relations of the lawful guardian alleged in the indictment and of the minor.

The substance of these passages is that the entrustment may be proved not only by oral evidence but also by surrounding circumstances and the conduct of the parties concerned. Now, in the present case, Ketaki who is claimed to be a lawful guardian under the Explanation to S. 361 is not a stranger to the family but the eldest brother of the minor, and he is also admittedly the karta of the family. The position of a karta in a Hindu family is a unique one and even though for the purposes of this case one need not go so far as to say that a person would necessarily be the lawful guardian of a minor within the meaning of S. 361 by the mere fact of his being a karta, it is safe to say that very slight evidence of the consent of the natural guardian would be required to hold that the karta of the family was in fact the guardian of a minor who is being brought up under his care. In the present case, Basanti's mother is an old lady of about 54 and whatever evidence there is on the record, clearly shows that Ketaki exercised absolute control over Basanti with at least the acquiescence of their mother. For instance when Ananda and Kumar suspected that Basanti was going wrong, they sent a wire to Ketaki and it was Ketaki who after the incident of the 4th of July took Basanti to Calcutta for the purpose of marrying her. There is nothing on the record to suggest that whatever he was doing for Basanti was not being done with the consent of his mother, and in these circumstances I think that the prosecution has every justification for treating Ketaki as the lawful guardian of Basanti.

The next question which arises is as to the effect upon this case of Basanti's mother not having been examined at the trial. There can be no doubt that she was the best witness to state that Basanti had been kidnapped without her consent and if it had been established that she had been deliberately and without good reason withheld from the witness-box the defence would have been entitled to ask the Court to draw an inference adverse to the prosecution. But the prosecution accounts for her not being examined by pointing out that she is an old lady of 54 who being a chronic patient of rheumatism can hardly walk about. As against this, it is argued that there being some evidence that she used to have her meals on the ground-floor, we ought to infer that she could walk about in the house and that at any rate she might have been examined on commission. But having regard to her age and ailments one can easily understand that the members of her family would not have been too anxious to allow her to be subjected to a prolonged cross-examination on an unpleasant subject which affected the reputation of the family.

The real question, then, to be considered is whether upon such evidence as there is on the record it was not fairly open to the jury to hold that the appellants had taken away Basanti from her house without the consent of her mother. Mr. Yunus appearing on behalf of appellant 1 (K. K. Ali) contends that there is no evidence whatsoever on this point and the learned Judge should have directed the jury under S. 289 (2), Criminal P. C., to return a verdict of not guilty on the ground that there was a total absence of proof as to one of the main ingredients of the offence. Now, it need not be stated that the evidence contemplated in S. 289 (2) includes both oral and circumstantial evidence and I am not prepared to hold that in this case there was no evidence to go to the jury or that there was before the jury no such evidence as might reasonably lead them to the conclusion that the fact sought to be proved was established. There is nothing on the record to suggest that Ketaki and his mother held different views on the question of Basanti's association with the accused. Ketaki says that he had told his mother to give proper advice to Basanti and look after her carefully and there is also some evidence to show that her mother was sleeping in the same room with Basanti on the night of 4th July. If Ketaki had the slightest suspicion that his mother was disposed favourably towards the

appellants, he would, it seems obvious, not have acted in the manner in which he is said to have acted. Again, the appellants' own case with regard to the incident of 4th July is that Basanti had been driven out by her relatives including her brothers as well as mother. This case was definitely put to her in her cross-examination, but her answer was as follows:

> It is a complete lie to say that my brothers and mother having failed to dissuade me from persisting in my love to Samar expelled me from our Karmantola house on the night of 4th July.

This by itself would suggest—and from the defence too—that not only Ketaki but his mother also disapproved of Basanti's association with the appellants. Counsel for appellant 1 has made capital out of a statement made by Ketaki to the effect that he had once heard from his mother that Basanti had expressed a desire to be allowed to go with the accused. But Ketaki has not stated anywhere that his mother approved of the suggestion made to her by Basanti. On the other hand, when it was somewhat faintly suggested to him that Basanti had left her house with her mother's consent the suggestion was promptly repudiated by him in these words:

> It is not a fact that my mother had consented to the removal of Basanti from my house by the accused and I am concealing the fact.

The jury would also naturally take into consideration the probability that an old lady of an orthodox Brahmin family would consent to the removal of her daughter by the appellants, one of whom is a Mahomedan and the other a Christian. The letters which passed between Basanti and Samar also indicate that Samar wanted her to maintain secrecy about their relations and that she had ultimately agreed to his proposal. The statements which have been made by Basanti herself also point in the same direction as will appear from the following extracts from her deposition:

> (1) I never informed my elder brothers or my mother that I was intimate with the accused or that they were putting temptations in my way in order to take me away with them; (2) I did not mention my proposed marriage with Samar to my brothers and mother as the accused and Samar's sister had warned me against doing so.

In my opinion, these and other similar statements made by her and Ketaki in their evidence as well as the positive case which has been put forward in Court on behalf of the defence with regard to the incident of 4th July would have been sufficient to entitle the jury to come to the conclusion that Basanti could not have left the house with the consent of her mother. Indeed, once it is held to be established that Basanti had secretly left the house, the jury would naturally presume and rightly that she had left the house without the consent of her brothers as well as her mother. The point which we may now consider is whether we would be justified in ordering a re-trial merely on the ground that Basanti's mother has not been examined and the Judge has not drawn the attention of the jury to the fact that she was the best person to prove that Basanti had been removed from her house without her consent. Now it seems to be well settled by authorities that the power of setting aside convictions and ordering a new trial for any error or defect in the Judge's charge to the jury will be exercised by the High Court, only when the Court is satisfied that the accused has been prejudiced by error or defect or that a failure of justice has been occasioned thereby. This view was expressed by no less eminent a Judge than Sir Barnes Peacock in 5 W R Cr 80[3] and it has, so far as I am aware, been always applied by the Courts of appeal in this country subject to one limitation only which was suggested by Jackson, J. in the same case in these words:

> In regard to the proposed rule that we should not interfere in the case of misdirection where the facts are such that if the trial had been held before a Judge and assessors, we should have affirmed the sentence, I have only one misgiving. It is not always safe—I might say it is rarely safe—for an appellate Court with papers before it to put itself in the place of the Court below which has heard the witnesses; and it might be that in affirming the conviction on the faith of some unnoticed circumstances of corroboration found in the evidence we might be using that which the Judge and the jury would not have relied upon.

But as the same learned Judge pointed out, this only suggests caution in the application of the rule rather than an objection to the rule itself. Now, if the case for the appellants had been that on the night of 4th July Basanti had left her house with her mother's consent, and if there had been any indications in the record to lead us to believe that the suggestion had any foundation in fact, we would have felt it our duty to set aside the conviction of the appellants and order

3. Elahee Buksh v. Emperor, (1866) 5 W R Cr 80=Beng L R Sup Vol 459.

a re-trial. But as I have already shown, the facts are otherwise and in my opinion it will serve no useful purpose whatsoever to order a re-trial. In fact Mr. Yunus himself took some pains to argue that a re-trial should not be ordered merely to enable the prosecution to tender evidence which it might have but has not tendered in the original trial. The next serious point which arises in the case is raised in the 12th ground of the memorandum of appeal which runs as follows :

That the learned Judge erred seriously in stopping Mr. Manzar, Counsel for accused K. K. Ali, from continuing his argument.

This ground was supported in Court by two affidavits both sworn by a son of the appellant K. K. Ali and a letter of Mr. Manzar to Mr. Yunus (counsel for the appellant K. K. Ali) which was attached to one of the affidavits. Even the first affidavit was filed late, without any attempt to explain the delay. Mr. Yunus was engaged late in the case, but ultimately conceded that the first affidavit with which he began his argument on the second day was worthless. As we wanted to have all the material facts before us, we called for a report from the learned Sessions Judge and informed the Assistant Government Advocate that if he considered it necessary to file any counter-affidavit he was at liberty to do so. The learned Assistant Government Advocate therefore filed an affidavit sworn by the Government Pleader of Arrah who had argued the case for the prosecution before the Sessions Court and as Mr. Manzar had made no statement directly to us from the Bar we called him to make a statement which he made on 28th August 1936. Now the facts which we are able to gather from the materials before us seem to be as follows :

Mr. Manzar was engaged by the accused in the case after some 23 out of about 45 prosecution witnesses had been examined in the Court of Session and with the exception of a few days he was present throughout during the cross-examination of the remaining witnesses. The defence witnesses, however, were examined by two pleaders named Mr. Sharif and Mr. Nurul Huda in Mr. Manzar's absence. On 26th May when the evidence for the defence was closed the learned Judge who was then under order of transfer allotted four days for arguments in consultation with the lawyers appearing for the parties. It is abundantly clear that he did not do so arbitrarily, but after enquiring from the lawyers of both parties how long their respective arguments were likely to occupy them. Indeed, it appears from the report of the learned Judge and the affidavit sworn by the Public Prosecutor of Arrah that at first Mr. Sharif who was then in charge of the appellants' case offered to finish the entire defence argument within one day if the Public Prosecutor gave a similar undertaking; but as the Public Prosecutor informed the Court that his argument would not be finished in less than two days, Mr. Sharif also wanted two days for his argument and so the learned Judge allotted two days to each party. On 27th May before beginning his argument, Mr. Sharif intimated to the Court that as Mr. Manzar, counsel for the appellants, had not turned up, he had been requested by the accused to argue the case and he proposed to argue the case generally and more particularly for Samaresh leaving it to Mr. Manzar to follow up his arguments when he arrived and deal with the case of K. K. Ali in particular.

It appears that Mr. Sharif argued on 27th May from 6-30 to 11-30 a. m. as the Court then used to hold morning sittings and on the next day he argued till about 8-15 a. m. About this time Mr. Manzar arrived and he was allowed to continue the argument. The learned Judge states in his report that he had told Mr. Manzar that four days had been allotted for the argument of the parties in consultation with their lawyers and Mr. Manzar did not say anything to suggest that he was not satisfied with the adequacy of the arrangement. Mr. Manzar continued his argument till 11-30 a. m. and upon being reminded of the arrangement told the Judge that he had not quite finished his argument and had some more submissions to make. The Judge was prepared to sit a little longer to enable Mr. Manzar to finish his argument, but Mr. Manzar states that as it was a hot day, and as he had already argued for three hours and wanted about two hours more to finish his argument, he could not continue his argument on that day and asked the Court to hear him on the following day. The learned Judge did not however accede to this request and thereupon, to quote the words of the learned Judge :

Mr. Manzar wound up his arguments after telling the jury that he had some more points to

urge, but he was bound to respect the orders of the Court.

On 29th May the Public Prosecutor started his argument and he concluded it on 30th May. The Judge being ill on 1st June the case was not taken up on that day and on 2nd June the Judge charged the jury in Hindi and their verdict was recorded. The learned Judge has stated in his report that Mr. Sharif had argued the case very ably and exhaustively and that there was very little left for Mr. Manzar to argue about He also lays some stress upon the fact that no petition was filed by the accused then and there, to show that 'either the party or their counsel had been prejudiced by reason of the procedure adopted by the Judge.' Mr. Manzar has on the other hand, stated that he drafted a petition embodying the material facts and gave it to the karpardaz of the appellant but the petition was not filed. It is further stated by him that he asked his client after the judgment had been delivered whether the petition had been filed but was told that it had not been filed, as the accused thought they might thereby incur the displeasure of the Judge.

Now, I do not wish to dwell at any length upon the abstract question as to how far a Court would be justified in imposing a time limit upon the arguments of the lawyers and whether such a time limit is binding upon the parties. It seems to me to be plain that any arbitrary and undue curtailment of the parties' right of argument is to be deprecated. In the present case, however, it is quite clear that when the learned Judge asked the lawyers of the parties how long their arguments were likely to occupy them, he had no intention of curtailing their arguments, but on the other hand he allotted two days for the defence argument though the advocate then appearing for both the accused had suggested in the first instance that the argument could be finished in one day. The learned Judge also, while he might well have insisted on Mr. Sharif arguing the whole case, tried to accommodate Mr. Manzar by allowing him to follow Mr. Sharif. In these circumstances, it is clear that the learned Judge had no desire to hamper the defence and it seems to me that he declined to grant further time for argument as he was probably convinced that the case had already been fully argued. Assuming, however, that the learned Judge should have acceded to Mr. Manzar's request, the question which is still to be considered is whether we would be justified in ordering a re-trial. Unfortunately Mr. Manzar did not ask Mr. Sharif before commencing his argument what points had already been dealt with by him, but he has stated before us that when he concluded his arguments he

had still to deal with the entire defence evidence and had also to place authorities on the charge of kidnapping and abduction and medical authorities on the question of age.

Now it is clear from the report of the learned Judge and the counter-affidavits filed on behalf of the Crown that Mr. Sharif had already dealt with the general aspects of the case as well as the points bearing on the case of the appellant Samaresh and Mr. Manzar had to deal with the case of K. K. Ali in particular. Mr. Sharif himself has made no statements before us and it is nowhere stated in the affidavit filed on behalf of the appellants that Mr. Sharif had omitted to deal with the defence evidence nor has it been argued on behalf of the appellants that the learned Judge did not deal with the defence evidence adequately in his charge to the jury. As to the authorities on the charges of kidnapping and abduction, they were presumably to have been cited for the satisfaction of the Judge, as the questions of law were to be decided by him and not by the jury; but nothing has been said to us in the course of the prolonged argument addressed on behalf of the appellants to convince us that the learned Judge has taken any erroneous view of the law so far as the charges against the appellants are concerned. As to the medical authorities the only authorities which have been cited before us were those which had reference to the question of Basanti's age and I have already shown that those authorities could not have materially altered the conclusion of the jury. Besides, although it cannot be denied that for the proper administration of justice the parties should be allowed a full and unrestricted right of addressing the jury, yet it cannot be overlooked that the summing up of the case by the Judge in his charge to the jury plays a very important part in a jury trial.

It is obvious that in those cases where the accused is undefended or where he is defended by an incompetent counsel or is too poor to engage the services of a competent lawyer, his case cannot generally

be adequately placed before the jury by means of argument. If however in those cases the Judge has properly charged the jury, the mere fact that the case has not been adequately argued on behalf of the accused cannot by itself be a good ground for ordering a re-trial. On the same principle, I do not think that a re-trial should be ordered, unless it can be shown that matters which counsel would have placed have not been placed before the jury or that the charge of the Judge is defective and erroneous in material particulars. In the present case there is also this additional fact to be considered that the cases of K. K. Ali and Samaresh are closely connected with each other and it has not been suggested that the case of Samaresh had not been adequately argued. The points however which were urged before us as affecting K. K. Ali's case as distinct from the case of Samaresh were very few in number and of little importance. In fact the strongest point which was urged in this connexion was that this appellant had been prejudiced by the learned Judge's assuming that certain letters which had been addressed to Samaresh alone had been written both to K. K. Ali and Samaresh. The learned Assistant Government Advocate had no difficulty in refusing this argument. In these circumstances, I think, that no good case has been made out for ordering a re-trial of appellant 1. Another point which was urged before us relates to the conviction of K. K. Ali both for the substantive offences under Ss. 366 and 363 and for the abetment of such offences. It appears that after the jurors had returned their verdict holding K. K. Ali guilty of the offences under Ss. 366 and 363 the learned Judge put to them the following questions:

Q.—Do I understand that as in the case of Samar, you consider Ali also guilty of the substantive offences under Ss. 363 and 366, I. P. C., and the question of Ali abetting Samar in the commission of these offences for which Ali has been separately charged under Ss. 363/109 and 366/109, I. P. C., does not arise?

To this question the answer of the jurors was:

Ali committed the offences under Ss. 366 and 363 and also abetted the crime of these offences under S. 109, I. P. C.

The verdict of the jury in this respect cannot be defended except on the ground that in some cases where the commission of the offence is abetted by aid and conspiracy the abettor may be treated as a principal under S. 34, I. P. C. Broadly speaking, however, it would be illogical to hold that a man is guilty of both the principal offence and of its abetment and this was conceded even by learned counsel for the Crown. Learned counsel for the appellants contends that this illogical verdict of the jury was due to the fact that the law had not been properly explained by the learned Judge in his charge. I am however not prepared to agree with this contention. It is stated in the heads of the charge that all the charges and the various sections of the Penal Code bearing upon them had been explained to the jury and we have no ground for holding that they were not properly explained; but however that may be, as the learned Judge has given no separate sentences to the appellant K. K. Ali for the offences of abetment the point is of little more than academic importance.

As the contentions to which we have so far referred, were the main contentions put forward by the appellants against the verdict of the jury and as they all fail, the verdict must stand and the conviction of the appellants under S. 366, I. P. C., cannot be disturbed. The question however which still remains to be dealt with is the question of sentence and it appears to me that in dealing with this question we cannot overlook certain important features of the case. There can be no doubt that Basanti is the most important witness to prove the circumstances under which she came in contact with the accused and was prevailed upon by them to leave her relations and her evidence can also throw considerable light on the intention of the accused. As I have already stated she completely supported the accused when she was examined by the Sub-divisional Officer on 19th August 1935. She was then remanded to jail and when she ultimately appeared to give her evidence before the Committing Magistrate she completely resiled from her previous statement and supported the prosecution case in its entirety. It is clear that in these circumstances her evidence will have to be approached with great caution. There are, however, on the record a series of letters which were written by her from time to time to Samaresh and I think that these letters can be of material assistance to us in finding out the true situation. These letters disclose that Basanti was not only a strong-willed girl but also

a girl of remarkably mature ideas and indeed if one had to base one's conclusions as to her age upon these letters and her handwriting and the manner in which she has replied to questions put to her in the course of her long examination, one would be inclined to think that her age has been under-estimated by the prosecution. I shall here reproduce an important passage from the learned Judge's charge to the jury in which he has referred to some of her letters: (After referring to some of the letters, His Lordship proceeded.) We find from her letters that she was pressing Samar for an open marriage and although she eventually expressed her willingness to a secret union, it is clear that what she meant was an honourable union. She also once wrote in strong terms to Samar because she thought that Ali had behaved to her in a manner in which he should not have behaved. These being the circumstances of the case, I think that the sentence which has been passed by the learned Sessions Judge on Samaresh is excessive and I think that the ends of justice will be served by reducing the sentence to rigorous imprisonment for 1½ years. The sentence of fine which has been imposed on Samar appears to me to be inappropriate, because the evidence shows that Samar was earning merely Rs. 20 a month as a fitter in an electrical company and had hardly any other means. I would therefore set aside the sentence of fine.

As to the sentence on K. K. Ali, we must keep in view the fact that he had grossly abused his position as a Sub-Inspector and that not only did he actively help Samar in the commission of an offence but also allowed Basanti to be concealed in his house on the 4th July as well as after the incident of the 10th August. At the same time, we have to bear in mind that Samar was his brother-in-law and that his action must have been considerably influenced by the attitude of his wife who was the sister of Samar. We should also consider that his conviction will not only bring him into social disgrace but also involve his dismissal from Government service. Taking all these circumstances into consideration I would sentence him to undergo rigorous imprisonment for two and a half years and to pay a fine of Rs. 250, in default to undergo a further term of rigorous imprisonment for six months. The whole of the fine, if realised, will be paid to Ketaki Rajan as compensation under S. 545, Criminal P. C. Before parting with this case I consider it necessary to make one or two observations. There can be no doubt that by this unpleasant case which seems to have been given an undue notoriety, the reputation of a family (which though poor is undoubtedly a respectable one) must have greatly suffered, but as I have already stated it is clear from the record that even though Basanti may have behaved somewhat foolishly and impulsively, she never departed from the path of honour and her virtue remains unstained. Indeed this is the main ground on which we have thought it fit to reduce the sentence passed on the accused.

Dhavle, J.—I agree.

K.B./A.L. *Sentences reduced.*

A. I. R. 1937 Patna 275

AGARWALA AND VARMA, JJ.

B. Biswas — Accused.

v.

Emperor.

Criminal Ref. No. 66 of 1936, Decided on 14th December 1936, made by Addl. Deputy Commissioner, Dhanbad, D/- 3rd November 1936.

Criminal Trial — Sentence—Enhancement of—Reference—Accused convicted and fined on pleading guilty—No evidence on record to show heinousness of offence—Fine cannot be enhanced.

An accused person was convicted and fined under S. 6 (c), Boilers Act, on his pleading guilty to the charge. His plea being accepted no prosecution evidence was recorded in the case. A reference was made to the High Court to enhance the fine:

Held: that the fine could not be enhanced as there was no evidence on the record to show the heinousness of the offence, and under the circumstances of the case there was no reason to interfere with the discretion of the trial Court.

[P 276 C 1]

S. C. Majumdar—Against the reference.

Agarwala, J. — This is a reference under S. 438, Criminal P. C. by the Additional Deputy Commissioner of Dhanbad recommending that a fine of Rs. 10 passed on Mr. B. Biswas, Manager of the New Sudamdih Colliery, on conviction for an offence under S. 6 (c), Boilers Act of 1923, be enhanced, having regard to the serious consequence of accidents arising out of the use of uncertified boilers. Unfortunately, as the accused pleaded

guilty to the charge when it was explained to him in the trial Court, and that plea was accepted without calling upon the prosecution to adduce evidence, we have no evidence before us by which we can Judge the heinousness of the offence committed by the accused. In these circumstances we are not prepared to interfere with the discretion of the trial Court in the matter of sentence. The reference is accordingly discharged.

Varma, J.—I agree.

K.B./A.L. *Reference discharged.*

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* A. I. R. 1937 Patna 276

ROWLAND, J.

Ramjank Patwa — Petitioner.

v.

Emperor — Opposite Party.

Criminal Revn. No. 454 of 1936, Decided on 21st September 1936, from order of Sub-divisional Officer, Patna, D/- 16th June 1936.

(a) Gambling—Public place—It need not be necessarily public property—Public should have access and should in fact resort to it as such.

It is not necessary that a public place for gambling should be public property; but if it is private property, the public must have access to it; nor is it sufficient that a place should be accessible to the public; it must be a place to which the public do in fact resort. Where the public has no access a place cannot be called a public place: *6 C W N 33*; *30 Bom 348*; *31 Cal 542*; *Reg.* v. *Wellard*, *(1884) 14 Q B D 63*; *A I R 1917 Mad 124*; *A I R 1922 All 542*; *9 N L R 164* and *A I R 1922 Oudh 275*, *Ref.* [P 277 C 1, 2]

*** (b) Gambling—Presumption — Presence of persons—Presumption of guilt in private gaming house—Person found in public gambling place—Presumption is of innocence—Person found running from public gambling place—No presumption of guilt.**

All the persons present in such an enclosed place as a common gaming house, may naturally be supposed to be members of the gaming party. But in dealing with a public place where the gravamen of the offence may be said to be the danger of corrupting the morals of the innocent passer by, the presumption regarding anyone found present (unless something further is proved against him) is that he is an innocent passer by. The mere fact that a person was found running away from public gambling place is not sufficient to support the presumption that he was actually gambling: *29 Bom 386*, *Rel. on.* [P 278 C 1]

Indu Bhushan Biswas—for Petitioner.

Gopal Prasad—for the Crown.

Order.—The petitioner has been convicted under S. 11, Bengal Public Gambling Act (Bengal Act 2 of 1867) and sentenced to a fine of Rs. 15. Two points are urged in revision: first, that the place of the alleged gambling was not a public place within the meaning of S. 11; and secondly, that the prosecution did not prove that the petitioner was gambling.

Section 11 of the Act refers to playing for money with instruments of gaming in any public market, fair, street, place or thoroughfare. The words do not refer to every kind of place. It must be a public place as was held in 6 C W N 33[1] and in 30 Bom 348.[2] In those two decisions, in considering what was a public place, the Courts looked to the context and applied the principle of *ejusdem generis*. The Bombay Act is not the same in its wording as that in Bengal, the words being a "public street, place or thoroughfare" and Jenkins, C. J. said that "place" for the purpose of this section must be a public place of the same general character as a public street or thoroughfare. In the Bengal Act the words are "in any public market, fair, street, place or thoroughfare", a somewhat wider definition; and in the Calcutta case cited, it was said the place must be of the same character as a public market, fair, street or thoroughfare. A similar view was taken in 29 Bom 386.[3] Here again it was, of course, the Bombay Act which had to be applied, and in that Act the word "place" is also used in an earlier section in connexion with house, room or office as meaning a private place of that kind. Commenting on the distinction between the two senses in which the word "place" is used in the different sections, Batty, J. discussed the mischief aimed at in the two parts of the Act. In the earlier part, he said:

> The mischief aimed at is the practice of individuals making a profit by providing a spot of their own selection known as a place where gambling is to be carried on, and making a livelihood by attracting people to a place which they would not otherwise frequent.

On the other hand, in the provision dealing with gambling in a public place, "the offence," he said,

> is, not that the individual members are making a profit at all, but simply that they are carrying on their gambling with such publicity that the ordinary passer by cannot well avoid seeing it and being enticed if his inclinations lie that way to join in or follow the bad example openly placed in his way.

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1. Khudi Sheikh v. Emperor, (1902) 6 C W N 33.
2. Emperor v. Hussein Noor Mahomed, (1906) 30 Bom 348=3 Cr L J 216=8 Bom L R 22.
3. Emperor v. Jusub Ally (1905) 29 Bom 386=2 Cr L J 252=7 Bom L R 333.

The meaning of the expression "public place" again came before the Calcutta High Court in 31 Cal 542[4] and the Judges referred to the general description of a public place to be found in (1884) 14 Q B D 63.[5] In this case Lord Coleridge, C. J., felt no doubt that a place was a public place though it was private property when it was shown that the public were in the habit of resorting to the place, and no one prevented them from so resorting to it and Grove, J. said that "a public place is one where the public go, no matter whether they have a right to go or not." Following this Calcutta decision a number of other High Courts have referred to *Wellard's case*[5] and treated it as settling what is a "public place". The Madras High Court did so in 39 Mad 886[6] and again in 40 Mad 556[7] which followed the Calcutta decision in 31 Cal 542.[4] The Allahabad High Court in 44 All 265[8] referred to and followed *Reg.* v. *Wellard*.[5] It was said that a place was a public place if the public were in the habit of resorting to it and no one prevented them from so doing, no matter whether they have a right to go there or not.

The Calcutta decision in 31 Cal 542[4] was approved and *Reg.* v. *Wellard*[5] applied by the Nagpur Judicial Commissioner's Court in 21 I C 910[9] and again by the Oudh Judicial Commissioner's Court in 68 I C 613.[10] There is thus no difference of opinion whatever on the question of principle and the only question is as to the application of the principle to the facts of a particular case. It is not necessary that the place should be public property; but if it is private property the public must have access to it; nor is it sufficient that the place should be accessible to the public; it must be a place to which the public do in fact resort. Where the public had not access, a place has been held not to be a public place: *see* 17 All 166[11] and 49 All 913.[12] In 68 I C 613[10] an open space of ground near two public roads was held not to be a public place because the public did not in fact resort to it. It was observed in passing that:

> A private place may be frequented by the public and may become a public place for the time it is so used,

and this is consistent with 44 All 265[8] in which a grove which was private property was held to be a public place because the public were using it without interference on the occasion of a mela. I turn to consider the nature of the place where gambling in the present instance is said to have occurred. It was in a bamboo grove which was private property. It is 400 yards from the nearest public road and 500 yards from the railway line. It is bounded on three sides by an orchard and on the fourth by a field. It is described by the Investigating Officer (P. W. 4) as a "secluded place". The Courts below have considered it to be a public place because two foot paths met near to it. On the principle of the decisions which I have cited, one element seems to be lacking to constitute this place a public place. Being a private property the prosecution should have shown that it was in a frequented locality and not only accessible to, but in fact resorted to by the public. I do not think the Act was intended to catch conduct like this which in substance seems to be gambling in private rather than gambling in public.

The other point taken is that the petitioner was not proved to have been gambling. It is pointed out that the provisions of the law are different in respect of gambling in a common gaming house, from those in respect of gambling in a public place. In the former case there is a penalty imposed on anyone either found playing or found present for the purpose of gaming and if any gaming or playing is going on in a common gaming house there is a presumption that any person found present was there for the purpose of gaming. There is a further presumption under S. 6 when any cards or instruments of

4. Hari Singh v. Jadu Nandan Singh, (1904) 31 Cal 542=1 Cr L J 349=8 C W N 458.
5. Reg. v. Wellard, (1884) 14 Q B D 63=54 L J M C 14=51 L T 604=33 W R 156=15 Cox CC 559=49 J P 296.
6. Emperor v. Govindarajulu, A I R 1916 Mad 474=30 I C 752=16 Cr L J 704=39 Mad 886.
7. Emperor v. Musa, A I R 1917 Mad 124=36 I C 839=18 Cr L J 7=40 Mad 556=31 M L J 285.
8. Emperor v. Sukhanandan Singh, A I R 1922 All 542=65 I C 419=23 Cr L J 67 = 44 All 265=20 A L J 80.
9. Vithu v. Emperor, (1913) 21 I C 910 = 14 Cr L J 670=9 N L R 164.
10. Emperor v. Bashir, A I R 1922 Oudh 275= 68 I C 613 = 23 Cr L J 581 = 26 O C 41 = 9 O L J 288.
11. Queen-Empress v. Sri Lal, (1895) 17 All 166 =1895 A W N 42.
12. Emperor v. Baburam, A I R 1927 All 560= 103 I C 202=28 Cr L J 666=49 All 913=25 A L J 578.

gaming are found in a common gaming house that the persons present there were present for the purpose of gaming even though no play was actually found taking place. In a prosecution under S. 11 it is otherwise. Mere presence is not an offence under this section which penalises "any person found playing for money"; secondly, "any person setting any birds or animals to fight"; thirdly, "any person there present aiding and abetting such public fighting of birds and animals". But there is no provision to penalise mere presence of any person at a public place where gaming occurs; nor is there any presumption that a person found present has been gambling. The observations above cited in 29 Bom 386[3] as to the mischief at which the two parts of the Gambling Act were aimed are in point. In the light of those observations it is not difficult to understand why the Legislature has given such different treatment to the matter of gaming in a common gaming house and that of gambling in a public place. All the persons present in such an enclosed place as a common gaming house, may naturally be supposed to be members of the gaming party. But in dealing with a public place where the gravamen of the offence may be said to be the danger of corrupting the morals of the innocent passer by, the presumption regarding anyone found present (unless something further is proved against him) is that he is such an innocent passer by.

In the present case the evidence is that the police raiding party came to the place and found eighteen or twenty persons gathered there. Of these, seven were apprehended there and then, and were found by the Magistrate to have been actually playing. The rest took to their heels. Petitioner Ramjanak Patwa also ran. There is no evidence that he was playing. Two witnesses have identified him as one of the persons who were seen running away from the place of gambling. The mere fact of running away is not sufficient to support the presumption which the Courts below have made that the persons who ran away were actually gambling. In the result, the application succeeds on both grounds. The rule is made absolute, the conviction set aside and the petitioner acquitted.

B.D./D.S. *Rule made absolute.*

A. I. R. 1937 Patna 278

MOHAMAD NOOR AND MADAN, JJ.

Rani Chhater Kumari Debi—Petitioner.

v.

Bhagwati Prasad and *others*—Opposite Parties.

Civil Revn. No. 156 of 1936, Decided on 18th September 1936, from order of Munsif, Bettiah, D/- 13th January 1936.

Bengal Tenancy Act (8 of 1885), S. 170—Scope—Two distinct and separate halves of one tenure—Decree for rent against owner of one of them—Decree is for rent—In execution of decree, objection under O. 21, R. 58, Civil P. C., by person alleging to be transferee of such tenure—Objection is barred under S. 170 of Act—Such objection can be taken in execution of money decree.

If the decree is not a rent decree, a third party can file objections under O. 21, R. 58; for instance, if it appears that the plaintiff is not the 16 annas landlord of the tenure or holding or that the suit is in respect of a portion of a holding or tenure or that rents for two or more holdings or tenures had been claimed in one and the same suit, the claim is entertainable; but if the decree is a rent decree but against a wrong person the claim is barred. [P 279 C 2]

A suit was brought for rent by a landlord against three persons, one of whom owned a half share in the tenure and the other two owned the other half. The plaint however was subsequently amended by giving up the claim against the two persons (owners of the other half) but the suit was continued against the owner of the half tenure. In execution of the rent decree an objection was filed by persons alleging to be transferees of the tenure under O. 21, R. 58, Civil P. C.:

Held: that originally the suit was no doubt for rent against the owners of two halves of the tenure but by amendment of the plaint the suit became one for rent for the tenure of the owner of the half only, the half of the original tenure becoming a complete tenure by splitting up the tenure into two distinct and separate tenures. The suit was one for rent and the decree was a rent decree and not a simple money decree. [P 280 C 1]

Held further: that by virtue of S. 170 of the Act no claim under O. 21, R. 58, Civil P. C., could be made by a third person in execution of the rent decree: *28 Cal 382 (F B)*; *A I R 1933 Pat 32*; *A I R 1929 Pat 195* and *A I R 1936 Pat 480*, *Rel. on*; *A I R 1930 P C 193*, *Expl.* [P 280 C 1]

D. N. Varma and *B. B. Sahay*—for Petitioner.

S. N. Sahay and *Jaleshwar Prasad*—for Opposite Parties.

Mohamad Noor, J.—This application in revision is directed against an order of the Munsif of Bettiah allowing the claim of the opposite party which purported to be under O. 21, R. 58, Civil P. C., and as preferred in execution of a decree which is claimed by the decree-holder petitioner

to be a decree for the rent of a tenure. The decree is against one Subasni Kuer whose husband Bir Bharthe was admittedly entitled to half of the tenure which she is said to have transferred to the respondent, the remaining half belonging to one Mt. Nanhuka Kuer and Ram Chandra Prasad. The rent suit was originally instituted against all these three persons, namely, Subasni, Nanhuka Kuer and Ram Chandra, but later the plaintiff obtained leave to amend the plaint by excluding Nanhuka Kuer and Ram Chandra and the claims against them on the allegation that the tenure was split up and a separate tenure consisting of half of the original tenure was created for the share of Subasni. A decree was passed on this basis. It was in execution of this decree that a claim was preferred on behalf of the opposite party Bhagwati Prasad and others. They claimed that they were purchasers of the tenure from the husband of Subasni and that the decree had been wrongly obtained against her and was therefore not a rent decree and they were entitled to come in under O. 21, R. 58. The learned Munsif held that the decree was not a rent decree for the reasons stated above, namely that it was against a person who was no longer a tenure holder, her husband having already transferred it to the claimant. He therefore allowed the claim. The decree-holder has come up in revision.

It was held by the Full Bench of the Calcutta High Court in 28 Cal 382[1] that a claim under S. 278, Civil, P. C. (now O. 21, R. 58) was barred under S. 170, Ben. Ten. Act, if it is not disputed that the decree-holder is the landlord of the tenure or holding and that the decree is for the rent due in respect of it. A claimant cannot be allowed to plead that the decree has been obtained against a wrong person. This decision has been uniformly followed in this Court: *see* 11 Pat 790;[2] 10 P L T 118[3] and A I R 1936 Pat 480.[4] It was held in these cases that if a claimant does not deny that the holding (or in this case the tenure) was held under the decree-holder and that rent was due thereon but contends that the decree has been passed against a wrong person, he cannot maintain the claim case. Generally speaking the position is this: If it can be shown that the decree was not a rent decree a third party can file objections under O. 21, R. 58; for instance, if it appears that the plaintiff is not the 16 annas landlord of the tenure or holding or that that suit was in respect of a portion of a holding or tenure or that rents for two or more holdings or tenures had been claimed in one and the same suit, the claim is entertainable; but if the decree is a rent decree but against a wrong person the claim is barred. Though sometimes it may be difficult to distinguish between cases in which O. 21, R. 58 is applicable and where it is not, the distinction is there and can be found out for all practical purposes.

The learned advocate for the opposite party contended that these cases are no longer good law in view of the decision of their Lordships of the Privy Council in 34 C W N 821.[5] In my opinion the Privy Council decision does not in the least affect the decisions which I have already cited. The question came before their Lordships in a substantive suit instituted for a declaration that the decree was not binding as it was not a rent decree. It was contended that the suit itself was barred under S. 170, Ben. Ten. Act. Their Lordships referring to S. 170 observed that that section bars the investigation of the claim in the course of the execution proceeding but not the suit. In my opinion this decision instead of helping the opposite party is against them. Their Lordships say:

> Reliance has been placed by counsel for the appellants upon S. 170, Tenancy Act, which makes Ss. 278 to 283, Civil P. C. of 1882, (now O. 21, Rr. 58 to 63 of the Code of 1908) inapplicable to a tenure attached in execution of a decree for arrears of rent. The effect of this provision is that there can be no investigation in execution proceedings held under Chap. 14, Tenancy Act, of claims by third parties to an interest in the tenure; but it does not in their Lordships' opinion bar a substantive suit such as that filed by the respondents.

The learned advocate relied on the word 'object' which occurs later in the judgment

1. Amrita Lal Bose v. Nemai Chand Mukhopadhya, (1901) 28 Cal 382=5 C W N 474 (F B).
2. Deonandan Prasad v. Pirthi Narayan, A I R 1933 Pat 32=142 I C 40=11 Pat 790=13 P L T 643.
3. Dwarka Singh v. Nema Singh, A I R 1929 Pat 195=117 I C 203=10 P L T 118.
4. Surpat Singh v. Shital Singh, A I R 1936 Pat 480=162 I C 805=15 Pat 614=17 P L T 385.
5. Jitendra Nath Ghose v. Monmohan Ghose, A I R 1930 P C 193=126 I C 422=57 I A 214=58 Cal 301=34 C W N 821 (P C).

of their Lordships. The passage in which the word occurs runs thus :

> If a landlord seeks to use the machinery for recovery of something that is not the rent, to the prejudice of a third party on whom the decree is not binding, it would be a manifest injustice to deny him the right to object. It would require very clear words in the Act to induce their Lordships to impose this penalty upon him.

This passage occurs in the same paragraph which begins with the sentence I have quoted before. It is obvious that their Lordships were referring to the right to bring a suit and not to the right to file objection under O. 21, R. 58. The word 'object' in their Lordships' decision clearly means objecting to the sale by means of a separate suit. In my opinion, therefore, as I have said, the Privy Council decision does not in the least take away the binding nature of the decisions of this Court.

The next contention of the learned advocate was that the decree was not a rent decree on account of the fact that it is in respect of half of the holding. No doubt as the suit was originally instituted only half of the tenure was said to belong to Subasni, the other half being that of Mt. Nanhuka Kuer and Ram Chandra. But the plaint was amended and the suit became a suit for the tenure held by Subasni alone, that is to say, the half of the original tenure became a complete tenure by splitting up of the tenure into two distinct and separate tenures. It was on the basis of this amended plaint that the decree was based. In my opinion it cannot be held to be a simple money decree on this ground. Under these circumstances I think the order of the learned Munsif maintaining the claim of the opposite party under O. 21, R. 58 which was clearly barred under S. 170, Ben. Ten. Act, was without jurisdiction. I would, therefore, allow this application and set aside the order. The petitioner will be entitled to costs from the opposite party. Hearing fee one gold mohur.

Madan, J.—I agree.

K.B./A.L. *Application allowed.*

A. I. R. 1937 Patna 280

WORT AND DHAVLE, JJ.

Joti Lal Shah and *others*—Defendants—Appellants.

v.

Beni Madho Prasad Singh and *others*, Plaintiffs and *others*, Defendants — Respondents.

Appeal No. 100 of 1933, Decided on 4th February 1937, from original decree of Sub-Judge, Saran, D/- 26th November 1932.

(a) Transfer of Property Act (1882), S. 6—Agreement by one reversioner with another to sell his interest in estate or not to claim estate for certain sum to be paid annually—Agreement is unenforceable as dealing with mere spes successionis.

An agreement by which one reversioner sells his interest in the estate to another reversioner in consideration of a payment of certain sum annually to him or an undertaking by him in consideration of that payment not to make a claim to the estate is an agreement dealing with a mere *spes successionis* and therefore unenforceable : *21 All 71 (P C)* and *A I R 1917 P C 95, Ref.*

[P 282 C 2]

(b) Family Arrangement — Agreement between only two members of family either to convey or to relinquish future right—Agreement is unenforceable—Agreement not acted upon when succession opened—Party is not estopped from bringing action for his share.

An agreement between only two members of the family, either to convey or to relinquish the future reversionary right is unenforceable. Such agreement when not acted upon when the succession opens on the death of the widow does not estop a party from bringing an action for his share in the property : *Case law discussed.*

[P 284 C 1, 2; P 285 C 1]

S. N. Dutt—for Appellants.

B. P. Sinha—for Respondents.

Wort, J.—This is the defendants' appeal. It arises out of an action by the plaintiff-respondents who being already in possession of 8 annas interest in a property known as the Amnour estate, claimed the remaining 8 annas from the defendants. Plaintiff 1 is the son of Tejpratap Singh. The contesting defendants 2 to 5 are the transferees in respect of certain mauzas and mortgagees in respect of others from Tinkauri, defendant 1. The relief claimed in the plaint is that

> it be adjudged by the Court that properties in dispute by virtue of the family arrangement mentioned. . . belong to the plaintiff, and defendant 1 has no right or title or subsisting right or title to any portion of the estate,

and there was also a claim for possession. One Krishna Bahadur Singh was the last male holder and proprietor of the estate, apart from the parties to this action. He

died on 17th October 1898, leaving him surviving his widow Bahuria Devapati Kuer only, there being no issue of the marriage. After Krishna Bahadur Singh's death Devapati Kuer went into possession of the estate. It is not disputed that on her death Tejpratap Singh, the father of the plaintiff, and Tinkauri Singh, defendant 1, became entitled to the estate to the extent of 8 annas each. The claim put forward by the plaintiff is (without going into details at the moment) that the defendant agreed, in consideration of a payment to him by Tejpratap Singh of the sum of Rs. 2,400 per annum, to make no claim to the estate on the death of the widow. It will be necessary to consider later, in some detail, the actual terms of the agreement in so far as they have been proved in this case. The agreement is alleged to have been made in the following circumstances. In the first place from the genealogical table attached to the plaint (which is admitted by the defendants) it will be seen that the common ancestor of Tejpratap and Tinkauri was one Dalip Singh. By the second wife of Dalip Singh there were four sons. Tinkauri is the great-grandson of the second of these sons Debidut Singh, and Tejpratap is the great-grandson of the fourth of these sons, Kashidut Singh.

Krishna Bahadur Singh having died in October 1898 as already stated, in January 1899 his widow Bahuria Devapati Kuer propounded a will under which she was to have an absolute estate in the property in dispute. Ultimately this will was found to be a forgery. Another will was propounded by one Motiraj Kuer as guardian of her son Harmadho Prasad Singh. Harmadho it may be stated descended from the youngest of the four sons of Dalip Singh to whom I have referred, and was the nephew of Tejpratap Singh. The petition of Motiraj Kuer was dated 6th January 1899. To the petition of Bahuria Devapati Kuer, five persons filed caveats: Tejpratap Singh, Tinkauri Singh, Mt. Motiraj Kuer, Raghubar Singh and Dundbahadur Singh. The case of the plaintiff is that his father Tejpratap was comparatively well off whereas Tinkauri was a schoolmaster in receipt of a very small salary, and being poor was unable or unwilling to jeopardize such property as he possessed by fighting the litigation in connexion with the will, and therefore made the agreement alleged. It is said by the plaintiff as an explanation of the appearance of Tinkauri's name in many of the proceedings in the litigation following upon the death of Krishna Bahadur, that the agreement between the parties was that Tinkauri should lend his name, although taking no active part in the proceedings. Exactly what were the terms of the agreement relied upon by the plaintiff as the basis of this action it is difficult to state. It is set out in para. 3 and again referred to in para. 9 of the plaint. The substance is that in the circumstances to which I have referred Tinkauri was not to spend any money on the litigation but the expenses were to be borne entirely by Tejpratap; that Tejpratap would protect Tinkauri in Court in proceedings which the lady propounding the will might take against him; that Tinkauri would be reimbursed if his properties were in any way affected on account of the litigation; but that the fruits of the litigation with the widow would go entirely to Tejpratap Singh. It was agreed that if the litigation turned out successfully the monetary allowance to be made to Tinkauri would be Rs. 2,400 per annum. The reference to the agreement in para. 9 is that Tinkauri would have nothing to do with the expenses of the litigation and that there was a corresponding agreement that he should have no interest in the estate other than the allowance referred to. This agreement is described by the plaintiff, as we have seen in the relief portion of his plaint, as a family arrangement.

There were at least five persons who put forward by their opposition to the will some sort of claim or interest in the estate. It is perhaps material to repeat what I have said already that the admitted position was that Tejpratap and Tinkauri were the reversioners to the extent of 8 annas each and that other parties, excepting so far as they may have been members of a joint family of which Tejpratap was the head, had no interest in the estate. The learned Judge in the Court below has come to the conclusion that the agreement was made and that the parties having now acted upon it, Tinkauri is estopped from claiming a share in the estate. Tejpratap is dead and the oral evidence which has been accepted by the Judge, is in so far as the plaintiff is concerned, evidence of persons who attempt to prove that they were present when this agreement was entered into. The

evidence on the part of the defendant is of course a denial that any such agreement was arrived at. The Judge has pointed out in the course of his judgment that the oral evidence is open to criticism, but there are certain circumstances to which he refers which in his opinion corroborate the story of the plaintiff. So far as the credibility of the witnesses is concerned, the Judge has definitely come to the conclusion that Tinkauri is an unreliable witness—unrealiable that is to say in material particulars. More especially does he criticise Tinkauri in his statement as to the expenditure which he alleges he made in the course of the litigation and in payment of a part of a decree which the Mussamat obtained against the parties in execution of a decree for costs. I agree with the learned Judge in the Court below that the oral evidence is open to the most serious criticism and the circumstances upon which the respective parties rely to corroborate their own evidence suffers in many instances from the infirmity of being equivocal. Documents are relied upon by both parties, in many cases for the purpose of contradicting the statements of witnesses and in a very large number of instances, in the majority I might say, the apparent contradictions have not been expressly put to the witness whom it is sought to contradict. In my opinion the adoption of this procedure is very often deliberate, it being wrongly supposed that the party has a greater scope in his argument in a Court of appeal.

In so far as the witnesses have had no opportunity to give an explanation of apparent contradictions, the documents relied upon in my opinion are of no avail to the party relying upon them. The most serious comment in the first place is that this alleged agreement, dealing as it did with a property of considerable value, was not put into writing. The estate is alleged to be of the value of several lakhs of rupees. Before dealing with the oral evidence and the arguments on the part of the respective parties certain facts regarding this litigation had better be stated. On 26th April 1899 the probate proceedings of Devapati Kuer were compromised. On the same day the application for probate of the other will by Motiraj Kuer was also settled. All the parties who had entered caveats were parties to the compromise of Devapati Kuer's petition. The substance of the compromise was that she gave up her claim under the will. On 7th of September 1899 Devapati Kuer filed a review petition making certain allegations as regards the compromise. This was opposed by Tejpratap and Tinkauri, and on 16th June 1900 the application was dismissed. Then on 16th November of the following year Devapati Kuer brought a suit to set aside the compromise, which action succeeded and on 28th February 1903 the decree in the compromise was set aside. In 1905 the appeal to the High Court was dismissed and then Devapati Kuer put in execution a decree for costs amounting to approximately Rupees 6,000. Ten years later, that is in 1915 Devapati Kuer revived the probate proceedings, but the Court pronounced against the will, and by a judgment dated 24th May 1916 came to the conclusion that the will propounded was a forgery. An appeal to the High Court also failed. On 20th September 1922 Devapati Kuer died.

The parties rely in support of their respective cases upon the circumstances which existed and the events which took place after the death of Krishna Bahadur Singh. The plaintiffs more particularly rely in support of their case, that such an agreement was in fact made that all the expenditure incurred during the litigation referred to above was met by Tejpratap. It is also contended that after the death of the widow Tejpratap went into exclusive possession as the Judge in the Court below has held. This matter will be referred to in greater detail later. (His Lordship then discussed the oral evidence and proceeded.) It is not disputed that the agreement alleged in the plaint is unenforceable. If it be taken to be an agreement by which Tinkauri sold his 8 annas interest in the estate in consideration of a payment of Rs. 2,400 per annum, or an undertaking by him in consideration of that payment not to make a claim to the estate, it was an agreement dealing with a mere *spes successionis* and therefore unenforceable : *see* S. 6, T. P. Act, also the decision in 25 I A 183[1] and 45 I A 35[2] at p. 39. Again as it was an agreement purporting to deal with immoveable

1. Sham Sunder Lal v. Achhankunwar, (1899) 21 All 71=25 I A 183=7 Sar 417 (P C).
2. Amrit Narayan Singh v. Gaya Singh, A I R 1917 P C 95=44 I C 408=45 I A 35=45 Cal 590 (P C).

property, it is not enforceable not being in writing registered in conformity with the provisions of the Transfer of Property Act and the Registration Act. As a mere agreement and not as a transfer, no action for specific performance with regard to such an agreement is maintainable as it is hopelessly barred by limitation. If the matter ended there, it is not seriously contended by the respondents that the present action could be maintained or that the defendant was estopped as the learned Judge has held him to be.

It was in those circumstances that Mr. Sinha was forced into contending that either the agreement of 1899 implemented in 1922 or a new agreement of 1922 upon which the parties went into possession, was in the nature of a family arrangement and that having been acted upon by the defendant he was estopped as the learned Judge has held him to be. Mere estoppel would not assist the plaintiffs; the defendant would be estopped from asserting that no agreement had been made. But even if such an agreement is proved, it is unenforceable as I have stated. It cannot be said, to be a family arrangement as many of the conditions of a family arrangement are absent. At most it was an arrangement made between two out of a large number of contesting members of a family, not for the purpose of settling a family dispute but rather to facilitate the fighting out of a family dispute by some members who are now admittedly entitled to the property, against those who were at that time making claims to shares in that property. Had Tejpratap gone into possession of the whole estate in pursuance of an arrangement arrived at by all the contesting members including the widow, the position might have been as the Judge has held. Incidentally the position which Mr. Sinha now takes up that it was a new agreement entered into in 1922, is quite untenable, as the evidence of what took place at the sradh ceremony is against the contention that any new arrangement was made at that time. The question of possession in pursuance of the agreement, alleged to have been affirmed in 1922, becomes of the utmost importance as it is upon that footing that the respondents support their case. They contend that whether there was an agreement of 1899 or a new agreement of 1922, the parties having acted upon it the question cannot now be re-opened

The widow died as we know in September 1922. There was another person who was contesting his right to this property and that was Dund Bahadur Singh, one of the descendants of Babu Dalip Singh by his first wife. He made a claim to have his name registered with one Harihar Prasad Singh to three-fifths share of Tauzi No. 3311, a part of the estate which Devapati Kuer had left. He had applied in the Land Registration Department, and in the early months of 1923 his case was pending in that Court. It was finally disposed of on 4th June 1923 against him. It cannot be disputed that Tejpratap and Tinkauri joined forces to fight Dund Bahadur; but immediately the latter's case was disposed of, the controversy between the parties to this litigation commenced. Tinkauri made his application to the Land Registration Department with regard to eleven mahals and on the 31st of March of the following year it was ordered that Tinkauri and Tejpratap should have their names recorded jointly. But the plaintiff's case is that he was in exclusive possession, and in support of that case he produced a large number of receipts showing payment of rent to him by the thicadars who were in possession of the greater part of the estate. That he was collecting rents from the thicadars is supported to some extent by the contention of Tinkauri, that the thicadars were in collusion with Tejpratap. Tinkauri supported his case by the production of a number of rent receipts showing payment of rent to him with regard to a very small part of the estate by one cultivating tenant.

But that this does not conclude the matter is, I think, shown by the statements which Tejpratap made whilst contesting Dund Bahadur's application to have his name registered with regard to eleven mahals. He there stated as we have seen that he and Tinkauri had been in possession of the entire estate since the death of the widow. The statement made by Tejpratap is not the only matter which supports the plaintiffs' contention that Tejpratap was not in exclusive possession after the death of the widow. In an action brought by Tinkauri against Hira Prasad and Tejpratap (judgment whereof was given on the 22nd of December 1926) Tinkauri recovered from Tejpratap the sum of Rs. 4,579.8.6 as rent for the years 1330, 1331 and 1332 Fs., i. e., 1923, 1924

and 1925. Now the agricultural year for 1330 would start in September 1922, the month of the death of the widow. This claim represented Tinkauri's eight-annas share in the rent collected by Tejpratap from the thicadars. The action was brought against the thicadars and against Tejpratap, Tinkauri seeking to recover the amount claimed from the thicadars or in the alternative from Tejpratap. As Tejpratap had been collecting the rent from the thicadars judgment was obtained against him. There are several comments to be made with regard to this action. A complete defence to the plaintiffs' claim would have been the alleged agreement, but no such suggestion was made by way of defence. The respondents endeavoured to explain the judgment and the absence of this defence on the footing that it was barred by S. 60, Ben. Ten. Act. Whatever might have been the effect of that section on the defence of the thicadars, it had no application to the case of Tejpratap. Although it is a common practice not to go into questions of what are called title in rent cases, the action could not be described as an action for rent as against Tejpratap; and, had the issue been raised, the Court would have been bound to decide the point. As the Judge trying that suit was a Subordinate Judge who would have the jurisdiction in this case, it is difficult to see what answer there is to the appellants' contention that this case is concluded as res judicata. In any event it seems to me to be conclusive on one point and that is that Tejpratap was not allowed to go into undisputed possession of the whole sixteen-annas of the estate.

The position seems to be this. The arrangement of 1899 was at the most an agreement between two members of the family which is unenforceable. Whether the evidence as regards the happenings at the sradh ceremony is evidence of a new agreement arrived at then or evidence of an affirmation of the old is immaterial, as it is clear in my judgment that the parties did not act upon the agreement, that is to say, at the first possible moment, after the dispute with Dund Bahadur had been settled, the dispute between Tejpratap and Tinkauri arose. Mr. Sinha has relied upon the case in 45 I A 118,[3] but that case bears no resemblance to the one before us. It was a case in which members of a family disputed the right of a Hindu widow to succeed to a certain property. The plaintiff in the action before their Lordships of the Judicial Committee of the Privy Council had been a party to the compromise by which the estate had been divided between the contesting members of the family. Although the plaintiff did not actually go into possession of any portion of the estate, he was recognized as the adopted son of a deceased uncle and at a later stage went into possession of the property of that uncle which had been allotted to his widow under the arrangement. Some 14 years after the arrangement an action was brought claiming the property.

In the argument before their Lordships of the Judicial Committee of the Privy Council, 31 Bom 165[4] was relied upon; but Sir John Edge, delivering the opinion of the Judicial Committee of the Privy Council stated that that decision had no bearing on the case before the Board as there was no question in the case before the Board of a conveyance of any future right or expectancy or of an agreement to convey any future right or expectancy or any agreement to relinquish any future right or expectancy. The question was whether the plaintiff did, by his acts in the compromise, debar himself from claiming as a reversioner. The Court decided that he was now estopped and his action failed. That case is distinguishable from the present for the reasons which I have already given. Here the plaintiffs are seeking to enforce an agreement either an agreement to convey or an agreement to relinquish the future right, which agreement was not acted upon when the succession opened on the death of the widow. The cases in 50 I A 69[5] and 50 I A 239[6] were referred to by the appellants. Those cases are not strictly in point excepting so far as the latter re-stated the proposition laid down in the former case that an expectancy is not an interest capable of transfer. Mr. Sinha has also relied upon a number of English cases including 2 Ch A

3. Kanhai Lal v. Brijlal, A I R 1918 P C 70=47 I C 207=45 I A 118=40 All 487 (P C).

4. Sumsuddin v. Abdul, (1907) 31 Bom 165=8 Bom L R 781.

5. Harnath Kuer v. Indar Bahadur Singh, A I R 1922 P C 403=71 I C 629=50 I A 69=45 All 179=26 O C 223 (P C).

6. Ananda Mohan Roy v. Gour Mohan Mullick, A I R 1923 P C 189=74 I C 499=50 I A 239 =50 Cal 929 (P C).

294.[7] That case however bears no resemblance to the present. The learned Lord Chancellor delivering the judgment there stated that not only the two brothers had been parties to the division of the property there in dispute but the widow also, and an agreement which had been acted upon for a long number of years could not be disturbed. In my judgment even if it be held that an agreement was arrived at between Tejpratap and Tinkauri, either in 1899 or in 1922, it is an agreement which cannot be enforced, and, as the parties did not go into possession on the footing of the arrangement, the defendant is not estopped in this action.

There was another matter relied upon by the appellants. The plaintiff-respondent in this appeal compromised with defendant 1. By this compromise Tinkauri's right to 8 annas in the property in dispute is admitted. It is contended therefore that as Tinkauri's right is recognized the compromise in effect admits the title of defendants 2 to 5 as assignees of Tinkauri. The answer in my opinion is that there is no admission in the compromise that the agreement alleged in the action was not made. The title of defendants 2 to 5 depends upon the failure of the plaintiff to establish the agreement, whereas the title of defendant 1 is now based on the agreement of compromise. However for the reasons already given the appeal succeeds and the plaintiffs' claim is dismissed as against these appellants with costs throughout.

Dhavle, J. — I agree. The terms of the family arrangement under which the plaintiffs claim the moiety of the Amnaur estate that in default of such an arrangement it undoubtedly fell to Tinkauri's share on the death of the Bahuria (Devapati Koer) have not been given with any precision either in the plaint or in the evidence. Para. 4 of the plaint speaks of Tej Pratap causing a house to be built for Tinkauri "on account of proximity of mutual relationship caused by the family settlement" set out in the previous paragraph. It has been found by the lower Court that Tinkauri's story of how his house stands on a piece of land which he obtained by exchange from Tej Pratap is a myth and that the plaintiffs' case in this connexion is nearer the truth. This finding rests on good evidence and cannot be rejected. But Mr. Dutt for the appellants has argued that providing Tinkauri with a house on Tej Pratap's land was no part of the family settlement. The circumstance is small in itself, but the argument has been rendered possible by the failure of the plaintiffs to set out the family settlement fully in para. 3 of the plaint, so much so that we have to turn to para. 9 to find out what it was that Tinkauri agreed to do in return for Tej Pratap carrying on the litigation with the Bahuria on behalf of both of them, namely

> to have no interest in the estate left by Babu Krishna Bahadur Singh except the allowance of Rs. 2,400 a year.

In his deposition Harmadho Prasad says that according to the agreement

> the entire estate would belong to Babu Tej Pratap and he (Babu Tinkauri) would get an allowance of Rs. 200 per month.

The difference between Tinkauri not claiming the estate and the whole estate belonging to Tej Pratap is perhaps unintended, and Tej Pratap's interpretation of that term of the agreement of family arrangement as given by Harmadho in connection with what in para. 14 of the plaint is treated as the reaffirmation and ratification of the agreement on the occasion of the sradh of the Bahuria is that Tinkauri relinquished the estate in Tej Pratap's favour at the time of the original agreement. The effect of such an agreement—involving a relinquishment in *praesenti* by a reversioner before his interest in the estate had become concrete by reason of the death of the Bahuria—will be dealt with later. The plaint does not state the month in which the agreement was made. In his deposition in the land registration proceedings of Tinkauri, Tej Pratap placed it in Aghan or Pus (corresponding roughly to December or January) of 1899, while Harmadho in his deposition places it in "Falgoon 1306 (while the first probate case was going on)." Comment has been made on this discrepancy, but it has to be remembered that Tej Pratap was only roughly giving the month about 25 years after the event and was not further cross-examined on the point. Mr. Dutt has not been able to show us that there was such effective cross examination of Harmadho on this point as to support the contention advanced before us on the ground that even by Falgoon 1306 Tinkauri had had too little to do in the proceedings to find the

7. Williams v. Williams, (1868) 2 Ch A 294=36 L J Ch 419=16 L T 42=15 W R 657.

expenditure beyond his means so as to make it likely that he would speak to Tej Pratap and enter into an agreement with him as alleged by the plaintiffs. The learned Subordinate Judge has accepted the explanation given on behalf of the plaintiffs for the agreement not being in writing. This explanation is that Tej Pratap's case as regards the genealogy would have been considerably weakened if Tinkauri had ostensibly given up the fight with the Bahuria who had set up a will to keep out the agnates, and with Dund Bahadur who claimed to be no further removed from Krishna Bahadur than Tinkauri and Tej Pratap, or if Tinkauri had executed any agreement retiring in favour of Tej Pratap. (His Lordship then examined the evidence and proceeded.) The learned Subordinate Judge has held that the agreement is legally enforceable, because

> defendant 1 having agreed not to claim any share in the estate if a certain course of conduct was adopted by Tej Pratap which Tej Pratap did adopt, he is now estopped from claiming a share in the estate.

This, however, is not the estoppel of S. 115, Evidence Act, which requires a representation of an existing fact as distinguished from a statement of something which the party does or does not intend to do. Tinkauri's agreeing not to claim a share in the estate or relinquishing his share in favour of Tej Pratap can only be regarded as a term in a contract between the parties. He had, however, at that time nothing beyond a *spes successionis* in the estate which the Bahuria was to hold for her life; he had nothing to assign or to relinquish or even to transmit to his heirs—no "right which could form the subject of bargain": 45 Cal 590.[2] If it meant a transfer or relinquishment *in praesenti* the agreement was void. Even as a bargain *de futuro* a transfer or relinquishment to be effected after the estate fell in it was void: 50 Cal 929.[6] Mr. Sinha has cited 48 All 637[8] in support of the contention that notwithstanding the inalienability of the *spes successionis* there may be an estoppel against a Hindu reversioner when the succession opens on the death of the widow who holds for life. But as was explained in 45 All 339[9] the ground on which a reversioner may be precluded from assailing an alienation made by a widow is not estoppel but that something might have been done by him even before the succession opens which amounts to "an actual election to hold the deed good." We are not concerned in the present case with any alienation by a Hindu widow and an election by the reversioner to hold it good. Mr. Sinha has urged that the agreement may be supported as a family arrangement to save the estate from going out of the family. But Dunda Singh who, like Tej Pratap and Tinkauri set up a claim to the estate in the probate case, was also an agnate, claiming at that time to be no further removed from the common ancestor than Tej Pratap and Tinkauri, though it has since been found that he was one degree further removed and he was not a party to the so-called family arrangement. The Bahuria who had possession of the estate was also left out. Mr. Sinha has urged that the compromise in the first probate case to which the Bahuria, Harmadho, Tej Pratap and Tinkauri were parties, was a part of the same transaction as the agreement between Tej Pratap and Tinkauri now in question. But Dunda is still left out, and the agreement between Tej Pratap and Tinkauri is clearly a different transaction altogether from the compromise. The essence of the agreement was to fight the Bahuria and Dunda in order to keep the estate for Tej Pratap and Tinkauri, or rather for Tej Pratap alone subject to his paying Rs. 200 per month to Tinkauri and Tej Pratap and Tinkauri were not only not in possession of the estate, but did not even have any interest in it to bargain with. Mr. Sinha has referred to 40 All 487[3] and 52 Bom 1[10] as instances where reversioners on their succession were held to be precluded from claiming by reason of family arrangements before the succession opened, but in those cases there were actual dispositions of the family property, of which the reversioners had had the benefit for a number of years.

In the present case the agreement between Tinkauri and Tej Pratap did not deal with the Amnaur estate at all and was no more than an attempt to bargain with Tinkauri's *spes successionis*. It is not altogether clear from the judgment of

8. Moti Shah v. Gandharp Singh, A I R 1926 All 715=96 I C 595=48 All 637=24 A L J 873.
9. Fateh Singh v. Thakur Rukmini Rawanji Maharaj, A I R 1923 All 387=72 I C 8=45 All 339=21 A L J 235 (F B).
10. Ramgowda Annagowda v. Bhausaheb, A I R 1927 P C 227=105 I C 708 = 54 I A 396=52 Bom 1 (P C).

the learned Subordinate Judge whether it was the agreement of 1899 by itself or that agreement as re-affirmed in 1922 that he considered enforceable on the ground of estoppel. At the time of the so-called reaffirmation the Amnaur estate was vested in Tej Pratap and Tinkauri. They could now have entered into an agreement under which Tej Pratap was to keep the entire estate and Tinkauri was to receive from him Rs. 200 per month for life, which would mean a transfer of Tinkauri's moiety of the estate to Tej Pratap for an annuity of Rs. 200 a month. But it was not the case of the plaintiffs that such a new agreement was made in 1922. They claimed Tinkauri's moiety on the basis of the agreement of 1899 as re-affirmed in 1922. The agreement of 1899 was however, as I have already shown, void and would remain so notwithstanding Tinkauri saying in effect that he would adhere to it.

It was for this reason that Mr. Sinha urged that the transaction of 1922 should be treated and upheld as a new family arrangement. But that transaction was very different from a family settlement of the usual type in which there is no transfer of title involved but each party takes a share by virtue of an antecedent title which is to that extent and by way of settlement admitted by the other parties. That there was no dispute going on between Tej Pratap and Tinkauri would not preclude a family arrangement in 1922 between them : 2 Ch A 294,[7] and if they did arrive at a family arrangement, the Court will not go into such questions as, for example, inadequacy of consideration. But if Tinkauri had agreed in 1922, after a moiety of the estate had vested in him to relinquish it in favour of Tej Pratap for an annuity of Rs. 200 a month, the mere fact that they were descendants equally removed from a common ancestor and thus owners of the Amnour estate would not enable them effectively to bring about that relinquishment without a registered deed. A mere oral agreement would not by itself suffice to pass or extinguish Tinkauri's title (though the position might be different if the agreement were acted upon for a sufficiently long time), and if Tinkauri resiled from the agreement in 1923 as is the plaintiffs' case, they would have to enforce it by suing within the period of limitation to establish their title. But the present suit was instituted in 1928 and on the footing that the family arrangement entitled the plaintiffs to Tinkauri's moiety. Not only would the transaction of 1922, such as it was, thus fail to operate in law as an actual transfer or relinquishment of Tinkauri's title, but it is difficult to feel satisfied that it was acted upon.

The learned Subordinate Judge no doubt finds that from the death of the Bahuria in September 1922 to the dismissal by the Collector (on appeal) of Dund Bahadur's application for registration in the Land Registration Department in June 1923 Tej Pratap remained in sole possession of the estate. But throughout that period Tej Pratap's own case in the Courts was that he and Tinkauri were in joint possession though the management was solely in his hands. The learned Subordinate Judge discounts this circumstance on the ground that it was still essential for Tej Pratap "to keep Tinkauri in toe" lest his genealogical table be discredited. He has however not taken notice of the fact that in a number of suits brought in 1925 against tenants for arrears of rent from 1330 onwards Tinkauri obtained decrees for his share in the presence of Tej Pratap as a second party defendant. Tej Partap appears to have allowed these decrees to be passed in his absence, but in the suit by Hira Prasad (judgment, Ex. A B), where a decree was passed against the tenant and also a decree against Tej Pratap for the portion of the rent collected by him in excess of his share, the first two plaintiffs in the present suit appealed to the District Judge and also to the High Court without contesting Tinkauri's title to a moiety. The suit was tried by a Subordinate Judge whose decision on the question of title as between Tinkauri and Tej Pratap would, I take it, be *res judicata* in later proceedings, though the point was apparently not raised below. One of the issues framed in that suit was whether the plaintiff (Tinkauri) was entitled to recover any rent in respect of his share, and the finding was that he and Tej Pratap, defendant 2, were entitled to a moiety each. Mr. Sinha has endeavoured to get rid of the force of this decision by urging that under S. 60, Ben. Ten. Act, Tej Pratap, no less than the tenant-defendant, had no defence to the suit. But S. 60, Ben. Ten. Act, had no application so far as Tej Pratap was concerned, as Jwala

Prasad, J. observed in his judgment (my learned brother concurring):

> The suit is not a suit for rent against defendant 2 but an ordinary suit against a co-sharer for disgorging the money received by him which was due to another co-sharer.

Tej Pratap and after him the plaintiffs had a complete defence to the suit in the title they now allege, but failed to advance it, and Tinkauri got his decree against the tenant and Tej Pratap, both on a title which was not denied and possession which alone was denied. As this and other rent decrees of the period are based on Tinkauri's possession from the beginning of the agricultural year 1330, it is impossible now to hold that Tej Pratap came into actual possession of Tinkauri's moiety in the mauzas to which these rent suits relate from the death of the Bahuria which occurred about a fortnight after the beginning of that year. As regards the other part of the family arrangement under consideration, namely, the payment of an allowance of Rs. 200 a month, the learned Subordinate Judge has recorded no finding, even though the plaintiffs obtained a revisional order from the High Court enabling them to amend the plaint by an addition to the end of para. 14 that payments were made from time to time in accordance with the family arrangements and recalled Harmadho (P. W. 28) and Jagannath Tewari (P. W. 12) to give evidence on the point. Unlike the oral evidence previously recorded this evidence was taken down by the Subordinate Judge whose judgment is under appeal. He has nevertheless not taken any notice of it, and it is possible that he was not impressed by it. The evidence is manifestly none of the best. Harmadho speaks of two of the payments as being made in his presence, but these are payments of Rs. 402 and Rs. 75, amounts which bear no recognizable relation to maintenance at the agreed rate. Jagannath speaks of one payment of Rs. 200 between those two payments and there are two other entries found in the abstract, Ex. 50, proved by Harmadho as in the handwriting of Paspat Lal, P. W. 37 (who was not recalled on the ground of illness), which could obviously have been supported by much better evidence than was actually adduced; the later of these two entries is dated Asin 1331 (October 1923) and though Mr. Dutt may be right in saying that the payment must actually have been made earlier (before the rupture of June 1923), Tinkauri's receipt, which is referred to in the entry, has not been produced. None of these payments was put to Tinkauri, and if any money was paid to him, this is by no means inconsistent with his title to the moiety, the management being admittedly in the hands of Tej Pratap. My conclusion is that even if the transaction or talk of 1922 which is put forward in the plaint as a re-affirming and ratifying of the agreement of 1899 be regarded as a new family arrangement, the plaintiffs have failed to establish that it was acted upon at all. There was an open rupture with Tinkauri as soon as the contest with Dund Bahadur was over, but even during the six or eight months when Dund Bahadur's application for registration was being contested by Tej Pratap, Tej Pratap's exclusive possession is contra-indicated if not definitely disproved, nor is the receipt of Rs. 200 a month brought home to Tinkauri. It follows that Tinkauri's title to the moiety has not actually passed to the plaintiffs, and that having allowed the period of limitation for a suit for specific performance (even as of a new arrangement of 1922) to elapse, they cannot now recover either on the basis of the agreement of 1899 as re-affirmed in 1922, or on the basis of a new family arrangement made in 1922. For this reason the suit ought to have been dismissed as against these appellants and the appeal succeeds.

Mr. Dutt also urged that the lower Court ought not to have proceeded even as against the appellants to pronounce upon the agreement set up by the plaintiffs after the compromise by which they recognized the title of Tinkauri to a moiety in several mauzas of the estate. But the plaintiffs had sued to recover possession from the appellants on the ground that Tinkauri could convey nothing to them by reason of his agreement with Tej Pratap. The compromise between the plaintiffs and Tinkauri does not negative this agreement. Nor were the appellants parties to that compromise. It was thus still in issue as between the plaintiffs and the appellants whether Tinkauri had any title left after the alleged agreement with Tej Partap to convey to the appellants. Appellants' rights as against Tinkauri after the compromise in this suit were not the subject matter of the suit. There was also another reason why the compromise did not mean the end of the suit as against

the appellants. Their mortgages, we understand, are not confined to the villages in which Tinkauri gets a share under the compromise but extend also to villages wholly allotted to the plaintiffs. It was thus necessary to go into the question of the agreement of 1899 in spite of the plaintiffs' compromise with Tinkauri.

S.C./D.S. *Appeal allowed.*

A. I. R. 1937 Patna 289

MOHAMAD NOOR, J.

Bengal Nagpur Ry. Co, Ltd.—Appellant.

v.

Harijiban Iswar Pathak and *another*—Respondents.

Appeal No. 367 of 1934, Decided on 18th December 1936, from Special Sub-Judge, Chaibasa, D/- 1st November 1933.

(a) Railways Act (1890), S. 72—Risk-note B—Distinction between risk-notes in force before and after 1924.

The difference between risk-notes in force before and after 1924 is that in the previous one the railway administration was entirely absolved from responsibility for loss in case of fire, robbery from a running train or any other unforeseen event or accident ; but in other cases it was liable only if the loss was brought about by the wilful neglect of the employees of the administration. In the form now in force the words 'wilful neglect' have been changed into 'misconduct' and the railway administration is liable in case of loss by fire also provided that it is due to the misconduct of their officials. In cases other than loss by fire or robbery a duty is cast upon the railway administration to give evidence as to how they dealt with the consignment. [P 290 C 1, 2]

(b) Practice—Second appeal — Finding of fact cannot be questioned in second appeal if supported by evidence.

A finding of fact arrived at by the first appellate Court is final if there is evidence on record to support it but such finding can be questioned in second appeal, if there is no evidence to support it and it can be interfered with in second appeal. [P 290 C 2]

(c) Railways—Misconduct—Inference from facts is question of law.

The question whether misconduct can be inferred from a set of facts is a question of law : *A I R 1916 Cal 647* ; *Metropolitan Ry. Co.* v. *Jackson*, (*1873*) *3 A C 193* and *A I R 1928 Lah 837*, *Rel. on* ; *Vaughan* v. *Menlove*, (*1837*) *3 Bing* (*N C*) *468*, *Disting.* [P 292 C 1]

(d) Railways Act (1890), S. 72—Misconduct—Risk-note B—Goods destroyed by fire—Suit for damages—Railway officials taking steps to extinguish fire—Steps prudent in their opinion—Their conduct not unbusinesslike—Misconduct on part of railway officials not proved by plaintiff—Railway administration held not liable for loss occasioned by fire.

A consignment of wood under risk-note in form B was destroyed by fire while in transit. In a suit brought by the consignor for damages it was found that the servants of the railway company soon after the discovery of the fire had shifted the two trucks carrying wood to a siding near a tank and had engaged a number of men to pour water upon the burning logs by buckets but they were unable to save them from being burnt. It was contended that failure of railway servants to unfasten the chain between the two trucks or unload the truck or use a hosepipe was misconduct on their part and hence they were liable :

Held : that in the circumstances nobody could have said that the unfastening of the chain and attempting to unload the truck or using a hosepipe would not have been as useless as the pouring of water by means of buckets. Unless the conduct of the officials was unbusinesslike misconduct could not be inferred. Because the railway officials took one step rather than the other they could not be said to be guilty of misconduct. They did whatever they thought prudent at that time to do, and the question whether some other thing could have been done was absolutely immaterial, as there was nothing to show that those other steps would have been efficacious : *A I R 1933 Cal 742*; *A I R 1936 Cal 24*; *A I R 1930 Pat 283* and *A I R 1936 Pat 84*, *Rel. on* ; *A I R 1929 Cal 654* and *Musgrave* v. *Pandelis*, (*1919*) *2 K B 43*, *Disting.* [P 292 C 2]

S. M. Mullick and *N. C. Ghose*—for Appellant.

G. C. Mukharji—for Respondents.

Judgment.—This second appeal is by the Bengal Nagpur Railway Company against an appellate decree of the Subordinate Judge of Singhbhum allowing the plaintiff-respondent damages for loss by fire of a consignment of sal wood despatched from Sonua Railway Station to Torang both being on the B. N Ry. The plaintiff made over Sonua Railway Station 94 sal logs to the appellant company for despatch to Torang Railway Station. Thirteen of them were, however, returned to the plaintiff to adjust the load of the train, and the remaining 81 which were loaded on two trucks reached Torang. It was discovered then that somehow or other, which is not very clear, the logs had caught fire. According to the defendant company attempts were made to extinguish it but to no effect, and all the 81 logs were burnt to ashes and the trucks on which they were loaded were also partly destroyed. The consignment was covered by a risk-note in form B. On these facts the plaintiff claimed damages from the defendant company. Various pleas were raised in bar of the suit. The trial Court accepted the pleas of the

defendant and dismissed the suit. On appeal by the plaintiff the learned Subordinate Judge has passed a modified decree only to the extent to which according to his finding the loss was due to the misconduct of the employees of the defendant. The defendant company has preferred this second appeal. The only point urged on behalf of the appellant has been that there was no evidence on which the learned Judge could come to a finding of misconduct by the railway employees. In order to appreciate this point it is necessary to refer to the risk-note in question which is in force from 1924. It will be useful if I give the difference between the risk-note which was in force prior to 1924 and the one which is in force now in order to appreciate the change in the position of the responsibility of the railway in case a consignment is destroyed by fire. The old risk-note made the railway administration responsible for loss of a consignment

except for the loss of a complete consignment or one or more complete packages forming part of a consignment due to the wilful neglect of the railway administration or to theft, etc. etc.

There was a proviso to the effect that the term 'wilful neglect' "be not held to include fire, robbery from a running train or any other unforeseen event or accident". The risk-note which came into force in 1924 exonerates the administration

for any loss, destruction or deterioration of, or damage to the consignment from any cause whatever except upon proof that such loss, destruction, deterioration or damage arose from the misconduct of the railway administration.

Then there are two provisos. Only one of them is relevant to this case. It is this. In case of

non-delivery of the whole of the consignment or of the whole of one or more packages forming part of the consignment packed in accordance with the instructions laid down in the Tariff, or where there are no such instructions, protected otherwise than by paper or other packing readily removable by hand and fully addressed, where such non delivery is not due to accidents to trains or to fire, the railway administration shall be bound to disclose to the consignor how the consignment was dealt with throughout the time it was in its possession or control and, if necessary, to give evidence thereof before the consignor is called upon to prove misconduct, but if misconduct on the part of the Railway Administration or its servants cannot be fairly inferred from such evidence, the burden of proving such misconduct shall lie upon the consignor.

The difference between the two risk-notes is this. In the previous one the railway administration was entirely absolved from responsibility for loss in case of fire, robbery from a running train or any other unforeseen event or accident; but in other cases it was liable only if the loss was brought about by the wilful neglect of the employees of the administration. In the form now in force the words 'wilful neglect' have been changed into 'misconduct' and the railway administration is liable in case of loss by fire also provided that it is due to the misconduct of their officials. In cases other than loss by fire or robbery a duty is cast upon the railway administration to give evidence as to how they dealt with the consignment. It is clear, therefore, that in this case the railway administration was not bound to adduce any evidence whatsoever as to how they dealt with the consignment. The onus was entirely upon the plaintiff. But the railway administration has chosen to lead evidence to prove not the origin of the fire but the steps their employees took to extinguish it. In fact, there is no evidence of any misconduct by the railway on behalf of the plaintiff. It has, however been conceded that if the railway administration has chosen to adduce evidence and if from such evidence misconduct of the officials of the defendant can be inferred, the plaintiff is entitled to succeed. Therefore, the main question in this case is whether there is anything in the evidence adduced by the defendant company from which misconduct of their officials can be inferred. If so, the appeal must fail, because, if there is any evidence from which misconduct can be inferred the decision of the lower appellate Court is final. If, on the other hand, there is no such evidence, the appeal must succeed, as a finding based upon no evidence is wrong in law.

The gist of the evidence adduced on behalf of the defendant company is that when the train which carried the two trucks loaded with the plaintiff's consignment reached Torang smoke was seen coming out of the logs by a jamadar. The driver and the guard of the train were informed and it was alleged by the witnesses of the defendant that a hosepipe was used to extinguish the fire, but without success. The two trucks were detached from the train and carried to a siding near about a tank and there attempts were made to extinguish the fire, but as the wind was high the attempt was unsuccessful and the consignment along with the trucks was burnt down.

The learned Subordinate Judge has held the officials of the defendant guilty of misconduct by holding : (1) that the story of the defendant's witnesses that a hosepipe was used was not true ; (2) that they did not unfasten the iron chain by which the logs of wood were tied to the trucks; and that had this been done a portion of the consignment would have been saved ; and (3) that the fire was noticed in one of the trucks only and that the station staff ought to have detached that truck only and not both of them. He has definitely not said so, but he seems to be of the view that as the two trucks were kept together the fire of one extended to the other and destroyed the logs loaded on it as well. These are the three acts of omission and commission by the railway officials on the basis of which he has held the railway administration partly responsible for the loss. Now the finding of the learned Subordinate Judge that no hosepipe was used is a finding of fact and is conclusive in second appeal. But it has been argued on behalf of the appellant that even assuming that no hosepipe was used, its omission does not constitute misconduct. It has further been contended that there is no evidence to show that the iron chain could be unfastened without risk of life or that its unfastening would have saved the consignment. It is urged that there is no evidence on the record to show that the fire in the second truck was not from before and that it caught fire because it was kept by the side of the first truck.

It is necessary, therefore, to examine the evidence of the witnesses examined on behalf of the defendant company on these two points not for deciding whether they are sufficient for the findings of the learned Subordinate Judge (of which he was the final judge) but to see whether there is any evidence at all to support his findings that : (1) only one wagon was found to be on fire and the other one caught it on account of its proximity to the first, and that (2) the logs could have been unloaded by unfastening the chain and thereby the extent of the damage could have been reduced. (His Lordship then examined the evidence and the judgment proceeded.) I am, therefore, clearly of opinion that there is absolutely no evidence on which the learned Subordinate Judge could base his finding that only one wagon was on fire and the other caught fire on account of its proximity to the first, and that the logs could have been unloaded by unfastening the chain. Nor is there any material to hold that the mere unfastening of the chain could have saved the logs without their being unloaded. The learned advocate who appeared on behalf of the plaintiff suggested that if the chain would have been unhooked on one side only a number of logs would have fallen down from the trucks. I am unable to hold so on pure imagination. There is absolutely no material on the record to show how the logs were loaded and whether any of them, and if so, how many were above the walls of the truck, or that they would have fallen down themselves by simply unhooking the chain.

The learned advocate, however, contended that if the final Court of fact has drawn inferences from the evidence of the witnesses the findings cannot be questioned in second appeal. As I have said before, had there been any evidence on the record on which the findings can be supported they would have been final, but there is no evidence to support them.

Assuming, however, that the findings of the learned Subordinate Judge that the chain could have been unfastened and this would have saved some of the logs from destruction, and that the fire in the second truck broke out later and could have been avoided had that truck been separated from the first one which was on fire, can be accepted and his further finding, which is final, that, hosepipe was not used is given effect to, the question still remains whether these constitute misconduct on the part of the railway company. In 60 Cal 996[1] it was held by the Calcutta High Court that when misconduct on the part of the railway administration's servants is alleged it must be shown that the servants were actually responsible for the guilt or wrongful act; knowledge on the part of the railway administration or of their servants that one was likely to cause injury is not sufficient. Misconduct is not necessarily established by proving even culpable negligence; it is something opposed to accident and negligence and is the intentional doing of something which the doer knows to be wrong or which he does recklessly not caring what the result may be. This view was adopted in the

1. M. & S. M. Ry. Co. v. Sunderji Kalidas, A I R 1933 Cal 742=147 I C 752=60 Cal 996=57 C L J 281.

same Court in 61 C L J 526[2] In this Court in 11 P L T 161[3] it was held that the mere omission of the railway company to lock one side of the wagon and simply sealing it was not a misconduct. It was also held that in any case misconduct is not less than "wilful neglect". In 16 P L T 887[4] Wort, J. held that there is no difference between "misconduct" and "wilful misconduct" a term used in England. "Wilful" expresses the act of the will of the person who is guilty of misconduct, but "misconduct", must always have that condition attached to it. In some cases, however, distinction has been drawn between "wilful misconduct" and "misconduct". The latter has been held to mean 'unbusiness like conduct'. Be that as it may, the question whether misconduct can be inferred from a set of facts is a question of law. Mookerjee, J. in 21 C L J 565[5] quoted the observations of Lord Cairns in (1873) 3 A C 193[6]:

> It is impossible to lay down any rule except that which at the outset I referred to, namely that from any given state of facts the Judge must say whether negligence can legitimately be inferred and the jury whether it ought to be inferred.

The learned advocate for the respondent has relied upon the case in 132 E R 490,[7] for the proposition that the decision of the question of neglect is one of fact and not of law. In that case neglect was established and the question was whether it was such that a prudent man could not be guilty of it; and it was held that this question was properly left to the jury. In this case the very question of misconduct is in issue. In 10 Lah 329[8] it was held that the question whether facts established amount to wilful negligence is a question of law and not of fact. The question therefore is, whether the omission to apply a hose, to unfasten the chain and keeping a truck in the proximity of one which was on fire are such from which misconduct can be legitimately inferred. Now according to the defence evidence, which seems to have been accepted by the learned Subordinate Judge, the servants of the railway company soon after the discovery of fire shifted the two trucks, took them to a siding and engaged a number of men to pour water upon the burning logs by buckets, but they were unable to save them from being burnt down. It is easy at this stage to say why a particular act was not done. Nobody can say that the unfastening of the chain and attempting to unload the truck or using hosepipe would not have been as useless as the pouring of water by means of buckets. Unless the conduct of the officials was unbusinesslike, misconduct cannot be inferred. Because the railway officials took one step rather than the other they cannot be said to be guilty of misconduct. They did whatever they thought prudent at that time to do, and the question whether some other thing could have been done is absolutely immaterial, as there is nothing to show those other steps would have been efficacious.

The learned advocate for the respondent has relied upon a Single Judge decision in 49 C L J 551[9] for the proposition that neglect is good evidence of misconduct; but in this case there is in my opinion no neglect. It is, as I have said, a question of taking one step to extinguish the fire instead of the other. Even if the officials erred in their judgment it is not a case of neglect much less of misconduct. He further relied upon the case (1919) in 2 K B 43[10] and contended that the omission to use a hosepipe, to detach one wagon from another, and to unfasten the chain amounts to neglect; but in that case there were clear materials on which the Court found that the fire which originally started would have harmlessly burnt itself out had the servant of the defendant turned off the cap leading from the petrol tank to the carburetter. Here it is not a case of taking no steps at all. Some step was taken and it was not unreasonable nor unbusi-

2. Banwari Lal Jagannath Firm v. B. B. & C. I. Ry. Co., A I R 1936 Cal 24=160 I C 728=61 C L J 526.
3. Durgadutt Sriram Firm v Secretary of State, A I R 1930 Pat 283=124 I C 833=9 Pat 733 =11 P L T 161.
4. Naurang Lal v. B. B & C. I. Ry. Co., A I R 1936 Pat 84=160 I C 1086=16 P L T 887.
5. Akhil Chandra Shaha v. India General Navigation and Ry. Co., Ltd., A I R 1916 Cal 647 =29 I C 260=21 C L J 565.
6. Metropolitan Ry. Co. v. Jackson, (1873) 3 A C 193=47 L J C P 303=37 L T 679=26 W R 175.
7. Vaughan v. Menlove, (1837) 3 Bing (N C) 468 =132 E R 490=4 Scott 244=1 Jur 215=3 Hodges 51=6 L J C P 92.
8. Secretary of State v. Ghanaya Lal Srikishan, A I R 1928 Lah 837=111 I C 523=10 Lah 329.
9. B N. Ry. Co., Ltd. v. Moolji Sicka & Co., A I R 1929 Cal 654=122 I C 625=49 C L J 551.
10. Musgrove v. Pandelis, (1919) 2 K B 43=88 L J K B 915=120 L T 601=35 T L R 299= 63 S J 353.

nesslike. In my opinion, therefore, the plaintiffs have not made out a case for damages. I allow the appeal, set aside the decree of the learned Subordinate Judge and restore that of the trial Court. The appellant will get costs of this Court as well as of the Court of appeal below.

K.B./A.L. *Appeal allowed.*

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* A. I. R. 1937 Patna 293

WORT, J.

Peninsular Locomotive Co., Ltd.—Applicant.

v.

H. Langham Reed and *others* — Opposite Parties.

Company Act Case No. 63 of 1930, Decided on 10th November 1936.

*** (a) Company — Winding up — Directors entering into contract and making payments on it during winding up must be assumed to do so with knowledge that such payments are likely to be void and are in this sense guilty of breach of trust — Absence of dishonesty on their part is no excuse — Relief under S. 281, Companies Act, cannot be granted.**

If the directors enter into a contract and make a payment on it during the winding up proceedings, they do so at their peril, and excepting those cases in which it would be held that the payment was necessary for the winding up or for the carrying on of the business of the company pending the hearing of the winding up petition, the directors must be aware that there is always a risk of such payments being void under this section. It is impossible to excuse the directors on account of lack of knowledge. They, above all, must be knowing what were necessary payments, and they also must be assumed to have known that having entered into a contract which had not been completed before the winding up, the person with whom they were contracting were entitled only to prove in the winding up for damages. In the sense therefore that the directors were aware that they were making an unauthorized payment they were disposing of the property of the company wrongfully and therefore guilty of a breach of trust and the absence of dishonesty or fraud is immaterial. The directors, therefore, are not entitled to relief under S 281, Companies Act : *Wiltshire Iron Co.*, (*1868*) *3 Ch A 443* and *Masonic General Life Assurance Co.* v. *Sharpe*, (*1892*) *1 Ch 154*, *Ref.* [P 298 C 1, 2; P 299 C 2; P 301 C 2]

(b) Company—Directors applying assets to other than defined objects are responsible as for breach of trust. [P 299 C 1]

The assets of the company are entrusted to the directors to be applied to certain defined objects and they are responsible as for a breach of trust if they apply them to other objects.

(c) Company—Directors—Position of.

Although the position of directors differs from that of trustees in some respects, yet to the extent of their being entrusted with the moneys of the company, they are trustees and are jointly and severally liable for breach of trust : *Ramskill* v. *Edwards*, *31 Ch D 100* and *Carriage Co-operative Supply Association*, *27 Ch D 322*, *Ref.* [P 299 C 1]

*** (d) Limitation Act (1908), Arts. 115, 116 and 120—Liability of directors under S. 235, Companies Act, arises out of a contract which is partly in writing and partly not in writing —Application by liquidator for compensation under S. 235 for breach of trust of directors is therefore governed neither by Art. 115 nor Art. 116 but by Art. 120.**

The directors are in a limited manner trustees. Their liabilities are liabilities which depend upon their position as directors. Their position as directors is governed by the Articles of Association and generally by the written constitution of the company. The Articles are a part only of the contract. Thus the liability of the directors under S. 235, Companies Act, arises out of a contract which is partly in writing and partly not in writing Therefore an application by the liquidator for compensation under S. 235 for damages for misfeasance or breach of contract of the directors is not governed by Art. 115 or Art. 116, Lim. Act, which deal with contracts exclusively in writing or not in writing. Hence the application is governed by Art. 120: *AIR 1930 Bom 572* and *AIR 1925 All 519*, *Approved*; *A I R 1923 Lah 58*, *Disapproved*; *Molineaux* v. *London*, *Birmingham* and *Manchester Insurance Co.*, (*1902*) *2 K B 589* and *In re City Equitable Fire Insurance Co., Ltd.*, (*1925*) *Ch 407*, *Rel. on.* [P 301 C 1, 2]

Netai Chandra Ghosh—for Applicant.

Sultan Ahmed and *S. N. Bose* — for Opposite Parties.

Judgment.—This is an application by the Official Liquidator of the Peninsular Locomotive Co., Ltd., under S. 235, Companies Act, for compensation for damages suffered by the Company by the payment of the sum of £6000 during the winding up which payment was void under S. 227 of the Act and which was a misfeasance or breach of trust and a sum which the directors became "liable" to re-pay to the Company within the meaning of S. 235. The defence of the director against whom the summons has been taken out is that he was not guilty of any misfeasance or breach of trust nor liable to re-pay the sum and that in any event he having acted honestly and reasonably he ought fairly to be excused under S. 281. Further the application is barred by limitation.

The Peninsular Locomotive Company was incorporated in the year 1921 for the purpose of the manufacture of locomotive engines. The Company was started in pursuance of a policy of the Government of India at that time, for encouraging the manufacture of locomotives in India. How-

ever, after it became manifest that the business of the nature for which the Company was incorporated was not forthcoming, the Company engaged for a time in the manufacture of railway wagons, and it is said that a profit of two or three lakhs of rupees was made during the short time this wagon business lasted. Ultimately Government purchased the works of the Company for twenty lakhs of rupees. This was on 14th July 1927, and on 21st May 1928, by a resolution of the Board a sum of six lakhs of the capital was returned to the shareholders by payment of Rs. 20 per share. The authorized capital, it should have been stated, was 60 lakhs of rupees, and the issued capital 28 lakhs of rupees in shares of Rs. 100 each. Of the 28 lakhs of rupees Messrs. Kerr Stuart & Co., Ltd., the Managing Agents, held Rs. 11,50,000, Mr. Langham Reed, the Chairman of the Board, Rupees 8,52,200, Sir George Buchanan of the directors Rs. 15,000, Mr. T. Gordon, director, Rs, 22,500, Mr. F. E. Dinshaw Rs. 5,00,000 on behalf of himself but principally as nominee for the Maharaja of Gwalior, and the balance by persons in India and England who were either friends or employees of Messrs. Kerr Stuart & Co., Ltd. It was a private Company with 22 share holders in all. No application was made to me in this case to order pleadings nor to take evidence orally, which might have been done, but the facts do not seem to be seriously disputed and sufficiently appear from those letters and documents which have been exhibited in the case annexed to the various affidavits.

The registered office of the Company up till 6th December 1921 was in Bombay but after that date was transferred to Jamshedpur in the jurisdiction of this Court. On 10th January 1930 Mr. F. E. Dinshaw, who had resigned from the Board in 1927, filed a petition in the High Court at Bombay to wind up the Company. The registered office having been removed to this Province, the petition was withdrawn and on 5th June 1930, a petition was filed in this Court. On 30th June 1930 the winding up order was made and a liquidator was eventually appointed although the order for winding up bore date 3rd July 1930. On 13th March 1931, the orders were set aside owing to irregularities as regards advertisement of the petition, but on 11th May 1931 after due advertisement a winding up order was made on the ground that the company had ceased to do business and the substratum of the company had gone. This sum of £6000 was paid on or about 20th June 1930 and it is not disputed that the payment was made after the commencement of the winding up and therefore was void under sub-s. 2 of S. 227, Companies Act. This Court declined to validate the disposition on 13th September 1932, an application having been made by the liquidator to the Court for certain directions in the winding up. The facts relating to the payment of £6000 are as follows : In 1927 it appears that the directors, the chairman of whom was Mr. Langham Reed, considered the advisability of purchasing the works of Calmoni Engineering Co., Ltd., and negotiations appear to have been commenced through Messrs. Kerr, Stuart & Co. Ltd., who were the Managing Agents of the Peninsular Locomotive Company, and a company known as Low & Co., Ltd., who represented the debenture holders of the Indian Company, the Calamoni Engineering Co., Ltd. (in liquidation). A meeting of the Board of Directors appears to have taken place in Bombay on 15th July 1927 ; the minute of that meeting is annexed to the liquidator's affidavit and marked Ex· H. There were present Sir Fazulbhoy Carrimbhoy, Sir Purshotamdas Thakurdas, Mr. F. E. Dinshaw and Mr. Manu Subedar, the respondent. It is convenient to state here that at times material to this application the directors were Mr. Langham Reed, Sir George Buchanan, Mr. Charles T. Gordon and Mr. Manu Subedar of whom Mr. Subedar alone was living in India (Bombay). It was agreed that a cable should be sent to the chairman in London to this effect :

Calmoni Engineering Company Mr. F. E. Dinshaw says no time to consult Gwalior Darbar. If Gwalior Darbar does not support, Gwalior Darbar will have to be returned money proportionately. Subject to this directors agree to purchase Calmoni Engineering Company.

Mr. Langham Reed cabled to Manu Subedar (the respondent) on 21st July to the effect that they had agreed to purchase the Calmoni Engineering Works and paid 10 per cent. deposit for an option to complete in ten weeks. It is by no means certain what happened in the meantime. But on 21st May 1928 Mr. Subedar cabled to Mr. Reed :

Calmoni Engineering Works. Board of Directors are opposed to purchase at any price. Much

prefer reasonable settlement without our taking over works.

Mr. Langham Reed cabled on 23rd July :

Calmoni Engineering Works. Regret Board's decision. Kerr, Stuart & Co., will probably make arrangements to purchase themselves.

Kerr Stuart & Co. and Low & Co. were in London. There was another Board meeting on 31st May 1928 of the Indian directors the minute of which stated that with regard to the cable of 25th May the directors had considered the offer of Messrs. Low & Co. to reduce the price of the Calmoni Engineering Works from Rs. 2,50,000. But in view of difficulties in organizing a large foundry business on a remunerative basis owing to the break-down of Messrs. Tata Iron and Steel Co., Ltd., the Directors had stated that they could not entertain any offer involving taking over the works of the company. Mr. Manu Subedar was authorized to send a cable to this effect. In 1927 it appears that two sums had been paid by the Directors to Low & Co., Ltd., with regard to this option, one of £500 and the other of £2125. Now we come to the year 1929. Mr. Subedar informed Mr. Langham Reed on 1st October by cable that Mr. Dinshaw who had by that time resigned from the Board was preparing a petition to the Court for winding up the company. He (Mr. Subedar) asked for instructions and the chairman of the directors in London cabled to Mr. Subedar that "winding up proceedings will be very prejudicial to the company". Mr. Subedar on 3rd October 1929 wrote to Mr. Langham Reed in London discussing the threatened winding up proceedings pointing out that if the petition was filed it could have to be filed in the High Court of Bihar and at the same time discussing the possible points which could be put forward as a defence to Mr. Dinshaw's petition. He also asked for authority from the Directors in London for the necessary power to defend the proceedings in the High Court. This matter was mentioned again on 27th December 1929 when Mr. Subedar wrote to Mr. Langham Reed. Then we come to the year 1930 in which on 11th January a cable was sent by Mr. Langham Reed to Mr. Subedar to the effect that the representatives of the debenture-holders of the Calmoni Engineering Company were prepared to sell their property for £6000 cash and £10,000 two years' six per cent. debentures". On 13th Mr. Subedar cabled in reply that owing to the unsettled conditions he would much prefer to make a further payment to extend the option to purchase the Calmoni Works.

It was on 10th January that a petition was filed in the Bombay High Court and notices were served on the company on the 21st of that month. Mr. Reed informed Mr. Subedar that they had extended the option to purchase Calmoni Works to 20th June at the same price, but £10,000 remaining on six per cent. debentures. The Chairman of Low & Co. wrote to Kerr, Stuart & Co., the Managing Agents of the Peninsular Locomotive Company, on 20th January 1930. This letter stated the terms of the option granted to the Peninsular Locomotive Company. He acknowledged the receipt of £1500 giving the company the option to be exercised within five months to purchase all the works, buildings, plant, machinery, tools etc., for £14,625. On the exercise of the option a further payment was to be made of £4625 and it is this £4625 which is the major portion of £6000 claimed in this application. I revert for a moment to the payments of £500 and £2125 in June and July of 1927. It is a little difficult to understand exactly what those payments were. The respondent in his affidavit refers to them as "paid in view of an intended purchase of the said factory". Whether the £1500 was a further sum paid for the extension of the option does not appear. The terms set out in the letter of the 20th January would appear to indicate that the £1500 was the first payment in connexion with the option. However, no particular point arises with regard to this, and indeed the summons before me deals only with the later payment of £4625 and the balance of the £6000 the details of which will be mentioned in a moment. On 22nd January 1930 Mr. Subedar cabled to Mr. Langham Reed to the effect that Mr. Dinshaw had presented a petition in Court and that he wanted authority to defend the proceedings.

A further letter dated 25th January 1930 clearly discloses that of which there can be no possible doubt, if it is at all material, that Mr. Subedar and the directors were well aware of the action of Mr. Dinshaw in presenting a petition to wind up the company. Mr. Dinshaw in his letter

of 25th January showed some anxiety as regards the purchase of the Calmoni Works and he was fearful lest the winding up proceedings in Court should disclose the intention of the directors as regards this purchase. And it is clear that Mr. Subedar was of the opinion that one of the grounds upon which they should resist the petition of Mr. Dinshaw was that the company was under contract for the purchase of the Calmoni Works. He points out during the course of that letter that the Calmoni Works was not a saleable asset although a valuable asset to the Peninsular Locomotive Company. He further points out that they were in a dilemma, if they put forward in their affidavit by way of defence to the petition for winding up, that they were under contract to purchase the Calmoni Works, it would prevent their taking advantage of any legal flaws to 'get out of this contract'. A power of attorney was sent by the directors on 7th February to Mr. Subedar. On 18th June 1930 Mr. Subedar cabled to Mr. Langham Reed to the effect that he understood that Mr. Dinshaw had filed a petition for compulsory liquidation. The words were, "understand that Mr. Dinshaw filed a petition compulsory liquidation". There was a suggestion by Sir Sultan Ahmed who appears on behalf of Mr. Subedar that it had not been proved that Mr. Subedar had knowledge of the winding up petition. That he had is in my opinion too clear to be discussed. We now come to an important point. On 18th June 1930 there was a cable from Mr. Langham Reed which I propose to set out in full :

Board Penloco Thursday next to complete purchase Calmoni and lay down future programme. Please instruct P & O Bank to credit by cable Penloco London £6000. All outstanding matters will be immediately dealt with.

The position was this. There was a banking account in London and there was also a banking account in Bombay, and I do not think it is disputed that whereas the London banking account was not in funds the Bombay banking account was, and it was for this reason that a cable was sent by Mr. Langham Reed asking Mr. Subedar to transfer money from the Bombay account to the London account. We have in Ex. G, to the liquidator's affidavit, a minute dated 19th June 1930 of a Board meeting held at 5 Board Street Place, London. Of the directors there were present Mr. Langham Reed, Sir George Buchanan and Mr. C. T. Gordon. The Secretary was there, the balance sheet of the year 1929 was submitted for the approval of the Board; it was approved and signed by the directors and he was instructed to post it to Mr. Subedar. It was resolved to complete the purchase of the Calmoni Works and to pay the balance of the cash consideration of £4625 to Messrs. James Low & Co. at once. It was resolved that the members of the Board should accept £250, the Chairman £500 for their services to date. It was agreed that the following cheques were to be drawn and signed : £4625 for the purchase of Calmoni Works, £500 for Mr. Langham Reed's fees, £1250 each for Sir George Buchanan and C. T. Gordon (Directors' fee), £100 for the Secretary, £20 for Mr. Bignal for services rendered and £20 for petty cash.

These sums make up £6000 which is claimed by this summons. Mr. Langham Reed cabled to Mr. Subedar on 20th June to the effect that it was decided to complete the purchase of Calmoni Works and that the balance had been paid. I would have stated that on 20th June Mr. Subedar cabled : "As per your telegram have telegraphed to-day £6000". The payment was made by the London Board sending a cheque under cover of a letter dated 21st June 1930, Ex. M, to the liquidator's affidavit. It is not disputed that the payment was made possible by Mr. Manu Subedar's transferring money from the Bombay account to the London account. On 21st June the Secretary of the Company in India wrote to Mr. Lovelock and Lewes, Liquidators of the Calmoni Works, informing them that as the Board in England had informed the writer by a telegram that the balance of the purchase-money had been paid, they had arranged for the Locomotive Company to take possession on 30th June 1930. On 23rd June Mr. Subedar received a letter from the Secretary in London informing him of a Board meeting held on 19th June in London. The draft balance sheet was enclosed with that letter. Apparently Mr. Subedar was to prepare the report and it was suggested that the report should contain the following statement :

During the year no active operations have been carried on by the Company. Negotiations have been carried on by the Company with the Government of India with a view to obtaining some satisfactory compensation in respect of the loss of possible locomotive orders, but no arrangement which would be satisfactory to the Company has

yet been arrived at. During the year an option on the General Engineering Works of the Calmoni Company has been obtained on favourable terms with a view to the Company being able to carry on a manufacturing business should a favourable opportunity occur.

I refer to this suggestion made by the English Board in order to show exactly what the position was at this date. There was further correspondence with which we are not concerned. A letter written by the Solicitors representing the Company to the Official Liquidator on 20th March 1931 sets out briefly the details of negotiations regarding the purchase of the Calmoni Engineering Works. It was on those facts that the liquidator made application to this Court for a summons under S. 235 of the Act. When this matter came before me on the application for the issue of a misfeasance summons, the question of the jurisdiction of this Court arose, and it was held that although this Court had jurisdiction over the directors in India it had no jurisdiction to issue process in England and therefore on the London directors. In answer to the case made by the liquidators Mr. Manu Subedar contended in his affidavit that this Court had no jurisdiction over him as he was not a resident within the Province, but this point has not been pressed before me at the hearing; indeed Sir Sultan Ahmed appearing on behalf of Mr. Manu Subedar does not deny that this Court has jurisdiction over Mr. Subedar in this matter. It is the contention of Mr. Manu Subedar that in transferring £6000 to the London account on 20th June 1930 he was acting under the instructions of the English Board, and was therefore in no way responsible for the payment of the sum of £4625. It is also contended that even if he be taken to have been responsible for the payment, in fact there was no liability under S. 235 of the Act. In development of that argument it is contended that it was neither a misfeasance nor a breach of trust; that the sum was paid in the ordinary course of business; that the payment was not one for which the directors would be liable; that S. 235 created no liability unless it could be shown otherwise that the payment was a breach of trust, and that a payment such as that contemplated by S. 227 was not within S. 235 of the Act.

As regards the question of fact I have no doubt. It is true that Mr. Subedar did not actually sign the cheque for £4625 or the other items which made up the balance of £6000; but it is clear that he was acting in agreement with the other directors and was (apart from matters of detail) at one with the policy of the English Board. And although from the facts and physical circumstances of the case it was impossible for Mr. Subedar to sign the London cheque, it is not by any means possible to hold that Mr. Subedar had no connection with the payment. But for the transfer of the money from Bombay to London it would appear that the payment would have been impossible. This in my opinion can be gathered from the fact that the English Board requested Mr. Subedar to transfer the money. Nor do I think that the liability of Mr. Subedar rests alone on the fact of his having transmitted the money from Bombay to London. The fact referred to is the clearest evidence of his agreement with the policy of the London directors, and evidence of that whether got from the proof of his having transferred money from the Bombay account to the London account, or from other facts in the case is sufficient to establish his liability. But it is said by Sir Sultan Ahmed that Mr. Subedar could do nothing but to obey the instructions of the Board. It is, however, impossible to look upon Mr. Subedar as anything other than what he was, namely, a director, and therefore entitled to express his views as regards the policy of the Company. What would have been the position had Mr. Subedar protested and declined to agree to the payment, but at the same time transferred the sum of money to the London account, it is difficult to say.

In my judgment it is impossible to look upon Mr. Subedar other than as being responsible equally with the other directors for the payment of this sum. On the rather limited question of Mr. Subedar's attitude in this matter, reference might be made to the decision in 8 Eq 381.[1] There a payment had been made by the Company with regard to a transaction which was ultra vires, and Brown, one of the directors, was said to have protested; nevertheless he was held responsible There is nothing in this case to suggest that Mr. Subedar had in any way disagreed with his fellow directors and, even

1. Joint Stock Discount Co. v. Brown, (1869) 8 Eq 381=20 L T 844=17 W R 1037.

if the transmission of the money from Bombay to London is looked upon as a mere ministerial act, I find it impossible to excuse Mr. Subedar on that account. As regards the legal position it is impossible to contend that this transaction was in any way valid. My brother Fazl Ali has already held in an application by the liquidator for a direction under S. 183, Companies Act, that the payment cannot be validated under S. 227 of the Act. Chitty, J. in 56 L T 727[2] held that by the operation of Ss. 153 and 165, Companies Act, then in force in England (these sections are equivalent to Ss. 227 and 283 of the Indian Companies Act) the directors were liable for the sums paid not in the ordinary course of business but after the commencement of the winding up. The authority of this case has never been questioned and is relied upon in such authoritative textbooks as the late Lord Wrenbury's (Lord Justice, Buckley's) Book on Company Law. But it is contended by Sir Sultan Ahmed that in that case the payment was a breach of trust apart from the section which made the disposition of the property of the Company after the winding up void.

I can hardly concede this argument, however, as it quite clearly appears from the very commencement of the judgment of the learned Judge who decided that case, that the liquidator was endeavouring to take advantage of S. 153, equivalent to our S. 227, and it was on that point that he rested his case. Chitty, J. decided that he was entitled so to do. I can only assume therefore that it was necessary in the circumstances to take advantage of that section. There may be no direct authority expressly holding, however, that the disposition of the Company's property by the directors during the winding up is of itself a breach of trust. It must, however, be decided on first principles and, as was pointed out in *Neath Harbour case*,[2] if the directors make such a payment, they do so at their peril, and, excepting those cases in which it would be held that the payment was necessary for the winding up or for the carrying on of the business of the Company pending the hearing of the winding up petition, the directors must be aware that there is always a risk of such payments being void under the section. It is impossible to excuse the directors on account of lack of knowledge. They, above all, must have known what were necessary payments, and they also must be assumed to have known that having entered into a contract which had not been completed before the winding up, the persons with whom they were contracting were entitled only to prove in the winding up for damages: *see* (1868) 3 Ch A 443.[3] In the sense therefore that the directors were aware that they were making an unauthorized payment, they were disposing of the property of the Company wrongfully and therefore guilty of a breach of trust. There is another aspect of the case. From the letter to which I have referred (if from no other fact) it is seen that from 1927 at least the Company was doing no business, the substratum of the Company had gone, as was held by this Court in deciding the application to wind up the Company; there was no hope of their ever doing the business for which they were incorporated. That the Company was incorporated for the purpose of building railway locomotives we have seen. Cl. 3 of the Memorandum is wide in its terms and I suppose, had the intention of the promoters been to carry on any one of the many businesses therein described, other than locomotive building, and had any of these trades been carried on from the incorporation of the Company, it would have been difficult if not impossible to say that the Company was acting beyond its powers. But here locomotive building was the purpose of the Company as I have said, and that can be gathered from the name of the Company and the Memorandum must be construed :

> General words (in the Memorandum) which construed literally, include anything must be limited by their context and the name of the company may also be important in construing the clauses which define the objects if these are not clear and unambiguous in themselves (Buckley's Company Law, Edn. 11, p. 5, and the authorities therein referred to).

Although Art. 3 of the Memorandum of Association might authorise them to carry on the business of heavy engineering, in which the Calmoni Engineering Co., Ltd., was engaged before that Company was wound up, there is nothing in the Memorandum of Association which would entitle the Locomotive Company to purchase the

2. *Re* Neath Harbour Smelting and Rolling Works, (1887) 56 L T 727=35 W R 827.

3. *In re* Wiltshire Iron Co., *Ex parte* Pearson (1868) 3 Ch A 443=37 L J Ch 554=18 L T 38 =16 W R 682.

Calmoni Engineering Works. Such omnibus clauses as sub-cl. (21) of Cl. 3 in the Memorandum of Association would not entitle them to make this purchase and indeed it is not suggested by Sir Sultan Ahmed that any such power is to be got from the Memorandum of Association. There are innumerable authorities to that effect. In (1892) 1 Ch 154[4] at p. 165, which was a case of payment of dividends or interest out of capital, Lindley, L. J., in holding such payment to be ultra vires said:

> As soon as the conclusion is arrived at that the Company's money has been applied by the directors for purposes which 'the Company cannot sanction', it follows that the directors are liable to replace the money however honestly they may have acted.

As it will be seen, the learned Lord Justice used these words 'which the Company cannot sanction'. It has not been contended in this case before me that the Company could sanction the £4625. The assets of the Company are entrusted to the directors to be applied to certain defined objects and they are responsible as for a breach of trust if they apply them to other objects. I am quoting for the moment from Buckley's (Lord Wrenbury's) Company Act, Edn. 11, p. 732 on this point. But with regard to objects which are intra vires : *see* 17 Ch D 467.[5] The position of directors has been discussed in a large number of cases and although their position differs from that of trustees in some respects, yet to the extent of their being entrusted with the monies of the Company, they are trustees: *see* 31 Ch D 100.[6] I am not unmindful of the case 10 Ch D 450[7] and Sir George Jessel's observations with regard to directors. But that case differs to a very considerable degree from the present and relates to the liabilities of the directors on their failure to get in sums due to the Company. It is not disputed incidentally that directors are jointly and severally liable for breach of trust : 27 Ch D 322.[8]

It was strongly urged by Sir Sultan Ahmed that as the respondent was not acting dishonestly he was not liable. I am pleased to be able to observe that the liquidator has withdrawn the allegations of dishonesty and fraud, indeed the only course open to him, as there was no evidence whatever of anything of the kind. But the absence of dishonesty and fraud does not assist the respondent as will be seen from the decision in (1892) 1 Ch 165.[4] There was at one time thought to be something in the nature of a conflict between the decision to which I have just referred and the decisions of Vaughan Williams, J., (as he then was) in two cases, (1892) 3 Ch 577[9] and (1896) 1 Ch 331.[10] But in the former case it was held that the payment of money (the granting of a loan) was intra vires of the Company and that the directors had exercised their discretion and judgment and were therefore not liable. Again in (1896) 1 Ch 331[10] the director accepted (and reasonably so) the certificate of the Manager as to stock in trade. During the course of the judgment the learned Judge in that case observed at p. 345 :

> I should have thought that he might safely be treated as the paid manager and agent of the Company and might well be held not to be responsible for the misapplication of the funds of the Company unless he, through want of care or fraud, misapplied those funds. If it is said that if his responsibility were thus defined he would not be responsible if by the direction of the shareholders, he applied the funds to a purpose which the Company could not authorize because it was a purpose ultra vires, my answer would be that, if he did so without carelessness or fraud he ought not to be held liable, and that if he did so knowing that the purpose was ultra vires or carelessly he ought to be held responsible not because he is a trustee, but because the ownership of the Company is limited, i. e. is limited to the application of the funds to the statutory purposes and his duty to the Company as manager is not knowingly or carelessly to apply the funds to a purpose ultra vires of the Company, even though he may have the authority of the shareholders, for a Company does not seem to me, in regard to questions of ultra vires, to be an aggregate of the shareholders, but a substantive legal entity.

The Lord Justice later observed:

> There is, however, a considerable bulk of authority to show that the directors are trustees for the Company of such funds as are committed to their control in such sense that they will be liable for a misapplication of the funds which is ultra vires of the Company, independently of any proof of fraud or actionable negligence by the directors,

4. Masonic General Life Assurance Co. v. Sharpe, (1892) 1 Ch 154=61 L J Ch 193=65 L T 806 =40 W R 241.
5. British Seamless Paper Box Co., (1881) 17 Ch D 467=50 L J Ch 497=44 L T 498=29 W R 690.
6. Ramskill v. Edwards, (1885) 31 Ch D 100= 55 L J Ch 81=53 L T 949=34 W R 96.
7. *In re* Forest of Dean Coal Mining Co., (1879) 10 Ch D 450=40 L T 287=27 W R 594.
8. *In re* Carriage Co-operative Supply Association, (1884) 27 Ch D 322=53 L J Ch 1154=51 L T 286=33 W R 411.
9. *In re* New Mashonaland Exploration Co., (1892) 3 Ch 577=61 L J Ch 617=67 L T 90=41 W R 75.
10. *In re* Kingston Cotton Mill Co. (No. 2), (1896) 1 Ch 331=65 L J Ch 290=73 L T 745=44 W R 363.

and then referring to a number of authorities which established the liability of the directors the learned Judge observes :

> But in no one of those cases can I find that the directors were held liable unless the payments were made either with actual knowledge that the funds of the company were being misappropriated or with knowledge of the facts that established the misappropriation.

"Misappropriation" is a hard word, but what was being referred to by the learned Judge was the application of the funds to purposes beyond the powers of the company, as the case before him (as Lord Justice Buckley observes in his book) was a case of an application right in law if the state of facts which he honestly believed to exist did in fact exist, but which turned out to be wrong. There is no question in this case of any misapprehension or lack of a correct appreciation of the true position on the part of the director or directors. Indeed the directors were in full possession of all the facts and it must be assumed that they knew the law. The position therefore in my judgment is that the director is liable to repay the sum of £4625 or a part thereof as compensation for loss sustained by the company. Had the other directors been before me I should have been in a position to determine the question of the liability as regards the balance of £6000, expended for the purposes to which I have already referred in the earlier part of my judgment. To what extent they were entitled to pay the directors fees and sums for the remuneration of the Secretary, etc., is a matter with which I am hardly able to deal on the evidence before me. It is true that in requesting to transfer £6000 it was clearly indicated by the London Board that this sum was being paid. Apart from the bare fact of transferring the £6000 there is no evidence that Mr. Subedar took any part in this payment. I am well aware that the same argument has been advanced with regard to the £4625, but in that case there is clear evidence that Mr. Manu Subedar was acting in concert with the other directors. In any event I should find myself in some difficulty in holding Mr. Manu Subedar liable for the balance. Sir Sultan Ahmed also relied upon the indemnity clause of the Articles of Association, Art. 137, which is as follows :

> Each and every Director, Auditor, Managing agent, Secretary, Treasurer and every member, Manager, Assistant or employee of any company being agents of the company and every ex-officio and alternate director of the company, and every other officer or servant of the company and their respective heirs, executors and administrators of each and every such director and other person as aforesaid, shall be indemnified out of the funds of the company against all claims, liabilities, losses, costs, charges and expenses that may at any time be made against or incurred by him respectively in the discharge of his duties or in the conduct of the company's business, except such as are incurred by his own wilful neglect or default, and no director or other such person as aforesaid shall be liable for any act or omission committed by any other director or person as aforesaid or by reason of any loss accruing to the company in relation to any transaction into which the company may enter or upon any ground whatever other than his own wilful neglect or default.

In my judgment this clause has no application. It is a clause indemnifying the director

> against claims, liabilities, losses, costs, charges and expenses that may at any time be made against or incurred by him respectively in the discharge of his duties or in the conduct of the company's business, except such as are incurred by his own wilful neglect or default.

The words of this clause are explicit and point to liabilities incurred in discharge of the director's duties. That together with the exception that there is no indemnity where the liability has been incurred by wilful neglect or default clearly indicates that this clause has no application to payment of funds for purposes which are ultra vires of the company. In the course of the argument Sir Sultan Ahmed agreed that this clause does not apply to the facts of this case. There are two other matters, one of limitation and the other the question whether relief should be granted to Mr. Subedar under S. 281 of the Act. As regards the question of limitation Sir Sultan Ahmed contended that Art. 36 and not Art. 120, Lim. Act, applied. This argument was not developed although in the course of the argument by the learned advocate on behalf of the liquidator it was contended that neither Arts. 36, 115 nor 116 applied. The authorities were not analysed by the advocates, and there is a difference of opinion in India with regard to the matter. This question appears to be one of very considerable importance and it was for that reason primarily that I took time to consider my decision in the case as a whole. In 54 Bom 226[11] the Court held that Art. 120 applied.

11. Govind Narayan v. Rangnath Gopal, A I R 1930 Bom 572=127 I C 305=54 Bom 226= 32 Bom L R 232.

In 47 All 669[12] it was also held that Art. 120 applied. I prefer to follow the reasoning in these cases than that adopted by the Lahore High Court in A I R 1923 Lah 58[13] which was mentioned by Sir Sultan Ahmed in support of his argument. The first point was whether the liability of the directors under S. 235, Companies Act, was a liability independent of contract. The directors as I have already shown are in a limited manner trustees. Their liabilities are liabilities which depend upon their position as directors. Their position as directors is governed by the Articles of Association and generally by the written constitution of the company. The articles are a part only of the contract however as was pointed out in the Bombay case to which I have just referred. There is ample support for this view in (1902) 2 K B 589[14] where Cozens Hardy, L. J. states that where a director accepts an appointment as such, he "must be held to have contracted with the company that he will, etc." The recent case in (1925) Ch 407[15] in the Court of Appeal at p. 520 also supports this view. There Warrington, L. J., in dealing with the position of the auditors and referring to one of the Articles of Association (Art. 150), made this statement:

> In the first place, I think that that article, as the learned Judge has held expressly in the case of the directors and impliedly if not expressly in the case of the auditors, does in such a case as the present form part of the contract between the company and the auditors.

The liability which I have held has been established here is a liability which arises from a breach of duty to deal with the property of the Company in accordance with its constitution and in accordance with the law, and, therefore, I find it impossible to hold that it is a liability which arises independent of contract. Art. 116 is an article applicable to registered contracts and so long as it is held that a contract is partly in writing and partly not in writing, it cannot be said that article applies. Again so long as the articles are held to be part of the contract Art. 115 does not apply as that article deals with contracts not in writing. Again Art. 115 deals with a contract not in writing registered, and so long as either registration is present or writing is present that article cannot apply. There has been some discussion and difference of opinion in the Indian High Courts as to whether registration mentioned in these articles is a registration referable to the Registration Act or otherwise. In 54 Bom 226[11] Sir Amberson Marten, C. J., took the view that "registered" within the meaning of Arts. 115 and 116 was not confined to documents registered under the Registration Act, preferring the view expressed by Sir John Wallis in 42 Mad 33[16] to the view of the Full Bench of the same Court in 49 Mad 468.[17] However, it is unnecessary for me in this case to decide whether the word "registered" is confined to registration under the Indian Registration Act, as I have already held in conformity with English decisions that the contract by which the directors are governed is a contract partly in writing and partly not in writing. Arts. 115 and 116 deal with contracts exclusively in writing or not in writing. These articles therefore in my judgment did not apply. We are thrown back to the provisions of Art. 120, Lim. Act, which gives a period of six years and in this case brings the application of the Liquidator well within time and obviates the necessity of a discussion of the question of the date from which limitation runs—a question which has been discussed with different results in a number of cases in the Indian High Courts. I hold therefore that the application is not barred by limitation.

The only other question raised by the defence is whether the director should be relieved either wholly or partly from his liability and ought fairly to be excused for negligence and breach of trust under S. 281, Companies Act. I know of no authority which would entitle me to hold that in circumstances such as the present although Mr. Subedar acted honestly, he ought fairly to be excused. A decision of

12. *In the matter of* Union Bank, Allahabad, Ltd., A I R 1925 All 519=88 I C 785=47 All 669=23 A L J 473.
13. Bank of Multan, Ltd. v. Hukum Chand, A I R 1923 Lah 58=71 I C 899.
14. Molineaux v. London, Birmingham and Manchester Insurance Co., (1902) 2 K B 589=71 L J K B 848=87 L T 324=51 W R 36=18 T L R 753.
15. *In re* City Equitable Fire Insurance Co., Ltd., (1925) Ch 407=94L J Ch 445 = 133 L T 520=40 T L R 853=1925 B & C R 109.
16. Ripon Press and Sugar Mill Co. Bellary, Ltd., v. Venkatarama Chetty, A I R 1919 Mad 646=48 I C 903=42 Mad 33=35 M L J 256.
17. Venkata Gurunadha Rama Seshayya v. Tripuri Sundari Cotton Press, Bezwada, A I R 1926 Mad 615=94 IC 515=49 Mad 468=50 M L J 520 (F B).

Astbury, J., in the Chancery Division in England in (1921) 1 Ch 543[18] is often relied upon as showing that S. 281, which is similar to S. 279, Company's Consolidation Act in England of 1908, applies to acts ultra vires. But in that case the directors had acted reasonably as they had taken the best advice in the circumstances as in (1914) 1 Ch 1[19] and had acted on that advice although erroneous. The directors in this case cannot be said to have been misled and it can hardly be said that the directors in making this payment did not act deliberately, but as I have already held they must have known or must be assumed to have known that their act was ultra vires. Mr. Subedar's letter of 25th January 1930 throws some light upon his view of the payment. It indicates that he was desirous of using the fact that they had entered into this contract as a defence to the petition of Mr. Dinshaw to wind up the company and at the same time to have the way open to retire from the contract if possible. It is impossible in my judgment to find any circumstances which would entitle me to grant relief under S. 281.

As it is a question of damages, the only remaining point is the amount. The total amount claimed by the Liquidator is £6000. I have already decided that in the circumstances Mr. Subedar cannot be held liable for £1375, the balance of the £6000. There remains therefore the sum of £4625. Had all the directors been before me I should have found it difficult to reduce in any way the claim made by the liquidator. But so far as Mr. Manu Subedar is concerned, he is one of a body of four directors and, although liable with the rest jointly and severally, it is a mere accident that the Court cannot impose liability on the whole body of directors. I hold in the circumstances that it would be right and proper to hold Mr. Subedar liable for one quarter of the sum of £4625, reducing thus the total liability under my power under S. 281. The sum will be payable at the rate of 1/6 to the rupee. The Official Liquidator is entitled to costs which I assess at Rs. 500.

P.R /D.S. *Order accordingly.*

18. *In re* Claridge's Patent Asphalt Co., Ltd., (1921) 1 Ch 543=90 L J Ch 273=125 L T 255=37 T L R 465=65 S J 455.
19. *In re* Allsop, (1914) 1 Ch 1=83 L J Ch 42=109 L T 641=30 T L R 18=58 S J 9.

A. I. R. 1937 Patna 302

WORT, J.

Khurshed Husnain and *others*—Plaintiffs—Appellants.

v.

Secretary of State and *another* — Defendants — Respondents.

Appeal No. 350 of 1934, Decided on 18th December 1936, from appellate decree of Sub-Judge, Patna, D/- 11th December 1933.

(a) Tort — Nuisance—Public and private—Difference between — In public nuisance rights common to all are infringed — Private nuisance affects particular section of community.

The difference between a public and private nuisance is that in regard to the former the rights which are common to all subjects have been infringed; generally speaking such rights are unconnected in any way with possession or title to immoveable property. A private nuisance on the other hand is one which affects a particular section of the community, those who come particularly within the scope of its operation. [P 304 C 1, 2]

(b) Tort—Nuisance — Public nuisance—To establish cause of action with regard to public nuisance, private individual must prove special damage—Special damage and general damage explained—Failure to give details of damage in case of special damage does not affect cause of action.

For a private individual to establish a cause of action with regard to a public nuisance, special damage has to be proved. [P 304 C 2]

Special damage is used in two different senses. With regard to actions based upon tort, damages may be general or special. General damages are those which, although they can be estimated and are unliquidated, they cannot be measured with arithmetical exactness whereas special damages are those which a person has suffered and which can be measured with accuracy and generally are those expenses to which the person has been put as a result of the acts complained of. The expression 'special damage' used in connection with nuisance is that damage which an individual has suffered over and above the inconvenience met with by other members of the public. And in an action for damages in such a case the mere fact that persons did not give any details of the damage which they suffered in no way detracts from their right to succeed in the action if their success or failure depended upon that point. [P 304 C 2]

(c) Tort—Nuisance—Person has no absolute right to drain of flood water to another's land — He must prove prescriptive right to drain it off through defined channels.

A person has no absolute right to have his land free from flood water by draining it to another's lands. His right is to drain the water off through certain defined channels and in order to succeed he must show that he has a prescriptive right to drain flood water off in the manner suggested by him: *Gervard* v. *Crowe*, *(1921) A C 395*; *Whalley* v. *Lancashire & Yorkshire Ry. Co.*, *13 Q B D 131*; *Nield* v. *London & N. W. Ry. Co.*, 10 *Ex* 4, *Rel. on.* [P 306 C 1]

Manohar Lal and *H. R. Kazimi* — for Appellants.

Govt. Pleader—for Respondents.

Judgment.—The action out of which this appeal arises was brought by the plaintiffs against the Secretary of State claiming a mandatory injunction to remove a certain bandh which runs parallel to the railway line on the Futwah Road south of Patna. The bandh was erected for the purpose of preventing the Patna City and its bazar from being inundated by the water by reason of the overflow of the Poonpoon river. It is alleged by the plaintiff that the Government erected this bandh and in addition placed automatic shutters in the culverts under the road upon which the bandh was erected with the result that in times of flood the water was prevented from draining away to the north and was held up thus flooding the district in which the plaintiff's house is situate. I adjourned the hearing of the case for the purpose of hearing the advocates engaged in the case on the evidence in the case. I wish to observe that my jurisdiction with regard to the evidence is strictly limited by the provisions of S. 103 and I can only decide such questions of fact as have been left undecided by the Judge in the Court below or have been wrongly determined by the Court by reason of illegality, omission, error or defect such as is referred to in sub-s. (1) of S. 100, Civil P. C. I more particularly referred to the evidence in order to determine the question of damage which had been alleged by the plaintiffs and which according to the judgment of the Judge in the Court below had not been established. It will be seen, however, that this question does not strictly arise having regard to the view I now take of the matter.

I have now heard the parties on the evidence and I do not propose to reserve my judgment as no useful purpose would be served thereby. I have come to a very clear conclusion with regard to the matter. There is one observation I should like to make, however, and that is with regard to the defence. It appears that the plaintiffs, with the leave of the Court, administered certain interrogatories, the purpose of the interrogatories being to obtain from the defendants particulars of their defence. The plaintiffs desired to know under what authority the defendants erected this bandh. It was erected by the District Board at the instigation of Government, and it is admitted that in this regard the District Board acted as the Agent for Government. We have therefore to dismiss from our consideration the District Board who have been made a party to this action. It appears that the bandh was erected in pursuance of a Resolution of a Flood Committee; under what statute or under what authority of law the Government had to appoint a Flood Committee, it does not appear. I find myself in great difficulty in ascertaining exactly what the position of Government was in this respect as no information with regard to this matter was given in the answers to the interrogatories by the Government. The plaintiff was therefore left in a position of uncertainty as regards the authority of Government in this matter. It was not suggested that the Government's action was an Act of State and perhaps could not be, having regard to the law laid down in the learned Judgment of Sir Barnes Peacock in 5 B H C R App 1.[1] But I must observe that the uncertain attitude which has been taken has made the case all the more difficult to decide. This is possibly one of the reasons for the rather irrelevant considerations into which the Judges in the Courts below entered.

The learned Subordinate Judge first of all discussed in great length whether a private individual's interest can be sacrificed for the good of the public, and then comes to the conclusion that the question does not arise. Amongst other infirmities the judgment of the learned Judge in the Court below suffers from the fact that the Judge not only inspected the *locus in quo* but comes to his own conclusion on what he saw a procedure which was wholly illegal. Not content with that he introduces his own experience into the judgment as also the discussions he had with the Public Works Officers. But if there was one reason why the appeal failed in the Court below and the plaintiffs' claim was dismissed, I suppose it was (although it is not very clear) that the plaintiffs had not proved special damage. The judgment of the trial Court is equally unsustainable for reasons which are not dissimilar from the ones I have expressed. I merely make this observation for the purpose of pointing out that neither of

1. Peninsular and Oriental Steam Navigation Company v. Secretary of State, (1868) 5 B H C R App 1=Bourke A O C 166.

the Courts below seems fully to appreciate what the issues were and therefore the matter becomes one of considerable difficulty for me to decide in this Court. Had the Government set up the position that they were the proprietors of the khas mahal of the northern part of this district which is under discussion in this case, the defence would have been complete unless it had been shown by the plaintiffs that they had a prescriptive right to drain the water coming on to their land in times of floods through certain well defined channels. But that is not the defence and therefore is not the position under consideration in this appeal.

The learned Government Pleader, Mr. Sinha, who appears on behalf of the Secretary of State, however, contends that quite apart from the defective defence the plaintiffs disclosed no cause of action but for a reason different from that given in the Court below. A great deal of the evidence is irrelevant and it is rather difficult to ascertain exactly what the position of the matter is. As far as I can understand the position, as found by the Judge in the Court below, after reading the evidence bearing on the questions I have to determine, I think it is as follows. Before dealing with the case I must deal with one aspect of the question which I have just stated and which was discussed in the Court below and in this appeal. It was contended by the defence in the Court below that as the plaintiffs had not proved special damage, and having not established special damage and not having proceeded under S. 91, Civil P. C., their action would not lie. Whether the action was for a public or private nuisance, is a matter which is very material. One of the tests by which to distinguish a public from a private nuisance in England is whether an indictment lies. That test is inapplicable in India. So far as this case is concerned, in order to decide whether the action of Government created a public or private nuisance the following considerations may be noted. It can be said that the difference between a public and private nuisance is that in regard to the former the rights which are common to all his Majesty's subjects have been infringed; generally speaking such rights are unconnected in any way with possession or title to immoveable property. A private nuisance on the other hand is one which affects a particular section of the community: those who come particularly within the scope of its operation. In most cases the former relates to the user of public highways. In my judgment quite clearly in this case what is complained of by the plaintiffs is the private nuisance. It is a limited area in the first instance which is affected by the acts of the defendants and, in any event, even supposing the facts establish the opposite view, in the circumstances of this case I have no hesitation in coming to the conclusion that the plaintiffs have proved sufficient damages to bring themselves within the rule which lays down that for a private individual to establish a cause of action with regard to a public nuisance, special damage has to be proved. The Courts below have in my judgment misunderstood this matter.

Special damage is used in two different senses. With regard to actions based upon tort, damages may be general or special. General damages are those which although they can be estimated and are unliquidated, they cannot be measured with arithmetical exactness whereas special damages are those which a plaintiff has suffered and which can be measured with accuracy and generally are those expenses to which the plaintiff has been put as a result of the acts complained of. The expression "special damage" used in connexion with nuisance is that damage which an individual has suffered over and above the inconvenience met with by other members of the public. And in this case the mere fact that Mr. Khurshed Husnain and the other plaintiffs in the action did not give any details of the damage which they suffered in no way detracts from their right to succeed in this action if their success or failure depended upon that point. Apart from such general questions there was no question put in cross-examination which would in any way disprove the plaintiff's evidence that they had suffered damage to the extent of a few hundred rupees by reason of their sugarcane crops being inundated by the flood water. The learned Judge in the Court below in my judgment misconceived the law with regard to this matter. Shortly stated the witness went into the box and established the fact that the plaintiffs had suffered damage to that extent and there was no serious cross-examination on that question. Lack of details is not a ground for refusing to accept the plaintiff's

statement when it is not a matter of the credibility of the witness, which it certainly was not in his case as will be seen from the observations of the Judge in the Court below. I do not propose to go into the question of whether it was an action in trespass or an action based upon a nuisance for the reason which I think I have sufficiently indicated. The question arises whether, as Mr. Sinha suggested, the plaintiffs have failed to disclose a cause of action ; in other words, the plaintiffs have failed to establish such facts as would entitle them to succeed in this action.

The facts must be observed. The bandh complained of runs from east to west. At certain points in the bandh there are gaps which at times of floods are filled up with boards. The bandh is situate on the road and under the road there are culverts or tunnels through which the water drains. In the immediate vicinity and running parallel to the road in question is the railway. Under the railway there are also culverts through which water flows to the area to the north, according to the plaintiffs' case. According to one of the maps exhibited in the case there were two of these culverts under the railway. There may be more, but whether there are more or less is a matter of no materiality in this case. Generally stated, it is the plaintiffs' contention that in the time of flood the water having collected in what is the Englishganj area where the plaintiffs' houses are situate, it has a natural drainage to the north and would drain in that direction if not prevented from so doing by the obstructions to which I have already made reference. These are the bandh and the doors or traps closing the culverts. Now, both the closing of the gaps in this bandh and the closing of the culverts are complained of. What happened was this. In recent years certain trap doors (if they may be described as such) have been erected in these culverts in such a way that they automatically close in the event of the flood water of the southern area reaching a certain level. Now, one of the controversies between the parties is that what happens to the water in case of flood. It is the plaintiffs' case that the water drains over a large area and eventually falls into certain drains of considerable dimensions which proceed down on the western side of the maidan at the back of what is now the Cinema, at the back of the English Church and the European Club, eventually finding its way into the river Ganges. Both the Judges of the Courts below inspected these drains and have come to different conclusions.

The trial Judge was of the opinion that the water drains from the south to the north through this channel, while the learned Judge in the Court below has come to a different conclusion, and, as I understand, the appellate judgment has found that the water drains to the east, west and possibly to the north. I think one thing is established, however, and that is that whether the water does drain or not, these drains are now to a very large extent silted up. It does not appear whether this is so by reason of the material carried down by flood water or by reason of persons throwing waste stuff into the drains, although I believe one of the witnesses made the statement that the drain was silted up. Mr. Sinha points out however that during the course of the evidence the plaintiffs themselves admitted that after leaving the culverts the water would pass over what is known as land which is a Mahomedan graveyard, spread over the land and eventually would find its way into these defined channels. This question was argued (as I understood the argument in support of the contention) that unless the plaintiff proved that they had a right (prescriptive right) to drain the water in certain defined channels, they have not shown any cause of action.

I propose to deal with the authorities in this matter. In the first instance, so far as the right of the plaintiffs to bring this action is concerned, I have already had occasion in this Court to refer to the case in 4 Ex 43[2] for the purpose of holding that the plaintiff had a right of action without proof of special damage. I made certain observations in regard to that case when following it in circumstances similar to those in the present. I do not propose to say anything more with regard to the matter. There are three cases only which I propose to refer to in this connexion : 10 Ex 4[3] shows one aspect of the law which applies to this case. The second case is 13 Q B D 131.[4] In the former case

2. Harrop v. Hirst, (1869) 4 Ex 43 = 38 L J Ex 1=19 L T 426=17 W R 164.
3. Nield v. L. & N. W. Ry. Co., (1875) 10 Ex 4 =44 L J Ex 15=23 W R 60.
4. Whalley v. Lanchashire and Yorkshire Ry. Co., (1884) 13 Q B D 131=53 L J Q B 285= 50 L T 472=32 W R 711=48 J P 500.

the defendants had merely protected their own land from floods which were imminent and they were held not to be liable in the action at the instance of the plaintiff, on the ground that the water which did the mischief was not brought there by them and they had a right to so protect themselves. In the latter case to which I have made reference, although the water had not been brought on to the defendants' land by the defendants it was held that the water having once gone there they were not entitled to discharge it on to the land of the plaintiff and thus to cause damage to it, in other words, the defendants, if they were land owners, as in this case, would be entitled to erect such works as would protect them from damage to their land caused by any flood. It is not suggested in this case, as I think I have already indicated that the defendants have done any act which would come within the principle laid down in the latter of the two cases to which I have referred. It is merely a case in which the plaintiffs alleged that they had a right to discharge flood water towards the north, and that this flood water would ordinarily drain through certain defined channels and ultimately find its way into the Ganges. The law is as follows :

The plaintiffs have got no absolute right to have their land kept free from flood water by draining it to the north thus flooding these lands. The flooding of their land is a danger to which all persons in the neighbourhood of a river which is likely to overflow its banks are exposed. Their right, if any, is (as alleged in their case) to drain the water off through certain defined channels. Now, it is quite clear that in order to succeed the plaintiffs must show that they have a prescriptive right to drain flood water off in the manner suggested. This I think is quite clearly established by authorities and reference also might be made in this connection to (1921) A C 395,[5] where Lord Cave in delivering the opinion of their Lordships of the Judicial Committee of the Privy Council referred to this point. From the judgment of the Court below I think it is sufficiently clear that the plaintiffs have established no such right. The only difficulty in the matter is that which arises from the method by which the learned Judge in the Court below comes to this conclusion. It might be argued that he has imported his own knowledge in the matter and for that reason his finding cannot be supported. But from a perusal of the evidence it is clear to me that there is evidence upon which the Judge could have come to this conclusion apart from the objectionable method which the Judge appears to have adopted. It is clear that these channels are choked up, and, even apart from that, the area of the flood which affected the plaintiffs' properties is such that it would be impossible to come to the conclusion that those channels were sufficient to take all the flood water from 150 square miles which is one of the estimates of the extent of the flood.

There is another aspect of the case, and the one which in my judgment is conclusive. The act complained of was the automatic shutting of these culverts under the roads. It is nowhere suggested by the plaintiffs, and certainly not proved, that they had any prescriptive right to drain off the water through those culverts; nor could there be any prescriptive right to drain through the gaps in the bandh as the bandh has been erected only in recent years and no complaint was made at the time as to the erection of the bandh. Their case is limited to a claim to drain off the water to the north. It is admitted by the plaintiff in his evidence that after leaving the culverts the water spreads over the land to the north and evidently finds its way into the alleged defined channels. It is clear therefore that such obstruction as may have been proved is the preventing of the water from spreading over the land to the immediate north of the bandh which was not actionable and not an obstruction of the defined channels which it was necessary to prove in order to establish a cause of action. As regards the facts I have already stated that the Judge in the Court below has come to the conclusion that the water not only drains from south to north, but also from west to east. That is an additional reason for holding that the plaintiffs have failed to establish their case; it was their contention it must be remembered that water drains merely from south to north. I do not consider that the observation of the learned Judge, that if the plaintiff had plastered the wall of his garden the water would not have entered is relevant.

5. Gerrard v. Crowe, (1921) 1 A C 395=90 L J P C 42=124 L T 486=37 T L R 110.

On the whole I have great hesitation in coming to the conclusion that the bandh which is complained of, the trap-doors and culverts would drain the whole of this very large area which becomes flooded at a time when Poonpoon overflows its banks. One of the difficulties in this case, as I have already pointed out, is the attitude of the defendants. Had the Crown established the fact that they were proprietors of the land to the north and the erection of the bandh was for defending this land from flood water, it would have been a complete defence to the plaintiffs' action as the authorities which I have already noticed clearly show. In Crown taking up the attitude that they have done, they have seriously jeopardized their case. But having regard to the conclusion at which I have arrived, namely that the plaintiffs have established no prescriptive right, the weakness of the defence would not assist the plaintiffs. Every sympathy is to be offered to the plaintiff in a case of this kind, but the matter must be decided strictly according to the facts and the law. I cannot part with the case without observing that the defence are not to be congratulated on the defence they put up which left the Court completely in the dark as regards the strict legal position of the Crown in the matter and so were the plaintiffs. In those circumstances although the appeal fails, I am of the opinion that it should be dismissed without costs. There will be leave to appeal.

S.C./D.S. *Appeal dismissed.*

A. I. R. 1937 Patna 307

VARMA, J.

Mukhram Marwari and *others* — Defendants 1st party — Appellants.

v.

Bateswar Mahton and *others*, Plaintiffs and *others*, Defendants 2nd party — Respondents.

Appeal No. 1380 of 1933, Decided on 31st August 1936, from appellate decree of Addl. Sub-Judge, Bhagalpur, D/- 15th September 1933.

(a) Transfer of Property Act (1882), S. 73 —Right to surplus — Property under mortgage sold for arrears of revenue—Revenue sale with or without annulling encumbrances —Right of mortgagee to surplus after satisfaction of revenue decree remains unchanged.

Property under mortgage was sold for arrears of land revenue. There was some surplus left after satisfying the decree for arrears of rent. Another decree-holder of the mortgagor attached and withdrew that surplus while the mortgagee had applied for an injunction against the mortgagor restraining him from withdrawing the surplus. So the mortgagee brought a suit against the said decree-holder of mortgagor for refund of the amount so withdrawn by him. It was contended by the decree-holder that as the property was sold without annulling the encumbrances, the mortgagee had no right to proceed under S. 73, T. P. Act, but the mortgagee could proceed against the property :

Held: that the right of the mortgagee to proceed against the surplus under S. 73, T. P. Act, could not be taken away by the revenue sale being held either by or without annulling the encumbrance: *33 Cal 878* and *A I R 1934 Pat 209*, *Rel. on.* [P 308 C 2; P 309 1, 2]

(b) Civil P. C. (1908) — Rules — Force of— Rules have force of law and must be observed.

Rules framed under Orders in the Civil Procedure Code have the force of law and should be observed. It is incorrect to say that the main Sections of the Code are more imperative and the Rules are less. [P 310 C 2]

(c) Transfer of Property Act (1882), S. 73 —Right to surplus — Intention to protect mortgagee—Surplus taken away by others— Mortgagee can follow it.

Sec. 73, T. P. Act, is intended to protect the mortgagee's rights in the secured property. He should be in a position to realize his dues from the property mortgaged. If portions of the property are converted into cash, that cash also should be available to him as a part of the security, because S. 73 says that if any part of the property or interest in the property is sold the mortgagee's right comes into play to realize the money. It is either the property or any part of it or any interest in the property that is to say, the whole object is that the mortgagee's security should not be diminished and the moment there is any attempt to diminish it his remedy comes in. If any portion of such surplus is taken away by anyone else, the mortgagee has got a right to follow it: *20 Cal 241*, *Rel. on.* [P 311 C 1]

Yasin Yunus and *K. P. Sukul*—for Appellants.

S. S. Bose—for Respondents.

Judgment.—This is an appeal on behalf of the defendants 1st party. The plaintiffs filed a suit for recovery of Rs. 196-5-9 which was withdrawn by the defendants 1st party out of the sale proceeds in deposit in Rent Execution Case No. 746 of 1928 after a declaration that the defendants 1st party had no right to withdraw any portion of the surplus sale proceeds and that the plaintiffs had a right to withdraw all the surplus sale proceeds. In order to understand the case fully it is necessary to give a few important details. On 3rd December 1921 the defendants 2nd party executed a usufructuary mortgage bond

in favour of plaintiff 1 who is a member of a joint family. On 19th February 1928 the plaintiffs sued upon the mortgage bond and got a decree. On 25th September 1928 it appears that the property was sold in execution of a rent decree and was purchased by one Nathu Mahto who is not a party. After satisfying the amount due in the rent decree it appears that a surplus of Rs. 458 odd remained. It is said that the plaintiffs came to know of the sale on 7th August 1929 and on 8th August 1929 they applied for an injunction against the second party restraining him from withdrawing the surplus money. While the defendants second party and plaintiffs were fighting each other it appears that on 29th September 1928 the defendants 1st party having obtained a money decree against the defendants 2nd party actually withdrew Rs. 196-5-9 out of the surplus Rs. 458 odd. The suit was evidently under S. 73, T. P. Act, and was contested by the defendants 1st party alone. The contention of the defendants 1st party was that the plaintiffs' mortgage bond was not a genuine document and was without consideration, that the plaintiffs were not entitled to recover the amount which had been withdrawn by them out of the surplus sale proceeds, and that the plaintiffs were not entitled to get any interest and that the rate of interest was excessive. The Munsif who originally tried the case dismissed the suit.

As a particular incident has occupied this Court a long time in discussing I had better mention it here. It appears that a certain document (which is now Ex. 6) was filed before the trial Court but no use seems to have been made of it in that Court. When the plaintiffs went in appeal before the lower appellate Court they prayed that these documents be exhibited on their behalf. On 3rd April 1933 this prayer was rejected because on that date the then respondents (who are now the present appellants) were not present in Court. We are not concerned with the story as to how the appeal was re-heard, but it appears that the argument in this case were begun on 12th September 1933 and finished on 13th September 1933. From Ex. 6 it appears that it was marked as such on 13th September 1933. On appeal the lower appellate Court has decreed the suit of the plaintiffs and allowed interest at the rate of 12 per cent. per annum simple from 29th September 1929 till the date of the suit. Against this judgment of the lower appellate Court the defendants 1st party have come up in second appeal.

Mr. Yasin Yunus appearing on behalf of the appellants has very clearly put the points of law that he has argued before me. Broadly speaking he has taken up two points : one is whether in a case like this the plaintiffs could take advantage of S. 73 T. P. Act, when their right as a mortgagee was not in jeopardy ; in other words, if a sale takes place without anulling an encumbrance the incumbrancer has no right to proceed under S. 73 of the Act, and the second point is, that the lower appellate Court has allowed the plaintiffs to exhibit a document at a very belated stage of the case, which apart from being against the provisions of O. 41, R. 27, Civil P. C., has materially prejudiced his clients.

In support of his contention Mr. Yunus has relied upon the decision in 24 Cal 746[1] where it was held that a sale purporting to be under S. 161 and subsequent sections of the Bengal Tenancy Act, does not *ipso facto* cancel encumbrances unless steps are taken under S. 167, Bengal Tenancy Act. S. 73, T. P. Act, only gives a right to the mortgagee for the residue of the sale proceeds and refers to cases where the law otherwise provided that the effect of the sale was to nullify a mortgage. It was further held that S. 73 was not intended in any way to enlarge the interest of a purchaser at a sale for arrears of revenue or rent. The Courts below have referred to this decision but they have relied on a subsequent case of the Calcutta High Court in 33 Cal 878.[2] There the suit was to enforce a mortgage and the property mortgaged was sold under a decree in a rent suit. After paying off the arrears of rent there was a surplus of the sale proceeds and the mortgagee wanted to get hold of the surplus under S. 73, T. P. Act. Evidently one of the arguments advanced was that unless the purchaser tries to get the property free from the encumbrance the incumbrancer has no right to proceed against the sale proceeds. Maclean, C. J. in delivering the judgment of the Court said as follows :

1. Beni Prosad Sinha v. Rewat Lal, (1897) 24 Cal 746.
2. Gobind Sahai v. Sibdut Ram, (1906) 33 Cal 878.

It is not apparent, and I do not see that it makes any difference, whether under the decree in the rent suit the property was put up for sale with power to the purchaser to avoid encumbrances or not. Under the provisions of S. 73, T. P. Act, the plaintiff has a charge on the surplus sale proceeds, and I do not think that Ss. 159, 161 to 167, Bengal Tenancy Act, can in any way prejudice the plaintiff's right in that respect.

The judgment further emphasizes the point that it was not suggested that the sale was caused by any negligence on the part of the mortgagee and that the mortgagor himself did not contest but a third party who had purchased the property. That is the position in the Calcutta High Court up to the year 1906. The present S. 73, T. P. Act, has assumed its present form by Act 20 of 1929. We are chiefly concerned with S. 73 (1) which provides :

Where the mortgaged property or any part thereof or any interest therein is sold owing to failure to pay arrears of revenue or other charges of a public nature or rent due in respect of such property, and such failure did not arise from any default of the mortgagee, the mortgagee shall be entitled to claim payment of the mortgage money in whole or in part, out of any surplus of the sale proceeds remaining after payment of the arrears and of all charges and deductions directed by law.

Now the question is whether on the facts mentioned in the present case the mortgagee is entitled to get the surplus of the sale proceeds. There was a mortgage decree and the mortgaged property was sold. On the wording of the section itself, I do not see why the mortgagee should be forced to defer his remedy till the encumbrance is annulled. I am of opinion that it would be reading something in the section which is not there. Of the two Calcutta decisions I would adhere with due respect to the reasonings adopted in the case in 33 Cal 878.[2] But I may add that so far as this Court is concerned, in 148 I C 972[3] although the sale was under the revenue sale law the same considerations seem to have weighed with their Lordships of this Court. His Lordship, the Chief Justice, who delivered the judgment of the Court after referring to the wordings of the section and comparing with the old section as it stood, said as follows :

The new section therefore gives to the mortgagee rights against the sale proceeds. If the sale was of the whole of the estate, then the rights given under the section as in the case of the section which it replaced corresponded with the right of substitution. Where however the right of substitution did not exist and where the sale was of a portion of the mortgaged property nevertheless the right of the mortgagee to go against the sale proceeds was conferred by the Act. Nothing is said in the section against the contention of the right of the mortgagee in addition to such rights as were conferred by the section to proceed against the mortgaged property.

Mr. Yasin Yunus has referred to several other cases in support of his contention in this connexion, but I need not refer to them when I find that a Division Bench of this Court has expressed its opinion definitely. I am afraid the contention must fail. I now come to the next question with regard to the admission of Ex. 6 in evidence at a late stage of the case. It is really with the object of expressing my opinion on this part of the argument that I have given the various dates in the beginning of this judgment. It is argued that the document should not have been taken in evidence because of the provisions of O. 41, R. 27, Civil P. C., and that the document does not show how it was connected with the rent execution case No. 746 of 1928. Mr. Yunus contends that the non-recording of reasons for admitting the document is illegal. He has relied on a decision of this Court in 36 I C 955.[4] In that case their Lordships in disapproving of the admission of evidence in the appellate Court said that the opposite party against whom the evidence was used should have been given an opportunity of rebutting the evidence. In 39 I C 886[5] their Lordships of the Calcutta High Court observed that the expression "substantial cause" in O. 41, R. 27, does not include a case where the only ground assigned is that the evidence already adduced by the aggrieved party is not satisfactory and sufficient; in other words, as the section itself says it is for the purpose of enabling the Court to pronounce judgment and not for the purpose of filling up gaps in the case of any of the parties.

In 49 I C 510[6] which is also a Calcutta case, the non-recording of reasons for accepting evidence in the appellate Court was held to be illegal and their Lordships laid stress on the provision that whenever additional evidence is allowed to be pro-

3. Kapuri Sahu v. Mathura Das Marwari, A I R 1934 Pat 209=148 I C 972=15 P L T 95.

4. Kandhdeo Narain Singh v. Dewa Singh, A I R 1916 Pat 319=36 I C 955.

5. Satis Chandra Bose v. Takurdas Mandal, A I R 1917 Cal 711=39 I C 886=25 C L J 473.

6. Mohesh Chandra Shaw v. Bipin Behari Khan, A I R 1919 Cal 170=49 I C 510.

duced in the appellate Court, the Court shall record the reasons for its admission, and they referred to the earlier decision in 35 I C 698[7] where it was held that the omission of the learned Judge to record any reason for the admission of the additional evidence was alone a sufficient ground for allowing the appeal. The strongest case cited by Mr. Yunus is the one in 57 I C 843[8] in which it was held that O. 41, R. 27, allows the parties to produce evidence in the appellate Court, if the appellate Court requires any document to be produced or any witness to be examined to enable it to pronounce judgment or for any other substantial cause, but this did not mean that in order to enable the appellate Court to pronounce judgment in favour of a particular party additional evidence should be admitted in appeal, and it only meant that where there was a lacuna in the evidence which precludes the appellate Court from pronouncing judgment on the evidence which is already on the record, additional evidence should be allowed to be adduced. As against that Mr. Satya Sunder Bose has advanced various arguments for holding, firstly, that the lower appellate Court was justified in taking the document into evidence, secondly, that the reasons are apparent from the judgment itself, and thirdly, that the defendant-first-party, the appellants, are estopped from raising any of these objections in the light of the pleadings and the issues that were framed in the case.

Dealing with the point as to whether or not the appellants are entitled to raise objection he has referred to paras. 7 and 9 of the written statement. But before I proceed any further I think it will be better to explain how the points raised by Mr. Bose arise. In the course of the trial it appears that the defendant-first-party raised the question that the mortgagee was not entitled to the surplus money because it was on account of his default that the property was sold for arrears of rent. Now the case of the mortgagee was that he was dispossessed in the year 1332 or in the end of 1331, Fasli, and the rent suit referred to was after he was dispossessed. The trial Court disbelieved the karpardaz who was examined on behalf of the plaintiff mortgagee and it appears somehow the document which is now marked as Ex. 6 was not marked in the trial Court. From the trend of Mr. Bose's argument it appears that it was after the learned Munsif accepted the contention of the defendants 1st party that the sale was due to the negligence of the mortgagee that this document assumed special importance. To proceed with the argument of Mr. Bose, referring to paras. 7 and 9, he says that all that the defendants 1st party contended was that the decree was not a rent decree and that the document was not a genuine mortgage deed. He argues that they themselves not having raised the point in the pleading and this point not having been in issue in the trial Court, it does not lie in the mouth of the defendants-first-party to object. If they themselves had raised the point against the plaintiffs, the plaintiffs wanted to meet their contention. He proceeds further and says that even the grounds of appeal do not show that they objected to taking of the evidence and they did not raise the question that they were taken by surprise. He has also drawn my attention to the fact that in the list of documents taken in against this document it is written 'without objection' and that there is no affidavit on the record to show that any objection was raised.

In reply to the argument that the non-recording of reasons was illegal, Mr. Bose has drawn my attention to the construction of the Civil Procedure Code. He says that the rules framed in the Civil Procedure Code are not so imperative as the main sections of the Code. This line of argument of Mr. Bose does not commend itself to me. If rules have been framed and have the force of law they should be observed. But he is on a better ground when he says that the lower Court has given reasons. The only point is that it is not in the order-sheet but it is in the judgment where it is said :

> The plaintiff no doubt should have exhibited this document before the lower Court though it was produced there but being a public document material for the purpose of this case I allow it to be exhibited on the side of the plaintiffs.

The general trend of the Evidence Act, Mr. Bose argues, is to admit evidence and not to reject evidence, and in support of his contention he cites 56 I A 119.[9] Mr. Bose further argued that even if it be held that this document is inadmissible in evi-

7. Gajadhar Prosad v. Mt. Lohia, A I R 1917 Cal 201=35 I C 698=24 C L J 457.
8. Baijnath Manjhi v. Dip Lal Mader, A I R 1920 Pat 235=57 I C 843.
9. Gopika Raman Roy v. Atal Singh, A I R 1929 P C 99=114 I C 561=56 I A 119=56 Cal 1003 (P C).

dence or should not have been admitted, the lower appellate Court has come to its finding without the aid of this document, because once it believes the karpardaz examined on behalf of the plaintiffs the plaintiffs' case is made out. Mr. Yasin Yunus has relied on the Privy Council decision in 10 Pat 654[10] to show that the evidence should not have been taken unless the Court had recorded its reasons to the effect that the evidence was necessary to pronounce judgment. So far as the point raised by Mr. Yasin Yunus, that this document does not connect itself with the rent execution case No. 746 of 1928, Mr. Bose frankly confesses that there is nothing on the record by which it can be connected, but he still maintains that no point has been raised as against this in the grounds of appeal. To my mind this seems to be the most formidable objection to the taking in of the document, but it seems to me that although it may be in this Court that this document is not connected with the rent execution case, the parties in the lower Court had no doubt about it, because it does not appear that any objection was raised on these lines before the lower appellate Court or that this was not relevant or was not connected with the rent execution case.

There is one more point raised by Mr. Yasin Yunus that the money has already been withdrawn by the defendants 1st party; no authority has been cited by the respondents that the money could be followed in the hands of a third party and as a matter of equity he says that the mortgagee should be satisfied with the money that is already in possession of the Court. To my mind the particular section is to protect the mortgagee's rights in the secured property. He should be in a position to realize his dues from the property mortgaged. If portions of the property are converted into cash that cash also should be available to him as a part of the security, because S. 73 says that if any part of the property or interest in the property is sold the mortgagee's right comes into play to realize the money. It is either the property or any part of it or any interest in the property, that is to say, the whole object is that the mortgagee's security should not be diminished and the moment there is any attempt to diminish it his remedy comes in. A situation somewhat similar to this arose in 20 Cal 241[11] where the various decree-holders had taken away their cash on the sale of a patni taluk and it was held that the plaintiff was entitled to realize the balance due to him out of the whole of the surplus and, therefore, he could proceed against any of the individuals who had withdrawn the money.

These are the points urged by Mr. Yasin Yunus and I am afraid although he has argued very vigorously and put his case very clearly before me, I fail to accept his contention. The appeal, therefore, fails.

There is a cross-appeal. The lower appellate Court has granted interest from 29th September 1929 up to the date of the suit. Evidently this is due to an oversight. He should have allowed the rate of interest from 29th September 1929 till the date of the judgment. In this case it will be the date of the present judgment. Subsequent interest will be at the court-rate up to realization. There will be no order as to costs. Leave to appeal under the Letters Patent refused.

B.D./R.K. *Appeal dismissed.*

10. Parsotim Thakur v. Lal Mohar Thakur, A I R 1931 P C 143=132 I C 721=58 I A 254=10 Pat 654 (P C).

11. Gosto Behary Pyne v. Shib Nath Dut, (1893) 20 Cal 241.

A. I. R. 1937 Patna 311

ROWLAND, J.

Babu Rameshwar Prasad Singh and *another* — Plaintiffs — Petitioners.

v.

Mangar Kahar and *others* — Opposite Parties.

Civil Revns. Nos. 354, 404 and 405 of 1936, Decided on 23rd December 1936, from orders of Dist. Judge, Monghyr, D/- 5th May 1936.

Bengal Tenancy Act (8 of 1885), S. 184, Sch. 3, Art. 2 (b), as amended by Bihar Tenancy (Amendment) Act, (8 of 1934), S. 22 —Limitation — Suit for rent on cause of action arising before Amending Act came into force—Amending Act passed into law on 14th November 1934 and came into force on 10th June 1935—Sufficient time intervening between passing of Amending Act and its coming into force — Limitation for suit for rent is governed by Amending Act and not by old law.

The rule ordinarily applicable is the law which is in force at the time of the institution of suit. But where the Amending Act prescribes a period of limitation shorter than the one under the old law, the Amending Act does not apply to

suits in which the cause of action arises before the Amending Act comes into force, when the Amending Act comes into force on the very day on which it is passed into law. The case is otherwise when there is a sufficient interval between the passing of the Amending Act and its coming into force ; because the passing of the Amending Act gives full notice to the litigant of the law to come into force and the interval thus gives him a fair and reasonable opportunity of availing himself of the right of suit which is soon to be extinguished by the Amending Act. In such a case the limitation is governed by the Amending Act even in the cases of suits in which the cause of action has arisen before the amending Act came into force. [P 313 C 1, 2]

Where, therefore, limitation for filing suits for rent under the Bengal Tenancy Act was for three years and later on the Act was amended by the Bihar Tenancy Amendment Act and the period was reduced to one year, and a suit for rent was brought in respect of a cause of action which arose before the amending Act came into force :

Held : that inasmuch as the Amending Act was passed into law on 14th November 1934 and was brought into force on 10th June 1935, the suit even though within limitation under the old Act, was barred by limitation under the Amending Act as there was sufficient time intervening between the passing of the Amending Act and its coming into force : *16 Cal 741* ; *17 Cal 926* ; *35 All 227 (P C)* ; *A I R 1914 Cal 806 (S B)*, *Rel. on* ; *19 I C 793*, *Expl.* [P 313 C 2]

B. C. Sinha — for Petitioners.

Order. — These are applications presented by the plaintiffs who instituted on 14th September 1935 suits for produce rent in respect of holdings of their tenants. Rents were claimed for the years 1339, 1340, 1341 and 1342. The Courts below have held that the suit was within time in respect of the rents of 1341 and 1342, the cause of action for which arose in September 1934 and September 1935 respectively, but as regards the claim for the rents of 1339 and 1340 the limitation ran from 30th Bhado, that is to say 14th September 1932 and 4th September 1933, respectively ; and this part of the claim was barred by S. 184, Bihar Tenancy Act, read with Sch. 3, Art. 2 (b) (ii), which prescribes a period of limitation of one year from the last day of the agricultural year in which the arrear fell due.

Under the Bengal Tenancy Act as it stood until the passing of the amendments of 1934 the period of limitation for such a suit was three years from the last date of the agricultural year, and no doubt had the Amending Act not been passed the suits would have been within time. It is argued that the new provision creating a shorter period of limitation does not apply to this suit the cause of action for which arose before the passing of the Act. In support of this contention reliance is placed on 17 C W N 889.[1] In that case the Calcutta High Court examined an amending statute which created a shorter period of limitation governing certain classes of suits for dispossession. There was a difference of opinion among the Judges, but it was eventually decided that the new shorter and special period of limitation did not apply to suits instituted after the commencement of the amending Act in respect of causes of action which arose before the amending Act came into force. This decision has since been generally regarded as a leading case, and Mr. B. C. Sinha for the petitioners has asked me to apply and follow it in these applications. It is necessary, therefore, to examine the reasoning on which the above decision was based. Mookerjee, J. pointed out that the Eastern Bengal and Assam Tenancy Amendment Act of 1908 became law on 10th June 1908 and came into operation on that very date. Hence it was argued that the Legislature could never have intended the new provision of limitation to apply to causes of action which had accrued before the new statute became law, because the effect would be to extinguish forthwith all causes of action in existence and enforceable in a Court of justice at the time when the statute came into operation. The learned Judge said :

> To hold that this amended provision applies to suits in respect of dispossession, which has taken place more than two years before the enactment of the new law, is to maintain the position that the Legislature intended the litigant to accomplish what is impossible in the nature of things for him to do ; in other words, to prescribe that his rights are forthwith extinguished without previous notice and without opportunity afforded to him to escape the operation of the new law.

The learned Judge continued :

> In my opinion, the cardinal and fundamental point in the case before me is that the Eastern Bengal and Assam Tenancy Amending Act of 1908 came into operation the very moment it became law, consequently, if it were taken to effect pre-existing causes of action, the effect would be absolutely to bar at once all actions where the cause of action had accrued more than the limited time before the statute was passed.

A little later the learned Judge explained :

> On the other hand where a new statute of limitation reduces the time previously allowed for commencement of the suit, but does not come into operation forthwith and allows a reasonable time for the enforcement of existing causes of

1. Manjuri Bibi v. Akkel Mahmud, (1913) 17 C L J 316=19 I C 793=17 C W N 889.

action, the Court will not hesitate to hold that the statute may affect causes of action already accrued in the same manner as those accruing after its passage.

It is, therefore, manifest that the decision on which Mr. B. C. Sinha has so strongly relied is based on the distinction between the cases in which a new period of limitation is introduced by an Act coming into force on the very day of its passing and cases in which a similar new period is introduced by an Act the passing of which is succeeded by its coming into force after an interval which would have first given the litigant full notice of the amendment to the law and a fair and reasonable opportunity of availing himself of the right of suit which was soon to be extinguished by the amended enactment. In point of fact, Mookerjee, J. never suggested that the previous decisions in 16 Cal 741[2] and in 17 Cal 926[3] had been wrongly decided. The ground on which he distinguished those cases was that in them the Court was considering the application of a period of limitation introduced by an Act which as is well known came into operation many months after it had become law. In the latter of these decisions the contention was raised that the cause of action having arisen before the Bengal Tenancy Act came into operation the plaintiff would be entitled to bring his suit within twelve years, that being the time within which he might have sued if the Bengal Tenancy Act had not been passed. But the contention was negatived, and it was pointed out that S. 184, Ben. Ten. Act, declares that suits specified in Sch. 3 of the Act, shall be instituted within the time prescribed in that schedule, and there is no saving clause for suits in which the cause of action had arisen before that Act was passed. It is certainly not the rule that when a statute introduces a shorter period of limitation suits instituted after the amendment of the law in respect of causes of action accruing before such amendment are governed by the rule of limitation which was in force on the date when the cause of action accrued. On the contrary, the rule ordinarily applicable is the law which is in force at the time of the institution of the suit. This principle was emphasized in 35 All 227[4] by their Lordships of the Judicial Committee of the Privy Council. Their Lordships observed that the High Court had rightly held that :

The law of limitation applicable to a suit or proceeding, is the law in force on the date of the institution of the suit or proceeding.

Therefore, in deciding the period of limitation applicable to this suit, it is material to consider whether as in the case of the Eastern Bengal and Assam Tenancy Amendment Act of 1908 which was construed in 17 C W N 889[1] the enactment we are construing came into force on the very day in which it was passed into law or as in the case of the Bengal Tenancy Act, which was applied in 17 Cal 926[3] there was an interval between the passing of the Act and its coming into force so that a party affected by the new period of limitation had a reasonable time during which he could avail himself of his remedy before the new period of limitation came into force.

Now a reference to the Bihar Tenancy Amendment Act, 1934 (B. & O. Act 8 of 1934) shows that the assent of the Governor-General to this Act was published in the Bihar and Orissa Gazette of 14th November 1934. It was enacted in section 1 (2) that the Act should come into force on a date to be appointed by the Local Government by notification; and in fact the Act was brought into force by a notification of the Local Government on 10th June 1935. Therefore, the case before me is not on all fours with 17 C W N 889[1] but is governed by the principle in 17 Cal 926[3] and of the Privy Council decision in 35 All 227.[4] It is not necessary to refer to more recent decisions except to say that there seems to have been a consensus of authority at least on this side of India accepting the law to be as stated in 17 C W N 889.[1] A doubt was raised as to whether the Privy Council decision in 35 All 227,[4] had shaken the authority of this decision. The matter came before a Special Bench in 41 Cal 1125[5] and it was decided that the decision in 17 C W N 889[1] was still good authority for the class of cases to which it applies. It was said:

The law as amended may regulate the procedure in suits in which the plaintiff could comply with its provisions, but cannot (in our opinion)

2. Saraswati Dasi v. Horitarun Chukerbutti, (1889) 16 Cal 741.
3. Ramdhan Bhadra v. Ram Kumar Dey, (1890) 17 Cal 926.
4. Soni Lal v. Kanhaiya Lal, (1913) 35 All 227 =19 I C 291=40 I A 74 (P C).
5. Gopeshwar Pal v. Jiban Chandra, A I R 1914 Cal 806=24 I C 37=19 C L J 549=41 Cal 1125=18 C W N 804 (S B).

govern suits where such compliance was from the first impossible. The effect is to regulate, not to confiscate. There are thus two positions: where in accordance with its provisions a suit could be brought after the passing of the amendment, it may be that the amendment would apply, but where it could not, then the amendment would have no application. The facts in 35 All 227[4] did not involve the second of these positions.

Nor does the case before me. The Courts below have correctly held the shorter period of limitation to be applicable to these suits and the applications must be dismissed. The opposite parties not having appeared, no order for cost will be passed.

W.D./A.L. *Application dismissed.*

A. I. R. 1937 Patna 314

FAZL ALI AND MADAN, JJ.

Hargouri Prasad — Defendant — Appellant.

v.

Raghunath Singh, Plaintiff and *others*, Defendants — Respondents.

Appeal No. 249 of 1934, Decided on 11th December 1936, from appellate decree of Sub-Judge, Monghyr, D/- 18th September 1933.

Bihar Tenancy (Amendment) Act (8 of 1934), S. 26 (B), (F) and (O)—Holding transferable by custom and transferred before commencement of Act—Ss. 26 (B) and 26 (F) have no application—When title of transferee is already perfect, recourse to S. 26 (O) need not be taken — S. 26 (O) applies only to transfers relating to non-transferable holdings.

Section 26 (B) and S. 26 (F) have obviously no application where the holdings are transferable by custom and have been transferred before the commencement of the Act. In such cases the title of the transferee will be deemed to be perfect even though the landlord may not have consented to the transfer. If the title of the transferee is already perfect, it will not be necessary to have recourse to provisions made about the payment of transfer fee in S. 26 (O). S. 26 (O) is intended to apply only to those cases where the title of the transferee has not been perfected, or, in other words, to those transfers only which relate to non-transferable holdings: *A I R 1936 P C 49, Expl.* [P 315 C 2]

Nawal Kishore Prasad 2, *Mehdi Imam* and *Sarjoo Prasad* — for Appellant.

S. M. Mullick and *Ishwari Nandan Prasad* — for Respondents.

Fazl Ali, J.—This appeal arises out of a suit instituted by the plaintiff who is the transferee of a portion of a holding situated in village Matwalwa in the District of Monghyr, to recover possession of the lands sold to him from defendant 1 who is admittedly the landlord of the village. The lands in question were sold to the plaintiff by two sale deeds dated 29th February 1928 and 19th September 1929. The plaintiff's allegation was that he got possession of the lands upon the execution of the sale deeds, but he was dispossessed by the landlord some time about 30th May 1930. The suit was contested by defendant 1 on the allegation that the holding was not transferable, that as a matter of fact the original tenants had made a gift of the entire holding in favour of his sons and the latter had surrendered it to the landlord and that the suit was barred by limitation. It was further pointed out on behalf of defendant 1 that at the date of the institution of the suit the entire holding had passed out of the possession of the original tenant, a portion of the holding having been sold to one Lakhi Singh on 15th October 1928.

The principal point which appears to have been in dispute in the Courts below was whether the holding was by custom transferable or not and on this point the Courts below came to two different conclusions. The first Court held that the holding was not transferable and accordingly dismissed the plaintiff's suit. The lower appellate Court, on the other hand, has held that the holding was transferable and passed a decree in favour of the plaintiff. The first point which has been raised on behalf of the appellant (defendant 1) in this second appeal is that the finding of the lower appellate Court that the holding is transferable is not conclusive because the Court has in coming to this conclusion, taken into consideration evidence which was not relevant to the point in issue. It appears that the learned Subordinate Judge in coming to the conclusion that the holding was transferable relied upon the village note which contained a definite entry to that effect and upon certain sale deeds coupled with the evidence of the fact that the sales had been recognized by the landlord without any salami having been paid to him. The point which has now been raised is that these sale deeds relate only to portions of holdings and therefore have no bearing on the question in issue. It has, however, been pointed out by the learned advocate appearing for the respondents that there

is nothing in the judgments of either of the Courts below to show that these sale deeds related only to portions of holdings and in fact no such contention was raised even in the memorandum of appeal filed in this Court. It is, therefore, clear that the finding of the learned Subordinate Judge cannot be challenged in second appeal.

The next contention put forward on behalf of the appellant is that this case is governed by S. 26 (O), Bihar Tenancy (Amendment) Act of 1934 and that the title of the plaintiff is not perfected until he pays to the landlord, or deposits with the Collector, a certain per centage of the consideration paid for the transfer, as specified in that section. The learned advocate for the appellant tried to support this contention by relying on certain observations made by their Lordships of the Judicial Committee in 17 P L T 25.[1] That was a case in which a question arose whether the transfer of an occupancy holding made before 1923 would be affected by the provisions of S. 26 (N) of the Act. S. 26 (N) provides that every person claiming an interest as landlord in any holding or portion thereof shall be deemed to have given his consent to every transfer of such holding or portion thereof by sale, exchange, gift or will, made before first day of January 1923. Accordingly it was held in that case that as the transfer in question had been made before 1923 the landlord must be deemed under this provision to have given his consent to it. Their Lordships also incidentally referred to S. 26 (O) and observed as follows:

> Again if S. 26 (O) is looked at, it will be seen that in the case of a transfer made after 1st January 1923, but before 10th June 1935, the provision is that the transferee may pay or deposit the landlord's transfer fee and thus perfect his title. There is no suggestion that a transferee shall be incompetent to make the payment or that the Collector shall refuse to receive the money in any case in which the transfer is impugned in a pending suit.

The inference which is sought to be drawn from this observation is that S. 26 (O) applies to every pending suit and whether the holding transferred is transferable by custom or not, the title of the transferee is not perfected until the transfer fee prescribed in this section is paid. It appears to me however that the argument involves a confusion of thought. S. 26 (A) clearly states that the provisions S. 26 (B) to S. 26 (M) shall apply to all transfers of occupancy holdings or portions thereof made after the date of the Bihar Tenancy (Amendment) Act of 1934. For the present purpose it will be sufficient to refer to S. 26 (B) and S. 26 (F). S. 26 (B) provides that an occupancy raiyat shall have power to transfer his occupancy holding or any portion thereof, but except in certain cases no such transfer shall be valid against the landlord unless he has given or is deemed under S. 26 (F) to have given his consent thereto. S. 26 (F) provides that if the landlord's transfer fee is paid in accordance with the provisions made in the Act, the landlord shall be deemed to have given his consent to the transfer. Now, as I have already stated, both these provisions apply to transfers made after the passing of the Bihar Tenancy (Amendment) Act. These sections have obviously no application where the holdings are transferable by custom and have been transferred before the commencement of the Act. In such cases the title of the transferee will be deemed to be perfect even though the landlord may not have consented to the transfer. If the title of the transferee is already perfect it is obvious that it will not be necessary to have recourse to the provisions made about the payment of transfer fee in S. 26 (O). These considerations make it clear that S. 26 (O) is intended to apply only to those cases where the title of the transferee has not been perfected or, in other words, to those transfers only which relate to non-transferable holdings.

The only other point which was raised in this appeal was that the suit was barred by limitation because it was not brought within two years of the date of the first sale deed executed in favour of the plaintiff. The answer to this contention is however provided in the written statement of the landlord who has stated that he entered into the possession of the disputed land on 21st June 1929. The suit was brought within two years of this date and is clearly within time. In these circumstances I would dismiss the appeal with costs.

Madan, J.—I agree.

B.D./D.S. *Appeal dismissed.*

1. K. C. Mukherjee v. Mt. Ramratan Kuer, A I R 1936 P C 49=160 I C 105=63 I A 47=15 Pat 268=17 P L T 25 (P C).

*** A. I. R. 1937 Patna 316**

WORT, J.

Magan Lal Marwari — Judgment-debtor — Appellant.

v.

Sitaram Panna Lal — Decree-holder — Respondent.

Appeal No. 130 of 1936, Decided on 30th November 1936, from order of Dist. Judge, Bhagalpur, D/- 24th February 1936.

*** Limitation Act (1908), Art. 182 (4) — Amended decree — Decree amended when it was barred by time — Execution application filed within three years from date of amendment is within time — Nature of amendment of decree is immaterial and cannot be gone into by execution Court.**

Where on application for an amendment of a decree made after three years of the date of decree, the decree is amended and an application for execution of the amended decree is filed within three years from the date of the amendment, the application is within time under Art. 182 (4), Lim. Act. It is not competent to the execution Court to sit in appeal on the decision of the Court amending the decree. The nature of the amendment whether the Court had jurisdiction to make it or not cannot therefore be gone into by the execution Court: *A I R 1930 Pat 286* ; *A I R 1935 Mad 97* ; *A I R 1929 Cal 650* and *A I R 1932 P C 165, Rel. on* ; *A I R 1917 Pat 517, Held overruled by A I R 1932 P C 165.* [P 316 C 1 ; P 317 C 1]

K. P. Sukul — for Appellant.

Bindeshwari Prasad— for Respondent.

Judgment. — The point for decision in this case is an attractive one and at first appeared to be one of some difficulty. But in my judgment it is concluded both by principle and authority. The judgment-debtor is the appellant before this Court and objected under S. 47, Civil P. C., against the execution of a decree which was made in the first instance on 21st August 1930. More than three years after the date of the decree an application for amendment was made on 5th January 1935, and then the application for execution on 13th May 1935, out of which this this appeal arises. Mr. Beevor, the learned District Judge, relying upon the observations made by me in a judgment reported in 11 P L T 181[1] has come to the conclusion that the application was not barred by limitation. It is true that my observations are in a sense mere obiter as the facts of the case upon which reliance was placed were that the application for amendment was made before the decree had become barred by limitation. But in the view I now take the observations in the former case were warranted both on principle and authority as I have already stated.

Article 182, Lim. Act, provides for various starting points of limitation for the execution of a decree, and under Cl. (4), Col. 3 it is provided that where a decree has been amended, the starting point is the date of amendment. Now, the words of the Article are quite unqualified; it does not speak of any particular form of amendment, whether the amendment is necessary or otherwise, whether the decree is capable of execution without the amendment ; it does not qualify as I have said the matter of amendment in any way. There is a decision of this Court which was not relied upon at the Bar in 2 P L J 286,[2] where this point has been discussed. There Chapman, and Roe, JJ. decided that an action was barred by limitation as the nature of the amendment was such as not to give a fresh point for limitation. The learned Judges in that case, as I have indicated, discussed the nature of the amendment and decided the case accordingly. The learned Judges of the Calcutta High Court have held a contrary view in the decision in A I R 1929 Cal 650[3] and the observations which the learned Judges in that case made were that an executing Court does not sit as a Court of appeal over the Court which has made the decree or which has made the amendment, but only to see whether the decree has been amended in order to decide whether the application for execution is barred by limitation. The Madras High Court in A I R 1935 Mad 97,[4] have come to the same conclusion relying upon a decision of their Lordships of the Judicial Committee of the Privy Council reported in 63 M L J 329[5] [the same case is reported in Law Reports 59 Indian Appeals 283]. The same Article of limitation was in question in that case. But the matter to be decided was whether execution was barred by limitation and whether the date from which limitation ran was from the date of

1. Mt. Bhagwati Kuer v. Narsingh Narayan Singh, A I R 1930 Pat 286=125 I C 785=9 Pat 782=11 P L T 181.

2. Kalanand Singh v. Rajkumar Singh, A I R 1917 Pat 517=39 I C 624=2 P L J 286.

3. Durga Prosad Das v. Kedarnath Nayek, A I R 1929 Cal 650=125 I C 292=53 C L J 150.

4. Lakshmikanta Rao v. Ramayya, A I R 1935 Mad 97=154 I C 847=58 Mad 743=67 M L J 904.

5. Nagendra Nath Dey v. Suresh Chandra Dey, A I R 1932 P C 165=137 I C 529=59 I A 283=60 Cal 1=63 M L J 329 (P C).

an appeal which had been preferred in the case. Their Lordships of the Judicial Committee in the opinion expressed by Sir Dinshaw Mulla made this observation on the argument addressed that the nature of the appeal altered the question :

There is in their Lordships' opinion, no warrant for reading into the words quoted any qualification either as to the character of the appeal or as to the parties to it ; the words mean just what they say. The fixation of periods of limitation must always be to some extent arbitrary, and may frequently result in hardship. But in construing such provisions equitable considerations are out of place and the strict grammatical meaning of the words is, their Lordships think, the only safe guide.

Likewise, the learned Judges of the Madras High Court, relying upon the decision to which I have just referred, have held that it was immaterial what was the nature of the amendment—whether the Court had jurisdiction to make it or not ; in other words, the question is in a sense determined on the principle of res judicata. When the application for amendment was made, it would have been a complete answer by the judgment-debtor to the application that the decree was already dead in the sense of its being barred by limitation, and the amendment having been made it must be presumed that that question had no substance. As held by the learned Judges of the Madras High Court, it was not competent for the Court below in this case to sit in appeal on the decision of the Court amending the decree. In so far as the decision of this Court reported in 2 Pat L J 286[2] appears to hold that the Court may look into the nature of the amendment, I have no hesitation in saying that it was overruled by the decision of their Lordships of the Judicial Committee of the Privy Council in 63 M L J 329.[5] On a parity of reasoning, that is to say, if it is impossible to look into the nature of the appeal under Article 182, it is equally irrelevant to look into the nature of an amendment. In the case before the Privy Council the appeal was apparently irregular and incompetent and the persons affected by it were not parties and the appeal did not imperil the whole decree. In spite of that their Lordships gave full weight to the plain meaning of the word 'appeal' contained in Art. 182. In my judgment the decision of the learned Judge in the Court below was right, his judgment must be affirmed and this appeal dismissed with costs.

K.B./A.L. *Appeal dismissed.*

A. I. R. 1937 Patna 317

ROWLAND, J.

Jadunandan Jha — Accused — Petitioner.

v.

Emperor — Opposite Party.

Criminal Revn. No. 486 of 1936, Decided on 23rd September 1936, from order of Magistrate, First Class, Darbhanga, D/- 30th June 1936.

(a) Penal Code (1860), Ss. 109 and 114—Distinction between Ss. 109 and 114—Active abetment at the time of committing offence is covered by S. 109—S. 114 applies where a person abets the offence sometime before it is committed and is subsequently present at its commission.

Section 114, Penal Code, applies to a case where a person abets the commission of an offence sometime before it takes place and happens to be present at the time when the offence is committed, and is not applicable to a case where the abetment is at the time when the offence takes place and abettor helps in the commission of the offence. In such a case a person is guilty of the offence itself and not merely of abetment. Active abetment at the time of committing the offence is covered by S. 109 and S. 114 is clearly intended for an abetment previous to the actual commission of the offence. [P 319 C 1]

Three persons were challaned under Ss. 324 and 325 for having waylaid a person on his way home and the third accused was sentenced under Ss. 324, 325 read with S. 114 (for having instigated the offence) :

Held: conviction against the third accused under Ss. 324 and 325 read with S. 109 would have been more proper under the circumstances. [P 319 C 2]

(b) Criminal Trial—Revision—Accused convicted under S. 114, Penal Code—Circumstances justifying conviction under S. 109—Same punishment for both—High Court will not interfere with the judgment of lower Court.

Where the accused was convicted under S. 114, Penal Code, by the trial Court but circumstances showed that he ought to have been convicted under S. 109 :

Held : as the accused on either view was liable to exactly the same punishment the interests of justice required no interference on merely a technical ground. [P 319 C 2]

Saiyid Safdar Imam and *R. Chaudhuri* — for Petitioner.

Order —On 26th November 1935 one Dhorai Dhobi was on his way home in the evening when he was waylaid by Madho and Bhutto Jha along with the petitioner Jadunandan Jha at whose instigation Madho and Bhutto inflicted certain injuries on Dhorai. This was the prosecution case on which the Courts accepting these allegations, Madho and Bhutto were convicted under Ss. 324 and 325, I.P.C., respectively,

and the petitioner Jadunandan was convicted under Ss. 324 and 325 read with S. 114. An appeal to the District Magistrate was unsuccessful and the Sessions Judge has declined to refer the case to this Court. Mr. Safdar Imam for the petitioner contends that the suspicion of the trial Court ought to have been aroused by the fact that the petitioner was not named as an accused in the first information report and that the only two eye-witnesses excepting Dhorai himself, are persons who were examined by the investigating officer at a comparatively late stage in the investigation, that is to say, the witness Misri was examined on 3rd December 1935 and the witness Kari on 8th December 1935. These are points which would deserve consideration if the matter was open for an investigation of the facts as in an appeal; but I do not feel justified in re-opening the questions of fact decided concurrently by the Courts below.

The next point taken is a point of law. It is said that on the findings it was not correct in law to convict the petitioner under Ss. 324 and 325 read with S. 114, though it might have been proper to convict him under those sections read with S. 109. For this argument he relies on the observations of the Privy Council in 52 Cal 197.[1] Their Lordships have said :

> As to S. 114, it is a provision which is only brought into operation when circumstances amounting to abetment of a particular crime have first been proved, and then the presence of the accused at the commission of that crime is proved in addition ..... Abetment does not in itself involve the actual commission of the crime abetted. It is a crime apart. S. 114 deals with the case, where there has been the crime of abetment, but where also there has been actual commission of the crime abetted and the abettor has been present there at, and the way in which it deals with such a case is this. Instead of the crime being still abetment with circumstances of aggravation the crime becomes the very crime abetted. The section is evidentiary and not punitory. Because participation de facto (as this case shows may sometimes be obscure in detail; it is established by the presumption *juris et de jure* that actual presence plus prior abetment can mean nothing else but participation. The presumption raised by S. 114 brings the case within the ambit of S. 34.

Their Lordships refer with approval to 27 Cal 566.[2] In that decision the learned Judges said that the mere presence as an abettor of a person at the commission of a crime would not bring him within S. 114 unless it was found that there had been abetment beforehand, and this is said to mean abetment on some previous occasion as distinct from an abetment followed at once by the commission of the crime. The Judges in 27 Cal 566[2] referred to 7 W R Cr 49,[3] and to 2 C W N 49.[4] In the former of these cases it was said :

> It is clear that, to bring the prisoner within this section, it is necessary first to make out the circumstances which constitute abetment, so that "if absent" he would have been "liable to be punished as an abettor," and then to show that he was also present when the offence was committed.

The Judges did not in this case enter into the question whether it was necessary that there should be any particular interval of time between the abetment and the commission of the offence or that the abetment must necessarily have been on some previous occasion to that on which the crime was committed. And in 2 C W N 49[4] I can find nothing to support the proposition that to make an accused liable under S. 114 there must have been an independent and antecedent abetment prior to and not part of the same transaction with the actual commission of the crime. In fact, the Judges have said with regard to Chatradhari and Gobordhan :

> There is no evidence to show that when Chatradhari and Gobordhan left the masjid, or whatever place they started from in company with Akbar Khan, they shared with Akbar Khan the common object of causing the death of Nawab Feda Ali, or knew that his death was likely to be caused ; nor is there any sufficient evidence, after the acquittal of Ramlal, that the number of assailants with a common object was five or more. That being so, we do not think that the charge of constructive murder under S. 302 read with S. 149 can stand. There can, however, be no doubt on the fact established by the evidence, that the charge of constructive murder under S. 302 read with S. 114 is clearly established against these two accused. They were present at the time the murder was committed, they were armed with lathis, but they did nothing to prevent the murder. They must therefore be taken to have been present aiding and abetting the murder within the meaning of S. 107, I. P. C.

Those two accused were accordingly sentenced under S. 302 read with S. 114, I. P. C., to transportation for life. There is an obiter dictum of Jenkins, C. J. in

1. Barendra Kumar Ghosh v. Emperor, A I R 1925 P C 1=85 I C 47=26 Cr L J 431=52 I A 40=52 Cal 197 (P C).
2. Abhi Misser v. Lachmi Narain, (1900) 27 Cal 566=4 C W N 546.
3. Queen v. Mt. Niruni, (1867) 7 W R Cr 49.
4. Queen Empress v. Chatradhari Goala, (1898) 2 C W N 49.

42 Cal 422[5] that to come within S. 114 the abetment must be complete apart from the presence of the abettor and that a conviction under S. 302 read with S. 114 could not stand if the only abetment charged necessarily required the presence of the abettor. These observations of Jenkins, C. J., are made with reference to the words in S. 114, "person who if absent would be liable to be punished as an abettor ; " and it may be conceded that it is difficult to apply those words to a person whose abetment consists in actual participation and aid in the commission of the crime. 52 Cal 197[1] shows that such a person is liable for the crime by virtue of S. 34 in the same manner as if it were done by him alone, and there is no need to invoke S. 114. Where the abetment consists of instigation other considerations may arise. It may well be said that if the active agents had waited till the instigator's back was turned, he would have been liable to be punished as an abettor. If that is so, it is hard to see why he should not be regarded as a "person who if absent would be liable to be punished as an abettor" within the terms of S. 114. The mere fact that after instigating the act he remains present until and while it is committed need not, on the face of the decisions cited, affect the legal position or render S. 114 inapplicable, provided that there has been abetment before the commission of the crime begins. In Madras, in 27 Cr L J 1198[6] a Division Bench held :

When a person is present and abets another to commit an offence, S. 144, I. P. C., is not applicable to the case. When a person who abets the commission of an offence is present and helps in the commission of the offence he is guilty of the offence and not merely of abetment except in a few cases like rape or bigamy where the person committing the offence alone can be guilty of the offence. S. 114 applies to a case where a person abets the commission of an offence some time before it takes place and happens to be present at the time when the offence is committed, and is not applicable to a case where the abetment is at the time when the offence takes place and the abettor helps in the commission.

This decision was followed in 51 Mad 263[7] by a Single Judge. A Division Bench of the Bombay High Court in A I R 1933 Bom 162[8] said :

S. 114 applies where a criminal first abets an offence to be committed by another person, and is subsequently present at its commission. Active abetment at the time of committing the offence is covered by S 109, and S. 114 is clearly intended for an abetment previous to the actual commission of the crime, any time, that is, before the first steps have been taken to commit it.

In the case before them the Judges amended the finding by substituting S. 109 for S. 114. On the Madras and Bombay authorities it can be argued that in the circumstances of the case it might have been more correct to convict under S. 109, but the accused on either view is liable to exactly the same punishment, I do not see that the interests of justice require any interference on what can only be regarded as a technical ground. Prima facie, it would seem illogical that a man should be deemed to have committed an offence if he has abetted it beforehand but does nothing at the time when it is committed and on the other hand shall not be deemed to have committed that offence if at the time when it is committed he has just abetted it, is still present and is still abetting it. The rule is discharged.

P.R /A.L. *Rule discharged.*

5. Ram Ranjan Roy v. Emperor, A I R 1915 Cal 545=27 I C 554=16 Cr L J 170=42 Cal 422=19 C W N 28.
6. *In re* Jogali Bhaigo Naiks, A I R 1927 Mad 97=97 I C 958=27 Cr L J 1198.
7. *In re* Krishnasami Naidu, A I R 1927 Mad 1115=106 I C 584=20 Cr L J 72=51 Mad 263=53 M L J 760.
8. Ahmad Hasham v. Emperor, A I R 1933 Bom 162=1933 Cr C 474=143 I C 273=34 Cr L J 559=57 Bom 329=35 Bom L R 240.

A. I. R. 1937 Patna 319

COURTNEY-TERRELL, C. J. AND DHAVLE, J.

Sah Radha Krishna — Plaintiff — Appellant.

v.

Jamuna Prasad Singh and *others*— Defendants — Respondents.

Appeals Nos. 3 and 4 of 1933, Decided on 18th September 1936, from original decree of Sub-Judge, Patna, D/- 28th September 1932.

Negotiable Instrument — Hundi not mentioning interest — Payee under it selling it with endorsement undertaking to pay interest—Presentation of hundi — Vendee is entitled to interest from payee under hundi from due date till date of realization of prinicipal money.

A hundi was drawn by *A* in favour of *C* on *B*. No interest was mentioned in it. *C* sold it to *D* with an endorsement undertaking to pay certain rate of interest. The hundi was presented to *A* and *B* who at first refused payment, but then *B*

paid the amount. Subsequently *D* claimed interest from *C*:

Held: that *D* was entitled to the amount of interest stipulated on the endorsement from the due date, that is to say 60 days after the date of the hundi until the date of realization of the principal amount from *A* and *B*. [P 320 C 2]

Rai Guru Saran Prasad—for Appellant.

B. C. Sinha and *Murari Prasad*—for Respondents.

Courtney-Terrell, C. J.—First Appeal No. 3 of 1933 is an appeal by the plaintiff from a judgment of the Subordinate Judge of Patna dismissing a suit based on two hundis dated Aghan Sudi 3, 1985 Sambat. Defendant 1 was the drawer of the hundis in question. He borrowed Rs. 10,000 from defndant 3. Defendant 1 drew the hundis on defendant 2, his father, who accepted the same in favour of defendant 3. Defendant 3 sold the hundis to the plaintiff endorsing the same to the plaintiff, and although the Hundi itself contains no mention of interest, defendant 3 endorsed it with an undertaking to pay interest at the rate of 1 per cent. per month. The principal money of Rs. 10,000 has been paid by defendant 2 and the only point before us is the liability of defendant 3 to pay the stipulated rate of interest from the date of dishonour to the date of payment. The suit was dismissed as against defendants 1 and 3 on the ground that the hundi had not been dishonoured in fact but was decreed (according to the order) ex parte against defendant 2 alone for the principal amount and interest at 6 per cent. per annum from the date of maturity to realisation. As a matter of fact defendant 2 appeared and the decree ex parte against him was in any case incorrect. The hundi, however, having been paid, the liability of defendants 1 and 2 is not now in question. The learned Judge's decision in favour of defendant 3 is, in my opinion, erroneous on the facts. The judgment was delivered on the 28th September 1932, one week after the last witness had been examined, and I think that the learned Judge reading the depositions clearly made a mistake as to the nature of the evidence. He appears to be under the impression that defendants 1 and 2 were called upon to pay the interest for which defendant 3 was alone liable, but this impression has resulted from a misreading of the evidence of Hari Narayan Prasad, the servant of the plaintiff, who stated as follows:

Baiju Babu (defendant 3) sold the hundis in suit to the plaintiff. Baiju Babu agreed to pay interest at 12 per cent. per annum. I enquired from Bhagwat Babu (defendant 2) and Jamuna Prasad (defendant 1) as to the rate of interest and they told me 12 per cent. per annum was the interest agreed to be paid.

The next paragraph of the Judge's note of this witness's evidence continues as follows:

I had once been to Jamuna Babu and Bhagwat Babu with the hundis. He did not pay any money. I then went to Baiju Babu. He also could not pay anything. Baiju Babu paid about Rs. 500 towards the interest on the hundis in suit. An account was taken and the interest due on the hundis were taken with the consent of Baiju Babu.

The plaintiff in his evidence said:

After the expiry of the stipulated period I sent the hundis to Bhagwat Babu and Jamuna Prasad. They wanted time and did not pay anything. I then sent the hundis to Baiju Babu but he wanted time.

In cross examination the plaintiff said: "I sent Hari Narayan to Jamuna Babu and Bhagwat Babu to demand interest". But this clearly refers to the interview which Hari Narayan spoke of in the paragraph of his evidence first quoted by me and does not refer to the subsequent presentation for payment. If the evidence is examined it shows that there was a presentation for payment to defendans 1 and 2 which was refused. The plaintiff-appellant is clearly entitled to judgment for the amount of interest stipulated on the endorsement from the due date, that is to say sixty days after the date, Aghan Sudi 3, until the date of realisation of the principal from defendants 1 and 2 and thenceforward until realization of the interest from defendant 3 at the Court rate of 6 per cent. per annum. The appeal of the plaintiff is allowed with costs to be paid by defendant 3 here and in the Court below. In First Appeal No. 4 of 1933 the suit was based on a hundi of Saban Duja Sudi 9, Sambat 1985, admittedly drawn by defendant 2 as proprietor of the firm, defendant 1, in favour of the plaintiff. Interest was claimed at the rate of 12 annas per cent. per month. The lower Court allowed interest at 10 annas and there can be no doubt on the evidence that the learned Subordinate Judge was right. There was a variance between the plaint and the evidence adduced by the plaintiff, who himself admitted that the money had been taken at 10 annas per cent. per month but claimed that the defendant subsequently agreed to pay interest at 12 annas. The claim was not made out by any reliable

evidence. Another question referred to before us was the appropriation of certain sums admittedly paid by the defendants to the plaintiff. The plaintiff's failure to credit these moneys was a point against him, and the letter, Ex. C, produced by the defendants, containing the signature of the plaintiff, supports the story of the defendants. Upon the evidence, therefore, the learned Subordinate Judge was clearly right in the appropriation of moneys that he has allowed for in the accounts. The only other question raised before us was that the plaintiff should be allowed costs and future interest. The learned Subordinate Judge, however, has given quite good and definite reasons for disallowing both. The plaintiff laid his claim without allowing for even admitted payments and sued on the admittedly wrong footing that the loan under the hundi had been taken with interest at 12 annas per cent. per month ; and there is clear evidence that the defendants were always ready to pay the amount due but that the plaintiff made unjustifiable demands upon them. The appeal is therefore without merit and must be dismissed with costs.

Dhavle, J.—I agree.

K.S. *Order accordingly.*

A. I. R. 1937 Patna 321

AGARWALA AND MADAN, JJ.

Ghasiram Marwari—Judgment-debtor —Appellant.

v.

Raja Shiba Prasad Singh—Decree-holder—Respondent.

Appeals Nos. 359 of 1935 and 10 of 1936, Decided on 18th February 1937, from orders of Sub-Judge, Manbhum, D/- 13th November 1935.

(a) Privy Council — Death of party — Judgment-debtor dying during pendency of appeal in Privy Council — No substitution of his heirs made — Decree passed by Privy Council against him is not nullity—It can be executed against property of deceased in his sons' hands under S. 53, Civil P. C.

Where during the pendency of the appeal before the Privy Council, the judgment-debtor dies and no substitution of his heirs is made and the Privy Council passes a decree, such decree is not a nullity and it can be executed against the property of the deceased in the hands of his sons as provided by S. 53, Civil P. C. : *A I R 1932 Pat 261, Rel. on.* [P 322 C 1, 2]

(b) Execution — Limitation — Under Civil P. C. procedure in execution is intended to be less formal than in suit—Execution petition against minor filed within time but not describing him as minor—Guardian ad litem appointed after expiry of period of limitation —Execution against minor is not barred by limitation.

Under the Civil P. C., procedure in execution is intended to be less rather than more formal than in a suit. [P 323 C 1]

Where in an execution petition filed within limitation against a minor, the minor was not described as such and the guardian ad litem of such minor was appointed after the expiry of the period of limitation :

Held : the execution was not barred by limitation against such minor : *4 All 37* ; *30 All 55* ; *A I R 1930 All 644* and *32 Cal 582, Rel. on.* [P 323 C 1]

(c) Limitation Act (1908), Art. 183—Reviver —Execution against two judgment-debtors, one of whom minor, but without describing him as minor—On objection guardian ad litem appointed and notice served on him under O. 21, R. 22, Civil P. C.—Guardian not objecting nor showing reason against reviver of decree — Realization of certain sum in execution proceedings — Passing of separate order by Court in case of minor judgment-debtor is not necessary—Decree must be held to have been revived against all judgment-debtors proceeded against in excution.

In an execution against the sons of the deceased judgment-debtor, one of whom was a minor but was not described as such, on objection being raised by the judgment-debtor, a guardian ad litem was appointed on describing the minor judgment-debtor as a minor. A notice under O. 21, R. 22, Civil P. C., was served on the guardian ad litem but he did not file any objection nor showed any reason why the decree should not be revived against the minor. The execution did proceed against both the judgment-debtors and a certain sum was also realized :

Held : that it was not necessary for the Court to pass a separate order dealing with the case of the minor judgment-debtor, and the decree must have been held to have revived against all the judgment-debtors against whom execution was taken out : *A I R 1916 Mad 1038* and *A I R 1918 Mad 513, Disting.* [P 323 C 1]

(d) Chota Nagpur Tenancy Act (6 of 1908), S. 47—Scope—Judgment-debtor's family doing business in cloth and grocery, having built pucca house for residence and shop on plots acquired — Judgment-debtor's family not proved to have acquired agricultural lands or to be depending on agriculture for their livelihood—Plots so acquired held were not exempt from sale in execution of decree against judgment-debtors.

In execution of a decree against the judgment-debtors by attachment and sale of their land, it was found that the land was purchased by the judgment-debtor's ancestors who built houses thereon for residence and shop and that they were doing business in cloth and grocery. It was also found that the judgment-debtor's family did not acquire any agricultural lands or that they depended for any appreciable portion of their livelihood on agriculture :

Held : that the land on which the houses were erected for residence and shop were not exempt from sale in execution of decree against the judgment-debtors as such lands did not fall within the purview of S. 47, Chota Nagpur Tenancy Act: *A I R 1935 Pat 105, Rel. on.* [P 323 C 2; P 324 C 1]

B. C. De and *M. K. Mukharjee* — for Appellant.

S. N. Bose and *N. N. Roy* — for Respondent.

Madan, J.—These two appeals by Bhagirath Marwari and his minor brother Ghasiram Marwari relate to the execution of a Privy Council decree for costs passed against Sheochand Marwari and others on 24th February 1919. The appellants who belong to a Hindu Mitakshara family are the sons of Sheochand who died on 1st January 1919. The decree-holder took out execution of the decree on 7th February 1931 within the statutory period of 12 years, and realized part of the decretal amount. The present execution was taken out for the balance of the decree in the year 1934, and objections filed by both the appellants were disallowed by the lower Court and have again been urged before us. Mr. De for the appellants contended that the Privy Council decree was a nullity against Sheochand as he died during the pendency of the appeal and there was no substitution of his heirs. According to Bentwich's Privy Council Practice, Edn. 2, p. 234, a Privy Council appeal abates on the death of one of the parties and revives on his heir being substituted according to the law of the country from which the appeal comes. We were also referred to the case 2 Pat 10[1] where their Lordships, having been informed before judgment that one of the respondents had died and his heirs had not been subsituted, directed that the order passed should be without prejudice to the rights of that respondent or of his heirs. The case, however, is different where a Privy Council decree has actually been passed against a dead person. Such cases are governed by S. 23 of Acts 3 & 4 of Will IV, which runs as follows :

> And be it enacted that in any case where any order shall have been made on any such appeal as last aforesaid, the same shall have full force and effect notwithstanding the death of any of the parties interested therein; but that in all cases where any such appeal may have been withdrawn or discontinued or any compromise made in respect of the matter in dispute, before the hearing thereof, then the determination of His Majesty in Council in respect of such appeal shall have no effect.

The decree against Sheochand was, therefore, not a nullity and under S. 53, Civil P. C., it can be realized from the property of the deceased which came into the hands of his sons : 11 Pat 445.[2] This objection must therefore fail. Mr. De next argued that the executions of both the years 1931 and 1934 were barred against the minor appellant. The execution of 1931 was taken out against both appellants, but Ghasiram was not described as a minor in the execution petition. On objection by Bhagirath filed on 27th June 1931 Ghasiram was described as a minor, and a guardian ad litem was appointed on 22nd July 1931 which was beyond 12 years from the date of the decree. It is therefore contended that the execution against the minor appellant had become barred. A similar point arose in 4 All 37[3] where a plaint was presented against two persons in ignorance of the fact that they were minors. It was held that a suit might be brought against a minor before a guardian was appointed, and that limitation counted from the date of the plaint and not from the appointment of the guardian. In 30 All 55[4] it was held that failure to make a guardian ad litem a party to an appeal within the period of limitation was immaterial. It was pointed out that the guardian ad litem was not really a party to the appeal, but that he was merely named on the record as the person responsible for looking after the affairs of the minor. 52 All 924[5] is a case where a suit was restored after it had been discovered in execution that an ex parte decree had been passed against a minor described as a major. It was held that the subsequent appointment of a guardian ad litem did not amount to the addition of a new party to the suit which must be deemed to have been instituted against the minor on the date on which it was filed. The same principle was ap-

1. Jai Berham v. Kedar Nath Marwari, A I R 1922 P C 269=69 I C 278=49 I A 351=2 Pat 10 (P C).

2. Chandra Chur Deo v. Mt. Shyam Kumari, A I R 1932 Pat 261=139 I C 397=13 P L T 719=11 Pat 445.

3. Khem Karan v. Har Dayal, (1881) 4 All 37 =1881 A W N 129.

4. Rup Chand v. Dasodha, (1907) 30 All 55= 1907 A W N 290.

5. Talib Ali Shah v. Piarey Lal, A I R 1930 All 644=128 I C 438=52 All 924=1930 A L J 938.

proved by the Calcutta High Court in 32 Cal 582.[6] Under the Civil Procedure Code, procedure in execution is intended to be less rather than more formal than in a suit, and it is clear that the execution was not barred merely because Ghasiram was not described as a minor in the execution petition and the guardian ad litem was not appointed till after the expiry of the period of limitation. This objection must also fail.

As regards the present execution the argument is that it is barred against the minor appellant as the former execution did not have the effect of reviving the decree against the minor within the meaning of Art. 183. A reviver of a decree is effected by an order for execution after issue of notice under O. 21, R. 22, and the order sheet in this case shows that on the same day when the guardian was appointed the Court ordered him to be served with a notice which must according to the normal procedure have been a notice under O. 21; R. 22. There is nothing to show that any objection was filed by the guardian on receipt of the notice, nor has any reason been suggested why the decree should not have been revived against the minor. The execution did in fact proceed against the judgment-debtors named in the execution petition, and a sum of more than Rs. 5,000 was realized. In the circumstances it was not necessary for the Court, as was contended by Mr. De before us, to pass a separate order dealing with the case of the minor judgment-debtor, and the decree must have been held to have revived against all the judgment-debtors against whom execution was taken out. Mr. De referred us to 38 Mad 1102[7] and 40 Mad 1127[8] where it was held that a decree does not revive against a judgment-debtor against whom the execution was not taken out. These cases are clearly different from the present case. This objection regarding the present execution was not raised before the lower Court, and it also must fail.

The next argument was that the appeal to the Privy Council having been based on a wrong view of the law was in the nature of a gamble in litigation, and that the decree for costs was therefore not binding on the appellants even under their pious obligation to pay the debts of their father not contracted for illegal and immoral purposes. In 5 Pat 198[9] it was held by this Court that it is not within the power of a karta to bind the joint family by entering into speculative transactions. In that case the suit was dismissed against all the defendants including the sons of the karta, but the question of the sons' separate obligation to pay off their father's debts was not dealt with in the judgment and does not appear to have been specifically raised. And apart from that this whole argument of the appellant must fail if only because the appeal to the Privy Council did in part succeed, the case being remanded for hearing against some of the defendants.

Lastly it was contended that the properties scheduled in the execution petition are exempted from sale under the provisions of S. 47, Chota Nagpur Tenancy Act. The schedule comprises five pieces of land situat-d in the village in which the appellants reside. Four of these pieces of land are small areas containing pucca houses belonging to the appellants, and the fifth is a bari or homestead land surrounded by a wall and valued at Rs. 150. S. 47 provides that no order shall be passed by any Court for the sale of the right of a raiyat in his holding, and a raiyat is defined in the Act as primarily a person who has acquired a right to hold land for the purpose of cultivating it. In this case it is admitted that the land was purchased by the appellants' ancestors, who built the houses and had come to the village for doing business in cloth and grocery. There is no evidence worth considering to show that the appellants' family also acquired agricultural lands or that they depend for any appreciable portion of their livelihood on agriculture. In the survey khatian one of the plots containing a pucca house is described as raiyati, and as has already been stated one of the plots described in the schedule is a bari, but there is no evidence that these plots form part of an agricultural holding. In A I R 1935 Pat 105[10] one

6. Peary Mohan v. Narendra Nath, (1905) 32 Cal 582=9 C W N 421.
7. James Russel McLaren v. Veeriah Naidu, A I R 1916 Mad 1038=32 I C 1003=38 Mad 1102.
8. V. Krishnaiya v. C. Gajendra Naidu, A I R 1918 Mad 513=40 I C 608=40 Mad 1127=33 M L J 533.
9. Ram Chandra v. Jang Bahadur, A I R 1926 Pat 17=90 I C 553=5 Pat 198=7 P L T 52.
10. Bama Charan Gorain v. Gobindaram Marwari, A I R 1935 Pat 105.

out of three plots was described as raiyati in the execution petition, but was held to be liable to be sold on the ground that land which is merely part of the compound of a house and shop does not come within the purview of the provisions of Chota Nagpur Tenancy Act. This ruling is applicable to the present case, and it follows that this objection also cannot be sustained, and in fact it was given up in the lower Court. These appeals must therefore fail and are dismissed with costs.

Agarwala, J.—I agree.

W.D./A.L. *Appeals dismissed.*

A. I. R. 1937 Patna 324

AGARWALA AND MADAN, JJ.

Haji Rajab Ali — Defendant — Appellant.

v.

Shaikh Akbar Ali, Plaintiff and *others*, Defendants — Respondents.

Appeal No. 535 of 1934, Decided on 17th February 1937, from appellate decree of Judicial Commissioner, Chota Nagpur, D/- 16th April 1934.

Chota Nagpur Tenancy Act (6 of 1908), S. 265—Properties put to auction by Deputy Commissioner in execution of rent decree—Suit by plaintiff for partition of such properties alleging that they were purchased at auction by himself and defendant jointly—Local Government not applying S. 66, Civil P. C., to matters before Deputy Commissioner under rules framed under S. 265, Chota Nagpur Tenancy Act—Suit is not barred by S. 66, Civil P. C.

Clause 1 of S. 265, Chota Nagpur Tenancy Act by implication renders the provisions of the Code of Civil Procedure inapplicable to matters before the Deputy Commissioner except in so far as the provisions of the Code are applied to such matters by rule. [P 325 C 1]

The plaintiff brought a suit for partition of certain properties alleging that such properties were purchased by him and the defendant jointly at the auction sale held by the Deputy Commissioner in execution of certain rent decrees. It was contended by the defendant that the suit was barred under S. 66, Civil P. C.:

Held: that the suit was not barred by S. 66, Civil P. C., inasmuch as it was not made applicable to the matters before the Deputy Commissioner by virtue of any direction by the Local Government under the rules framed under S. 265, Chota Nagpur Tenancy Act. [P 324 C 2; P 325 C 1]

Manohar Lal and *K. K. Banerji* — for Appellant.

B. C. De and *L. K. Chowdhury* — for Respondents.

Agarwala, J.—The plaintiff-respondent sued for partition of a half share in four items of property purchased at auction sales between 1912 and 1914. One of the sale certificates states that the purchasers were the plaintiff and defendant 1, in the second sale certificate the purchasers are said to be defendant 1 and the plaintiff's brother and in the other two sale certificates defendant 1 alone is described as the purchaser. The sales were held in execution of rent decrees by the Deputy Commissioner under the Chota Nagpur Tenancy Act. The plaintiff's case is that he agreed with the defendant that they should jointly purchase items of property at auction sales and should provide the money half and half for these purchases and acquire title half and half to the properties purchased. The plaintiff further alleges that some time after the purchases he became aware of the fact that his name had been omitted from the certificates in three cases and that the defendant thereupon executed an ekrarnama acknowledging his half interest in all the. items purchased. The Courts below have given the plaintiff the decree which he sought. With regard to one item of property, viz., that of which the plaintiff and defendant 1 are stated to be purchasers in the sale certificate, there is no appeal. Defendant 1, however, appeals with regard to the other three items.

It is contended by the learned advocate for the appellant that the suit is barred by S. 66, Civil P. C. On behalf of the respondent, on the other hand, it is contended that that section of the Code of Civil Procedure has no application to sales under the Chota Nagpur Tenancy Act. S. 265 of the latter Act empowers the Local Government to make rules for regulating the procedure of the Deputy Commissioner in matters under the Act for which the procedure is not provided by the Act itself, and goes on to state that by any such rule the Local Government may direct that any provisions of the Code of Civil Procedure 1908, shall apply with or without any modification to all or any class of cases before the Deputy Commissioner. The only provision of the Code of Civil Procedure which has been so applied by rule, so far as I have been able to ascertain, is S. 10 of the Code, which was applied to suits for recovery of arrears of rent by Notification No. 6807 in 1913. There is therefore no rule applying S. 66, Civil P. C., to matters

before the Deputy Commissioner. Cl. 1, S. 265 by implication renders the provisions of the Code of Civil Procedure inapplicable to matters before the Deputy Commissioner except in so far as the provisions of the Code are applied to such matters by rule. The contention, therefore, that in the present case the suit is barred by S. 66, is unsustainable. The appeal, therefore, fails and must be dismissed with costs.

W.D./A.L. *Appeal dismissed.*

A. I. R. 1937 Patna 325

ROWLAND, J.

Awadh Narain Tiwari and *others* — Defendants — Appellants.

v.

Santan Narain Tiwari and *others*, Plaintiffs and *others*, Defendants — Respondents.

Appeal No. 845 of 1934, Decided on 2nd February 1937, from appellate decree of Judicial Commissioner, Chota Nagpur, D/- 8th March 1934.

(a) Hindu Law—Widow—Accumulations—Widow is not trustee for reversioners — She has absolute power over income from her husband's estate — She is not bound to pay off husband's debts out of savings from such income.

A widow is not a trustee for the reversioners but has an absolute power of disposal of the income of the property inherited by her. She is not bound to save the income; she may spend the income upon herself or give it away as she likes during her lifetime. A widow is not therefore bound to pay off her husband's debts out of the savings made by her out of the income from her husband's estate. [P 326 C 1]

(b) Hindu Law—Alienation—Widow— She has power like manager or trustee to alienate husband's estate not only for its benefit or some pressure but also for purposes being religious, charitable or conducive to welfare of husband's soul—Satisfaction of husband's debts is necessary duty of widow—Alienation by widow of part of husband's estate to satisfy husband's debts is therefore valid — Question if transaction was beneficial to estate or there was immediate pressure for same does not arise in such case.

Whereas a manager or a trustee is to look at the secular interests of the estate and his power of alienation is limited to cases in which the estate will benefit or there is some pressure on it which makes alienation unavoidable, the widow has an additional power of alienation for other purposes which are regarded in the Hindu system of law as religious or charitable or conducive to the welfare of the soul of her husband. To justify an alienation for such a purpose, it is not necessary to show any benefit to the estate or pressure on the estate such as is necessary in the case of an alienation for other purposes. [P 326 C 2]

Where a widow alienates her husband's estate to pay off her husband's debts, the satisfaction of her husband's debts is a duty essentially necessary to be fulfilled by the widow before she rejoins him in the state of existence to which he is considered to have been translated. The alienation made by the widow of the part of the property for such purpose is valid. The question whether the transactions are beneficial to the estate or there was immediate pressure for the payment of the debts does not at all arise in such a case : *A I R 1922 P C 261*; *A I R 1930 Cal 351* and *21 Cal 190*, *Rel. on.* [P 327 C 1, 2]

B. C. De and *K. K. Banerji* — for Appellants.

B. B. Mukherji and *U. N. Banerji* — for Respondents.

Judgment.—This is an appeal by the defendants in a title suit in which the relief sought was only a declaration, and the dispute was about the validity of certain raiyati leases granted by a Hindu widow. The property is part of the estate of one Madhonarain Tiwari who died in 1876 leaving a widow Mt. Deoki Kuar. The lady died in 1919, and the plaintiffs and defendants of this suit are the agnates of her husband and the inheritors of the estate on her death. Partition proceedings were taken for the division of the properties among them, and it was found that certain bakasht lands have been settled by her as raiyati with some of the agnates after taking substantial salamis. These settlements were challenged by other of the agnates, now the plaintiffs, and for the purposes of the partition it was necessary in order to assess the divisible assets to have a determination whether these lands ought to be treated as bakasht or as raiyati. Hence the suit for a declaration that the settlements are invalid and not binding on the plaintiffs. The Subordinate Judge found that the three settlements which are impugned, were each made for the purpose of raising money to satisfy antecedent debts incurred by the husband and father-in-law of the widow and secured by usufructuary mortgages on the lands in suit. The genuineness of these usufructuary mortgages was not challenged, and the Subordinate Judge dismissed the suit. In each case about two-thirds of the salami money was required for paying these antecedent debts and nearly one-third was spent by the widow on her own purposes.

But the Judicial Commissioner in appeal acceded to the argument that there was

no pressure on the estate which would justify the widow in redeeming the usufructuary mortgages by alienating any part of the corpus of the property and thought that the transactions of Mt. Deoki Kuar were not such as a prudent owner would have made, the net result being not to increase but to decrease the total assets. He commented somewhat severely on the failure of the lady in forty years to re-pay any of the old zarpeshgis by savings out of her income, being apparently of opinion that it was her duty to save the income of the property for paying off her husband's debts. As to this the Subordinate Judge himself, a Hindu, had calculated that the total income at the lady's disposal could hardly have been more, at the highest computation, than about Rs. 75 a month and she could have had hardly any margin left out of this slender income from which it might have been possible to pay off the debts on her property. Whether or no it was possible for the lady to have paid off any of the debts, the law is absolutely clear that she was under no obligation to do so. It is settled law that a widow is not a trustee for the reversioners but has an absolute power of disposal of the income of the property inherited by her. She is not bound to save the income; she may spend the whole income upon herself or give it away as she likes during her life. This is so well settled that I do not think it necessary to cite the authorities. A general summary of the legal position will be found in Mulla's Principles of Hindu Law, para. 177. On this part of the case it is enough to add that there is no evidence whatever that the widow had any savings in hand which she could apply to the satisfaction of the debts incurred by her husband and father-in-law.

I turn now to the other question of the learned Judicial Commissioner's finding that the widow had no business to alienate property of the estate unless there was an immediate pressure on the estate, such as a threat of suit or a danger of the property being brought to sale by creditors. It is undoubtedly true as the Judicial Commissioner has pointed out that there is nothing to show that the zarpeshgidars were pressing for return of their money or that they were not content to remain in possession of the plots of land hypothecated to them as zarpeshgidars and in that situation it might perhaps be said of a manager, or of the trustee of property for an infant, that there was no immediate and cogent necessity for arranging to pay off the debts. But it will not do to confuse the position of a Hindu widow with that of a manager or a trustee. Whereas a manager or a trustee is to look at the secular interests of the estate and his power of alienation is limited to cases in which the estate will benefit or there is some pressure on it which makes alienation unavoidable, the widow has an additional power of alienation for other purposes which are regarded in the Hindu system of law as religious or charitable or conducive to the welfare of the soul of her husband (Mulla's Principles of Hindu Law, paras. 181 and 181-A). To justify an alienation for such a purpose, it is not necessary to show any benefit to the estate or pressure on the estate such as is necessary in the case of an alienation for other purposes.

An alienation by way of gift for a religious purpose was upheld by the Judicial Committee of the Privy Council in 44 All 503[1] after a hearing in which a very large number of authorities were cited. The case before their Lordships was a case of gift or dedication of property to a temple for offerings to the deity and maintenance of the priests in charge. Their Lordships observed that :

> The Hindu system recognizes two sets of religious acts. One is in connction with the actual obsequies of the deceased, and the periodical performance of the obsequial rites prescribed in the Hindu religious law, which are considered as essential for the salvation of the soul of the deceased. The other relates to acts which, although not essential or obligatory, are still pious observances which conduce to the bliss of the deceased's soul.

Their Lordships pointed out that to mix the indispensable or obligatory duty with a pious purpose which, although optional, is spiritually beneficial to the deceased, may lead to confusion. An alienation for a pious purpose, the performance of which is optional but spiritually beneficial to the deceased, will be upheld if it affects a portion of the estate not excessive having regard to the total extent of the property. On the other hand, an alienation for the purpose of performing a religious duty which is regarded as essential to the salvation of the soul of the departed may be upheld even if it results in parting with the entire estate. This decision affirmed

1. Sardar Singh v. Kunj Bihari Lal, A I R 1922 P C 261=69 I C 36=49 I A 383=44 All 503 (P C).

the correctness of a judgment of the Allahabad High Court, 41 All 130[2] which proceeded on similar lines and explained the law rather more fully. The decision of the Privy Council last cited was applied in 57 Cal 904.[3] This was a case in which the entire corpus of the estate of the husband was leased out by his widow on taking a salami which went to pay debts of the husband which had become time-barred. In the argument before the High Court it was conceded that there was legal necessity for the alienation, but it was contended that the necessity fell under the second class of religious acts explained in the Privy Council decision, that is to say, that it was not obligatory and essential in the sense in which the performance of funeral rights is essential, but was merely a pious act for which the widow would have been justified in alienating a fraction but not the whole of the property. The contention was, however, negatived, B. B. Ghose, J. observing :

> According to the Hindu shastras, ... a person dying without payment of his debts is subject to tribulations in after life and it is, therefore, the pious duty of his descendants to pay off his debts. . . . . It seems to me, therefore, that payment of a deceased's debts by his widow, who has received assets from him, falls within the first class of religious acts. I am of opinion that it is an essential duty of the widow, for which she may alienate the property inherited from her husband.

It has been held in the Calcutta High Court as far back as 21 Cal 190[4] that a widow has a pious duty to pay her husband's debts though barred by limitation and for the performance of this duty she may alienate her husband's property. Therefore, the learned Judicial Commissioner was in error in thinking that the necessity for the alienations or rather leases which are now challenged, was affected by the question whether there was immediate pressure on the estate for payment of the antecedent zarpeshgi debts. It is more in point to remember that the satisfaction of her husband's debts was a duty essentially necessary to be fulfilled by the widow before she rejoined him in the state of existence to which he is considered to have been translated and that in forty years of widowhood this duty had been awaiting performance and the sands of time were running out. In fact, the widow died the following year.

The question, therefore, does not at all arise in this case whether the transactions were beneficial to the estate. It is found by both the Courts that the debts were genuine debts, and the only point remaining for consideration was whether the transactions were genuine transactions. There were three raiyati leases. Each was for a salami of Rs. 900 and in each case more than two-thirds of the salami was applied to the payment of debt. In each case in granting the leases the widow reserved an annual rent the total of these rents being about Rs. 69 a year, whereas she was not receiving any income from the property from the time that her husband died until 1913 when she made arrangements by which she received a quit rent of Rs. 23 and the transactions of 1918 resulted in a further increase of the income of the estate by about Rs. 45. If one takes a broad view of the widow's dealings with her husband's estate the outstanding facts are that in forty years she created no new incumbrance and incurred no debt, that by transactions in 1913 and in 1918 she was able to leave the reversioners an estate producing a slightly larger net income than the estate she received from her husband; and that she had discharged her paramount duty to her husband by paying off his debts. It is suggested that the widow has not acted fairly towards the reversioners, but the facts speak for themselves. Which, I wonder, of the present plaintiffs would not wish his own widow to do the like?

The learned Judicial Commissioner thinks that the effect of the transactions was to enable the three sets of defendants who obtained the pattas to gain an advantage at the expense of the other reversioners including the plaintiffs, and that for this reason the leases cannot be supported. I fear he has been misled by analogies drawn from insolvency proceedings in which dealings giving an undue preference to one creditor over others may be set aside. It is enough to say that this is not such a case. It will not do to say that if there was cash available to pay off debts a more profitable transaction could have been entered into for the cash was not there; or that the reversioners might, with greater advantage to themselves, have

2. Kunj Bihari Lal v. Laltu Singh, A I R 1918 All 40=48 I C 847=16 A L J 996=41 All 130.
3. Ashutosh Sikdar v. Chidam Mondal, A I R 1930 Cal 351=126 I C 263=57 Cal 904=34 C W N 153.
4. Udai Chunder Chuckerbutty v. Ashutosh Das Mozumdar, (1894) 21 Cal 190.

redeemed the zarpeshgis after the widow's death, for no reasoning can make it out to have been the widow's duty to die leaving her husband's debts unpaid. And there has been no attempt to show, once conceding that the debts must be paid, that she could have made any better bargain.

On these grounds the judgment and decree of the lower appellate Court must be set aside and the decree of the Subordinate Judge restored, the defendants getting their costs throughout. The observation of the Subordinate Judge that the defendants ought to refund so much of the salami, as was not taken for purposes of necessity was *obiter dictum*, it went beyond the scope of the suit which was brought simply to determine whether the defendants were raiyats or were still zarpeshgidars. Its correctness is challenged. I leave the point open as it does not affect the decree to be passed in the suit. Leave to appeal refused.

W.D./A.L. *Appeal dismissed.*

A. I. R. 1937 Patna 328

VARMA, J.

Parsad Mahto and *others* — Appellants.

v.

Mt. Jasoda Koer — Respondent.

Appeals Nos. 985, 1057 to 1067 of 1934 and 84 to 88 of 1935, Decided on 12th February 1937, from appellate decrees of Dist. Judge, Gaya, D/- 6th September 1934.

Evidence—Expert evidence—Case against person depending upon comparison of handwriting—Opinion of expert is only piece of evidence—Opinion of Judge is decision in case—Judge is entitled to take such assistance upon evidence as is available in the circumstances of each case.

Where a case against a person depends upon a comparison of the handwriting, the Court is competent to use its own eyes for the purpose of deciding whether certain handwritings placed before it are similar or not. To hold to the contrary would be to deprive the Court of the function for which it exists of deciding disputed facts placed before it. The opinion of experts is only a piece of evidence. The opinion of the Judge is the decision in the case. A Judge has to be satisfied that he is entitled to take such assistance upon evidence as is available in the circumstances of each case : *65 I C 426, Rel. on ; 37 Cal 467; A I R 1923 Cal 240; A I R 1933 Pat 472 ; A I R 1934 Pat 66; A I R 1928 Pat 568* and *A I R 1921 Lah 126, Ref.* [P 329 C 2]

N. K. Prasad II and *R. K. Sinha* — for Appellants.

D. P. Sinha and *Dhyan Chandra* — for Respondent.

Judgment.—These are a batch of second appeals arising out of 17 rent suits. The landlord was the plaintiff : he wanted to realise rent at a certain rate. The defendant-tenants raised a plea of payment. This plea of payment was accepted by the trial Court with the result that 11 of the suits were dismissed with costs and in 6 of them the plaintiff got only a modified decree. The lower appellate Court after discussing the evidence on the point and referring to the evidence of the handwriting expert has come to the conclusion that the receipts on the strength of which the plea of payment was based were not genuine. He also disbelieved the evidence of the defence witnesses who came to support the plea of payment and therefore came to the conclusion that the plea of payment must fail and passed a decree in favour of the plaintiff at the rates claimed by her except in Suits Nos. 356, 359, 365, 366, 368, 369 and 373. In the latter cases he has fixed the rent at the rate shown in the old receipts. So far as damages and interest are concerned he has ordered that the plaintiff will be entitled to get damages at 25 per cent. or interest at 12½ per cent. per annum up to the institution of the suit whichever is greater. Mr. Nawal Kishore Prasad II, appearing on behalf of the appellants, urges that the oral evidence in the case has not been considered. I have only to quote the passage where the oral evidence has been mentioned to show how the lower appellate Court has disposed of the oral evidence and from this it will be clear that although there is not a long discussion of the oral evidence in the judgment, still it cannot be said that the oral evidence has not been considered. After having come to the finding that the receipts were forged, the lower appellate Court says : "The oral evidence in support of payment is of no value, because these witnesses speak of the forged receipts as genuine". In view of this observation, I see no force in the contention. If a series of witnesses come and say that rents were paid and receipts taken and it is found that the receipts are forged, a Court can hold that the witnesses are not telling the truth.

The next point urged by Mr. Nawal Kishore Prasad II was that the Court was not justified in holding that the receipts were forged on the strength of the expert evidence alone, and in support of his

contention he has cited a number of cases. The lower appellate Court looked at the evidence of Mr. Brewster and in the light of that evidence looked at the receipts themselves and found that Mr. Brewster's opinion with regard to the signature of Muneshar Lal, the patwari, on the receipts was correct inasmuch as it did not tally with the acknowledged signature and therefore the lower appellate Court came to the conclusion that, although he was not prepared to go so far as to hold that the signature of Chowa, who was the gomashta, on each of these receipts was forged, he was prepared to accept the evidence of Mr. Brewster and hold that the signature of Muneshar Lal, the patwari, on each of the receipts was forged, with the result that each one of those receipts was found by him to be forged. Apart from the comparison of the handwriting there are other circumstances also on the strength of which the lower appellate Court has come to the conclusion that the receipts were forged. He says in his judgment "In addition to this there are other points which go to throw a doubt on the genuineness of the disputed receipts"; and in this connexion he refers to the date of printing of the forms on which these receipts appear. He then goes on to say "then there is the variation between the manuscript and the printed serial numbers that appear on the disputed forms".

The various decisions that have been referred to by Mr. Nawal Kishore Prasad II are 113 I C 698;[1] 59 I C 220;[2] 70 I C 194;[3] 14 P L T 683[4] and 14 P L T 699,[5] but the *ratio decidendi* of all these cases is that when there is only the evidence of the handwriting expert the Court has to exercise a certain amount of caution before basing its conclusion thereon. There is a decision of this Court in 65 I C 426[6] where it was pointed out how the evidence of a handwriting expert is to be utilised. In the course of argument it was pointed out that the case of 7 I C 359[7] was an authority for the proposition that the prosecution must produce an expert in handwriting when the case against the accused depends upon a comparison of the handwriting and the Court further observed that the Court should not take upon itself the responsibility of judging of the handwriting by making comparison itself unaided by the opinion of an expert. While referring to this argument Jwala Prasad, J. observed :

> To my mind however this does not at all suggest that the Court is incompetent to use its own eyes for the purpose of deciding whether certain handwritings placed before it are similar or not. To do this would be to deprive the Court of the function for which it exists of deciding disputed facts placed before it. The opinion of experts is only a piece of evidence. The opinion of the Judge is the decision in the case. A Judge has to be satisfied that he is entitled to take such assistance upon evidence as is available in the circumstances of each case.

This is exactly what the lower appellate Court has done in this case : he has looked at the receipts, taken the assistance of expert evidence in the case and has come to his own conclusion with regard to the genuineness or otherwise of the receipts. There was another point urged and that was that as the Court did not come to the conclusion that Chowa's handwriting on the receipts was forged therefore the Court should not have come to the conclusion that the receipts were forged. In that connexion I think I ought to mention that the receipts in question are supposed to bear the signature not only of Chowa but of Muneshar Lal also. If in the peculiar circumstances of the case it was not possible to express any definite opinion about the forged nature of the signature of Chowa, but if the signature of Muneshar Lal was found to be forged and the other circumstances led to the conclusion that the receipts were forged, I see no reason why the finding of the Court of appeal that the receipts were forged should be set aside. Mr. Rajani Kant Sinha in the absence of Mr. Nawal Kishore Prasad 2 raised the point that the Court was not justified in granting damages as well as interest because it offends against the provisions of S. 68, Ben. Ten. Act, but I am afraid this argument is based upon a misapprehension. The Court has ordered that the plaintiff is entitled to damages at the rate of 25 per cent. or interest at

1. Gobindjee Madhawjee & Co., Ltd., v. C. J. Smith, A I R 1928 Pat 568=113 I C 698.
2. Hari Singh v. Lachhmi Devi, A I R 1921 Lah 126=59 I C 220=12 P L R 1921.
3. Baidya Nath Dutt v. Alef Jan Bibi, A I R 1923 Cal 240=70 I C 194=36 C L J 9.
4. Iswar Chandra v. Hariram Bistu, A I R 1933 Pat 472=146 I C 375=14 P L T 683.
5. Jyotindra Mohan v. Kanai Mahato, A I R 1934 Pat 66=148 I C 303=14 P L T 699.
6. Uohab Santara v. Emperor, (1922) 65 I C 426=23 Cr L J 74.
7. Barindra Kumar Ghose v. Emperor, (1910) 37 Cal 467=7 I C 359=11 Cr L J 453=14 C W N 1114.

the rate of 12½ per cent. per annum up to the date of the institution of the suit whichever is greater, that is to say it does not allow both damages as well as interest. It is for the office to find out which of these is greater and that has been granted by the Court. All these points having failed I am afraid that these appeals should be dismissed with costs. The cross appeals are not pressed; they are also dismissed with costs. Leave to appeal under the Letters Patent is refused.

W.D./A.L. *Appeals dismissed.*

A. I. R. 1937 Patna 330

MOHAMAD NOOR, J.

Mt. Sonphula Kuer — Plaintiff — Appellant.

v.

Gansuri and *others* — Defendants — Respondents.

Appeal No. 610 of 1934, Decided on 22nd December 1936, from appellate decree of Offg. Addl. Sub-Judge, Patna, D/- 26th February 1934.

Contract Act (1872), S. 65 — *A* advancing money to *B* as consideration for arranging marriage of *A*'s brother with *B*'s niece — Marriage not arranged — Suit by *A* to recover money advanced — Arrangement held was neither immoral nor criminal and *A* was entitled to refund.

Marriage brokage agreements are of two kinds: one is so immoral, obnoxious and repulsive that the Courts will have nothing to do with it; others are of such a nature that though they are not enforceable yet the refund of the benefit received by a party can be decreed. [P 330 C 2 ; P 331 C 1]

A advanced certain amount to *B* in consideration of his arranging the marriage of *A*'s brother with the niece of *B*. *B* was not the guardian of the girl but the money was paid to influence the father of the girl. The marriage was not arranged and then *A* brought a suit to recover the money advanced :

Held : that provisions of S. 65, Contract Act, applied. The arrangement between *A* and *B* was neither immoral nor criminal. *A* was therefore entitled to get the refund of the money advanced : *1 C L J 261* and *A I R 1933 Lah 849*, *Rel. on.* [P 331 C 1,2]

K. N. Lal — for Appellant.

D. C. Varma — for Respondents.

Judgment.—This appeal arises out of a suit instituted by the plaintiff-appellant for recovery of Rs. 500 principal and Rs. 65 as interest from the defendants said to have been advanced by her to them as a consideration for one of the defendants, namely Hito Singh, arranging the marriage of his sister's daughter with her (plaintiff's) brother, which he failed to do. It appears that the defendant Hito Singh was prosecuted for cheating in respect of this transaction and was convicted and sentenced to pay a fine of Rs. 200 out of which Rs. 150 was awarded as compensation to the plaintiff. The defence was a total denial of the plaintiff's case. It was pleaded that no money was advanced by the plaintiff to the defendants. Both the Courts below have held that the plaintiff paid Rs. 500 to Hito Singh for the marriage. They exonerated defendant 2. Both of them, however, dismissed the suit holding that as the contract was opposed to public policy the plaintiff was not entitled to recover any amount from the defendant Hito Singh.

The lower appellate Court has held that the girl was not under the guardianship of Hito Singh but that of her father and, therefore, Hito Singh was paid the money not as consideration for marriage but as consideration of his influencing the girl's father to perform this marriage with the plaintiff's brother who was of advanced age. In my opinion, the provisions of S. 65, Contract Act, are applicable to this case. If the contract was void or voidable the benefit received by Hito Singh has to be refunded by him to the plaintiff. It is true that in such cases the promisee cannot recover the money promised, but it does not follow that the money paid for the promise not performed cannot be recovered. It can be recovered unless it was paid for immoral or criminal purpose.

Reliance was placed on behalf of the respondents on the decision of this Court in 51 I C 280.[1] In that case the money, the refund of which was sought, was paid to a priest so that he may influence a certain gentleman to adopt a particular boy. Sir Dawson Miller, C. J., who gave the judgment of the Court, held that the transaction was of such a nature that the Court would have nothing to do with it and would not help the man who had advanced the money to get its refund. Agreements, like this, as has been held in several cases, are of two kinds : one is so immoral, obnoxious and repulsive that the Courts will have nothing to do with it ; others are of such a nature that though they are not enforceable but the refund

1. Raghubar Das v. Nataber Singh, A I R 1919 Pat 316=51 I C 280=4 P L J 542.

of the benefit received by a party can be decreed. Promise to procure girls for marriages by means not unlawful comes in this category. Mookerjee, J of the Calcutta High Court in 1 C L J 261[2] laid down that :

> Although a Court may not enforce an agreement to pay money to the parents or guardian of an intended bride or bridegroom on the ground that the agreement is opposed to public policy, yet a suit is maintainable for the recovery of any sum actually paid pursuant to the agreement, if the contract is broken and the marriage does not take place.

In another case the same learned Judge observed as follows :

> We are not unmindful that there are exceptions to the general rule that money paid or personal property transferred in accordance with the terms of an illegal contract cannot be recovered, notwithstanding the other party refuses to affirm his part of the agreement. It is plain that although where money has been paid under an unlawful agreement, but nothing else done in performance of it, the money may be recovered back yet this exception will not be allowed if the agreement is actually criminal or immoral : 21 C L J 537.[3]

In this case the arrangement between the plaintiff and Hito Singh for the marriage of the former's brother with the latter's niece cannot be said either to be immoral or criminal. Hito Singh though not the actual guardian of the girl, for whose marriage according to the findings of the Courts below he received the money, was in a position to bring about that marriage. The only objection to this marriage is the disparity between the ages of the plaintiff's brother and the girl. Marriages between a man fairly advanced in age and a young girl may be objectionable but they do take place with the approval of those who are interested in the welfare of the girls. This case to my mind is similar to the case in A I R 1933 Lah 849.[4] In that case the defendant offered to procure a Jat girl for the son of the plaintiff, who paid him Rs. 2,000 in cash but later on, it was discovered that the girl who was given out to be a Jat was a sweeper by caste. Tek Chand, J. held that under the circumstances the plaintiff was entitled to get a refund of the money. In this case also, it appears on the finding that Hito Singh in fact never wanted to have a marriage between the plaintiff's brother and the girl in question. It was a case of pure swindling. Under the circumstances I think the plaintiff is entitled to get a refund.

It appears that out of the fine which was imposed upon Hito Singh, Rs. 150 was paid to the plaintiff as compensation, and I think that the sum must be deducted from the amount of Rs. 500 which has been found to have been paid by the plaintiff to him. Hito Singh died during the pendency of the appeal before the lower appellate Court and the respondents, Ganouri Singh and others, have been substituted to represent Hito Singh in spite of their protest that they were not the heirs of the deceased Hito Singh. I set aside the decrees of the Courts below and decree the plaintiff's suit for a sum of Rs. 350 only with half the costs incurred by the plaintiff throughout. The decretal amount including the costs will be realizable only from the assets of Hito Singh, if any be found, and the added respondents or their personal properties will not be liable for it.

S.C./D.S. *Appeal allowed.*

2. Bakshi Das v. Nadu Das, (1905) 1 C L J 261.
3. Ledu v. Hira Lal Bose, A I R 1916 Cal 266 = 29 I C 625=43 Cal 115 = 21 C L J 537 = 19 C W N 919.
4. Bhan Singh v. Kaka Singh, A I R 1933 Lah 849=149 I C 1028.

A. I. R. 1937 Patna 331

WORT, J.

Sitan Narain Deo and *another* — Defendants — Appellants.

v.

Dasrath Deo and *others* — Plaintiffs — Respondents.

Appeals Nos. 457 and 458 of 1934, Decided on 9th November 1936, from appellate decree of Judicial Commissioner, Chota Nagpur, D/- 6th April 1934.

Limitation Act (1908), Arts. 138 and 95— Suit by mortgagee to set aside sale held for arrears of rent—Purchase of tenure by mortgagor defaulter through other persons — Allegations of fraud in plaint — Suit held was to set aside sale and allegations of fraud were unnecessary — Case was governed by Art. 138 and not by Art. 95.

A mortgagee of a tenure got an order for possession after having purchased the property in execution of his decree. During the mortgage litigation, the tenure fell into arrears of rent due to fraud and default of the mortgagor and was put up for sale by the landlord. It was purchased by the mortgagor through other persons. In a suit by the mortgagee to set aside the sale, allegations of fraud were made in the plaint :

Held : that the allegations of fraud were unnecessary and that the relief claimed was that the sale did not affect the encumbrance and mortgagee was entitled to possession. The suit was

therefore governed by Art. 138 and not by Art. 95, Limitation Act. [P 333 C 1]

B. C. De, *K. K. Banerji* and *K. Dayal* — for Appellants.

G. C. Mukharji — for Respondents.

Judgment.—This case has been argued very elaborately, a large number of authorities have been quoted, and the facts themselves have been gone into in great detail. So far as the facts are concerned, they can be stated very shortly for the purposes of the point which arises. The plaintiff was a mortgagee of the tenure, having got an order for possession after having purchased the property in execution of the decree. During the mortgage litigation (the dates in the circumstances are not very material), the tenure was put up for sale by the landlord and it has been held by the Courts below that the fact that the tenure fell into arrears for rent was due to the fraud and default of the defendants. The defendants, it has been held, had purchased, the tenure in the names of the appealing defendants. The transaction was therefore a *farzi* one and the purchase was therefore by the tenure-holders themselves. In the circumstances the learned Judge in the Court below has held that the plaintiff is entitled to the relief which he claimed in the suit and it is upon the nature of the relief claimed that the point in this appeal depends.

It is contended that the action is barred by limitation by reason of Art. 95, Lim. Act, which provides a period of three years for action based on a fraud. Mr. Mukharji on behalf of the respondents contends that in the circumstances of the case and in any event the action was not barred because the knowledge of the fraud was within three years of the case. But the case in both the Courts below proceeded on the footing that if Art. 95 applied, the action would be barred by limitation. The matter would therefore appear to depend upon the nature of the plaintiff's claim. It is true that there are in the plaint allegations which would amount to allegations of fraud ; in the relief portion the expression 'fraud' is used in connexion with the certificate sale. The plaintiff alleges that the proceedings arising out of the certificate sale were absolutely fraudulent and that defendants 3 and 4 had thereby acquired no right, nor did they or could they affect the plaintiff's title. It is no good pretending that the plaint is a model of pleading and I have no doubt that a good deal of it would have been struck out by any Court as embarrassing. But the question is, what was the substance of the plaintiff's claim, what facts did he prove, and did those facts entitle him to succeed in the action ? There is no dispute in this case that S. 208, Chota Nagpur Tenancy Act, applies. This section refers to the Bengal Rent Recovery (under-tenures) Act of 1865, the main provision of S. 16 whereof is that "the purchaser of an under-tenure sold under this Act shall acquire it free from all incumbrances". There is then a proviso, and lastly, a clause to the effect :

> Nothing in this section shall be held to apply to the purchase of a tenure by the previous holder thereof, through whose default the tenure was brought to sale.

Having regard to the findings of fact of the Courts below, there is not the slightest doubt that the clause last referred to applies. It is difficult to understand quite what the argument of Mr. De is. It is based on the contention (naturally so) that the plaintiff in this action is in some way seeking to set aside a sale or to modify the effect of a sale within the meaning of S. 214, Chota Nagpur Tenancy Act. The contention is that the plaintiff in this action is bound in some way, either directly or indirectly, to set aside the sale before he could have the relief which he sought. I have not the slightest doubt that if that were so, then the action would not be maintainable and would be barred under S. 214, Chota Nagpur Tenancy Act. But the argument seems to forget the proviso (which I have quoted) to S. 16, Bengal Rent Recovery Act of 1865. Neither one of the provisions of S. 16 is of greater value than the other. On a plain construction each sub-section must be given its full value ; and, taking the matter in that way, it is shown that there are two classes of cases : one in which a property is sold free from all encumbrances, and the other in which the encumbrances remain. The facts of this case disclose that it is the latter. Now, Mr. De's argument, which as I have already stated, is somewhat difficult to understand, is to the effect that the plaintiff had to establish those facts in order to bring himself within what I call the proviso to S. 16, Act 8 of 1865.

Whether so to do he had to bring an action or whether in the circumstances the defendants would have to bring an action, depended upon who happened to

be in possession. But I fail to see entirely how it can be said that this is to modify or to set aside an order under S. 214. Mr. Mukharji's client merely desired a declaration to the effect that the mortgage subsisted and that the plaintiff was entitled to the relief, which the fact that he was the mortgagee entitled him to, the relief in the present case being for possession. As I have already stated, it is true that allegations of fraud were made but in the circumstances they were entirely unnecessary ; and when one reads the substance of the relief, it was merely a declaration that the sale did not affect the encumbrances and, as I have just a moment ago said, the plaintiff was entitled to such relief which the fact that he was the mortgagee would entitle him to. The principle disclosed in the sub-clause under S. 16, Rent Recovery Act, has been the basis of many judgments of the High Courts in India and also of the Judicial Committee of the Privy Council, though neither that section nor S. 90, Trusts Act, applied. Shortly stated, the principle is that a person cannot benefit by his own wrong ; in other cases it might be said that the principle of a person not being entitled to derogate from his own grant would apply, apart from the sections to which I have referred. In my judgment it was not an action based on fraud although there were allegations of fraud. It was an action claiming that the sale did not affect the encumbrances and the plaintiff is entitled to possession. The period of limitation is the period provided by Art. 138, Limitation Act. This judgment governs both appeals Nos. 457 and 458 of 1934 and the appeals are dismissed with costs. Leave to appeal is refused.

S.C./D.S. *Appeals dismissed.*

A. I. R. 1937 Patna 333

WORT, J.

Abdul Baqi — Defendant — Appellant.

v.

M. Fakhrul Islam and *others* — Plaintiffs—Respondents.

Appeal No. 933 of 1934, Decided on 10th February 1937, from decision of Sub-Judge, 2nd Court, Gaya, D/- 19th Juy 1933.

(a) Practice—Duty of Court—Right of local inspection conferred on Judge is for purpose of understanding evidence and for no other purpose—A witness cannot be contradicted by Judge from his personal knowledge from local inspection.

The function of a Judge in exercising his right of local inspection granted by the statute, i. e., under the Civil P. C., is for the purpose of understanding the evidence and for no other purpose. By "understanding the evidence" is not meant "contradicting a witness". A witness may make a statement which from the local inspection may appear to be untrue but a Judge is not entitled to say that it is untrue from what he himself observes. [P 334 C 1]

(b) Record of Rights—Khesra not in conflict with Record of Rights but giving greater detail—Khesra is admissible in evidence for such purpose only.

A khesra which is not in conflict with the record of rights but is a mere explanation of it in the sense of giving greater detail, is admissible in evidence for such purpose only and no other. [P 334 C 2]

A. B. Mukharji and *A. H. Fakhruddin* — for Appellant.

Rajkishore Prasad — for Respondents.

Judgment.—The question in this case is whether the plaintiffs-respondents were entitled to exclusive rights of irrigation from a certain ahar. The details, it is unnecessary to state and the question argued before me is limited to the matter of whether the learned Judge has acted irregularly by importing, so it is said, his own knowledge into the case from a local inspection and secondly whether he was right in holding that the khesra was inadmissible in evidence. As regards the first question there are two or three observations during the course of the learned Judge's judgment from which it can be gathered what influence the local inspection had upon the learned Judge's mind as regards the facts of the case. The first observation he makes is this :

From the natural position of the lands in defendants' Takhtas on the locality lying much removed at a distance from the Pind 644 up to junction and Pind 645 and in the absence of any documentary evidence that the lands of the defendants are in *Kita Uperka Ahar Ka Pith* I would conclude that they are not in *Kita Uperka Ahar Ka Pith*.

It might be suggested that, that statement does not result from the local inspection, but on reference to other passages of the judgment with regard to this matter the point seems to be clear. It was the plaintiffs' case, it appears, that the defendant had other sources of irrigation and therefore was not entitled to irrigate from the ahar in dispute. The learned Judge in the Court below points out that the Munsif had not relied upon the oral evidence

excepting the evidence of D. W. 1. Then he goes on to point out that the evidence of D. W. 1 "must be taken with great caution". The witness had said that there were no Ahris called Utarwari, Dayali and Naiki. Then the Judge goes on to point out that he (the Judge) found at local inspection that there were Khatas very deep in these Ahris and the western Pinds were very high. From that he goes on to observe that this falsifies the witness's evidence. Then at a later stage of his judgment the learned Judge says:

> It appeared at the local inspection that a portion of the eastern Pind of Deyali Ahri has been removed or in other words the Pind 644 at its northern extremity has been removed. It shows clearly that the surface water goes to Utarwari Ahri in 633...

Now, the function of the learned Judge in exercising his rights of local inspection granted by the statute, i. e., under the Civil Procedure Code is for the purpose of understanding the evidence and for no other purpose. By "understanding the evidence" is not meant "contradicting a witness". A witness may make a statement which from the local inspection may appear to be untrue, but the learned Judge is not entitled to say that it is untrue from what he himself observes. The reason for granting this power of local inspection is perfectly obvious. In certain cases facts are complicated and without having the opportunity to see the subject matter of the witness's evidence it is almost impossible to understand what the witness means and it is for that purpose that the Judge is entitled to inspect the locality. If he wanted to condradict D. W. 1 he was not entitled to do so from what he saw on the spot as it is perfectly obvious that had the parties been entitled to question the learned Judge on what he saw a very different result might obtain from that which the learned Judge describes in his judgment. D. W. 1 may be a truthful witness or an untruthful witness; but when he says that there were no ahris he can only be contradicted in that by process known to the law, namely, cross-examination or by other and more cogent evidence which will show that his statement cannot be supported I have analysed the learned Judge's judgment with care and fail to come to the conclusion that the passages to which I have referred are not an indication that the whole judgment on this question of fact for such as it was, was not influenced by the learned Judge's observations.

As regards the question of khesra the matter is a little more difficult. In so far as any attempt was being made to rebut the record of rights by reference to the khesra, in my judgment the learned Judge was right. The law does not recognize khesras as documentary evidence, although it is possible that khesras might be admitted under some section of the Evidence Act. But I purposely do not decide that matter because I do not think it arises. In so far as the khesra was not in conflict with the record but a mere explanation of it in the sense of giving greater detail, I would hold that it was admissible, but for any other purpose it was clearly inadmissible. Having regard to the view I take of the effect of the learned Judge's inspection on his judgment I must come to the conclusion that the case must be remanded to him to be heard and determined excluding those matters to which I have referred and excluding any matter in the form of new evidence which arises by reason of that inspection. It is impossible of course for the learned Judge entirely to eliminate from his mind what he saw on the spot, but he must do his best to exclude these matters which would run counter to the cases of either parties; in other words, to state it quite shortly, his inspection must be used for the purpose of understanding the evidence and not otherwise. The appeal is allowed, the case will be remanded to the learned Judge to be heard and determined according to law and the costs of this appeal will abide the result of the hearing in the Court below. Leave to appeal is refused.

K.B./A.L. *Appeal allowed.*

A. I. R. 1937 Patna 334

ROWLAND, J.

Sahdon Singh — Plaintiff — Appellant.

v.

Balam Singh and *others* — Defendants — Respondents.

Appeal No. 768 of 1934, Decided on 14th January 1937, from appellate decree of Sub-Judge, Second Court, Muzaffarpur, D/- 28th June 1934.

Evidence Act (1872), Ss. 78, 56 and 57 — Certain printed Government publication relied on for proof of certain tauzi numbers

—Court returning it to party thinking it is to take judicial notice under Ss. 56 and 57—Court should regard it as public document under S. 78 and mark it as exhibit.

With respect to the existence of certain tauzi numbers reliance was placed on a report published by Government and this report was filed by the party relying on it but was returned by the Court thinking that it was a matter of which it was entitled to take judicial notice under Ss. 56 and 57 of Evidence Act. There was a reference to this report in the judgment of the Court:

Held: that the Court should have regarded the report as a public document under S. 78 of the Act and admitted it formally in evidence and marked it as an exhibit, inasmuch as the report could be proved by "any document purporting to be printed by order of Government", under S. 78 of the Act. [P 336 C 2]

K. P. Jayaswal, *H. P. Sinha* and *Dharamshila Lal* — for Appellant.

A. B. Mukharji and *R. Misra* —for Respondents.

Judgment.—The plaintiffs who are the appellants before me, claimed to have acquired a certain lakheraj property by purchase and to be entitled to Khas possession of the lands 2 bighas 18 kathas 8 dhurs=1·97 acres entered in survey kathas 507, 508 and 509. They impleaded several sets of defendants of whom defendant 6 (defendant third party) and defendants 10 and 11 (defendants fifth party) claimed adversely to have the right as lakherajdars; while the claim to khas possession was resisted by the defendants first party who claimed to have purchased this raiyati interest from raiyats on the land. The claim to the landlord's interest on behalf of defendant 6 extended to ·45 acre out of plot 1364, but the claim of Baldeo and Chanchal extended to the whole of the land in suit. The property appears from the record of rights to have belonged to Bhatu Jha and others eight annas, Jugeshwar and others six annas and Singheshwar Jha two annas. In 1914 there was a cess re-valuation and the lands were entered in the names of Bhatu, Singeshwar, Jugeshwar, Achambit and Bishundutt. It is said that Bajit Lal Jha and Sanjan Jha were in 1932 the last representatives of this family, and it was in that year that the plaintiffs got a conveyance from them. In the meantime there had been certificate proceedings for recovery of arrears of road cess against the lakherajdars and 1·42 acre out of plot 1364 was put to sale on 20th April 1917, and was purchased by Saiyid Ghulam Siptain. There was again default which led to the taking of certificate proceedings in 1925. ·45 out of plot 1364 was put up to sale along with other lands and was purchased by Phaguni, defendant third party. The plaintiffs' case was that Phaguni obtained nothing by this purchase, because, first this land had been already sold to Saiyid Ghulam Siptain who was no party to the certificate proceedings; and, secondly, all the persons named as certificate debtors in the proceedings (the names having apparently been taken from the old record of rights) were dead. The plaintiffs on 26th April 1932, took a conveyance from Saiyid Ghulam Siptain of the lands which he had bought in 1917. There remained still a residue in the hands of the successors of the old recorded lakherajdars, and of this residue amounting to about 0·55 acre the plaintiffs took a sale deed on 26th June 1932, from Bajit Lal Jha and Sanjan Jha.

At the trial, Phaguni put in a written statement in support of his title by his purchase, and in the first Court contested the suit. The contest was also raised by Baldeo Jha and Chanchal Jha, defendants 10 and 11, who alleged that they and not Bajit Lal Jha or Sanjan Jha were the successors of the old recorded lakherajdars and were entitled to the entire property. They did not admit that anything had passed to Saiyid Ghulam Siptain or to the plaintiffs by the sales to which I have referred. So much for the rival claims to the lakheraj right. Coming now to the tenant interest or right to khas possession, the Record of Rights showed khata No. 507 as raiyati of Chedi Dhobi, khata No. 508 as raiyati of Jhingar Dhobi and khata No. 509 as raiyati of Phuchi Dhobi. The plaintiff's case was that he and his father had been thikadars of this lakheraj since two years after the survey, that the lands were zirat or bakasht of the lakherajdars which were cultivated by tenants at will on batai, as the lakherajdars were not resident in the village. Two years after the survey the plaintiff and his father were given the thika, the tenants gave up possession to them and they have ever since been in khas possession. On the other hand, defendants 1 to 5 alleged that by the death of Phuchi and Jhingar without heirs all three khatas had devolved on Mangal Dhobi, defendant 4, and Soman Dhobi, defendant 5. Soman Dhobi was said to be the son of one Aghnu Dhobi whose name does not

appear in the Record of Rights in connexion with this land at all. These Dhobis, Mangal and Soman, on 9th May 1932, sold their raiyati rights in the disputed land to the defendants first party Balam Singh and others, defendants 1 to 3. They professed complete ignorance of any thika in favour of the plaintiff; also of any title in favour of Saiyid Ghulam Siptain and professed to have been paying rent all along to defendant 10, Baldeo, and defendant 11, Chanchal Jha. The Munsif came to the conclusion that neither Phaguni, defendant 6, nor Baldeo and Chanchal, defendants 10 and 11, had any right or title in the lands in suit and that the lakheraj right had validly and effectively passed to Saiyid Ghulam Siptain and from him to the plaintiff so far as concerned the lands covered by the sales to and by him and that Bajit Lal and Sanjan had effectively conveyed to the plaintiff a good title to the residue of the lands in suit.

Neither Phaguni, defendant 6, nor Baldeo and Chanchal appealed to the District Judge against that decision, but an appeal was presented by the defendants first party, Balam Singh and others. They in their appeal challenged the findings of the Munsif on all the issues which had been decided in favour of the plaintiffs, that is to say not only the issue as to the tenancy right of the Dhobis and after them the appellants but also the issues as to the proprietary or rather lakheraj right and they contended that the suit ought to have been dismissed in toto on a finding that the plaintiffs had no right of any kind. The manner in which the learned Subordinate Judge has dealt with the appeal is curious. He has considered only the question whether the plaintiffs had obtained khas possession of the lands or the tenant defendants remained in possession and has left open his judgment the question whether the auction purchase of Saiyid Ghulam Siptain or that of Phaguni was valid and has not at all considered the question whether Bajit Lal Jha and Sanjan Jha were competent to alienate the residue of the land or whether title was in Baldeo and Chanchal. It is obvious from a mere statement of the above facts that the appellate decision cannot stand.

Mr. Mukharji for the respondents has contended that the findings being findings of fact, this Court ought not to interfere on second appeal. But the necessary findings are not there. Dr. Jayaswal for the appellants has referred to various passages in the judgment of the learned Subordinate Judge in which he says that the learned Judge has taken a wrong view of law in approaching the evidence and has failed to consider certain parts of the evidence. The most important of these is with reference to the receipts purporting to be granted by Baldeo and Chanchal. Now, if, as the Munsif has found, Baldeo and Chanchal were nobody and have come forward only recently as mere pretenders to the property with which they had no concern, it is manifest that the evidentiary value of any receipts granted by them and purporting to date back to the years 1910 or so, must be seriously affected. In fact, it is not too much to say that a Court cannot properly determine the evidentiary value of those receipts until it has first settled the question whether Baldeo and Chanchal are genuine landlords or impostors.

Another point on which Dr. Jayaswal laid some stress was that the Subordinate Judge has criticized the Munsif for having remarked that some of the receipts contain tauzi numbers which were given only in the Cess Revaluation of 1912-13 and these tauzi numbers could not have been available in the year 1317 (corresponding to 1910 or 1911). The Subordinate Judge thought that there was no satisfactory evidence that the tauzi numbers existed only in the year 1912-13. It is pointed out that in the Munsif's Court reliance was placed on a printed Government publication, namely Mr. F. F. Lyall's Report of the Cess Revaluation Operations, District Muzaffarpur, 1913. This report appears from the rubber stamp to have been filed in the Munsif's Court on 18th July 1933, and is referred to by the Munsif in his judgment. It was then apparently returned to the party. It would have been more correct to mark it as an exhibit, but perhaps the Munsif thought that it was a matter of which he was entitled to take judicial notice under Ss. 56 and 57, Evidence Act. Strictly speaking, that is not quite the position. It is more correct to regard the report as a public document within the meaning of S. 78, Evidence Act, which may be proved "by any document purporting to be printed by order of Government."

The appeal will have to go back to the Subordinate Judge for hearing *de novo* and the plaintiffs will be able to move him to admit this report formally into evidence. The parties will then be able to make their submissions as to the effect of it. The result is that the order of the Subordinate Judge is set aside, the appeal is remanded to him for hearing *de novo*. Costs of the Courts below as well as costs in this Court will be governed by the result.

V.B.B./A.L. *Case remanded.*

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* A. I. R. 1937 Patna 337

COURTNEY-TERRELL, C. J. AND JAMES, J.

Firm Dedhraj-Lachminarayan — Appellant.

v.

Bhagwan Das and *others*—Respondents.

Letters Patent Appeal No. 15 of 1936. Decided on 17th February 1937, from decision of Dhavle, J., D/- 8th April 1936.

*** Limitation Act (1908), Art. 182 (2) and (3) —Cl. (2) does not state that appeal must be against decree in suit—There is no essential difference between orders for restoration and orders for review — Suit by *A* against *B* dismissed—In appeal decree passed ex parte against *B* on 7th August 1931 — Application by *B* for restoration dismissed on 19th November 1931 — Appeal by *B* dismissed on 1st September 1933—*A* applying for execution of decree on 15th November 1934—Application held was within time as starting point was order of appellate Court — If no appeal had been preferred, starting point would have been date of order on application for restoration.**

There is no warrant for reading into the words of Cl. (2) of Art. 182, Limitation Act, any qualification either as to the character of the appeal or as to the parties to it; the words mean just what they say. Cl. (2) of Art. 182 does not state in its strict grammatical construction, that the appeal must be against the decree in the suit. The real distinction between Cls. (2) and (3) of Art. 182 is really one of the particular tribunal which passes the order by which the original decree is imperilled. If the order is made by the appellate Court, then the period of limitation under Art. 182, Cl. (2) runs from the date of the appellate order. If on the other hand the order imperilling the decree is made by the original Court which passed it, then the date from which limitation runs is the date of the order of the original Court. There is no essential difference between orders for restoration and orders for review. All cases in which the Court re-considers its own judgment are cases of review within the meaning of Cl. (3) of Art. 182, Limitation Act. Application for restoration and application for review (using the word in the narrower sense) are, it is true, separately dealt with in the order appended to the Civil Procedure Code. These are mere questions of procedure and may be altered by any particular High Court; but the entire jurisdiction of any Court to interfere with its own decision once given is derived from S. 114 of the Code itself where the single word "review" is used. [P 340 C 2 ; P 341 C 1, 2]

A brought a suit against *B* which was dismissed. In appeal by *A* an ex parte decree was passed on 7th August 1931. *B* made an application for restoration which was dismissed on 19th November 1931. *B* then appealed but the appeal was also dismissed on 1st September 1933. *A* then made an application for execution of his decree on 15th November 1934 :

Held : that the application was within time as the starting point for limitation was 1st September 1933, the date of the order of the appellate Court. If no appeal had been preferred from the order on the application for restoration, the date of that order would have been the starting point for limitation under Cl. (3) : *A I R 1932 P C 165, Rel. on; A I R 1933 Bom 255, Ref ; A I R 1927 Pat 215, Disting.; A I R 1917 Pat 157; held Overruled by A I R 1932 P C 165.* [P 341 C 2]

S. N. Bose — for Appellant.

S. N. Ray — for Respondents.

Dhavle, J. — This is an appeal by the decree-holders, and it arises out of execution proceedings. The judgment-debtors contended that the execution case was barred by limitation; and this contention was rejected by the Munsif but allowed by the District Judge on appeal. The suit was tried in 1931 and was dismissed by the trial Court on 8th January of that year. On 7th August following, an appeal was allowed and the suit decreed ex parte by the lower appellate Court. Upon this the defendants made an application under O. 41, R. 21, on 27th August. On 19th November the application was rejected by the lower appellate Court. Against this rejection there was an appeal to the High Court, which was dismissed on 1st September 1933. The application of the decree-holders for execution was filed on 15th November 1934, which is more than three years from 7th August 1931, the date when the appeal was allowed and the suit itself decreed, and the question raised is whether the appeal against the rejection of the application under O. 41, R. 21 which appeal was dismissed on 1st September 1933, will provide the starting point for limitation for the execution. Art. 182, Limitation Act, provides a period of three years for the execution of such decrees, the starting point being (1) the date of the decree, or (2) "(where there has been an appeal) the date of the final decree or order of the appellate Court". So far as the decree under execution is concerned there was no appeal. The pro-

ceedings under O. 41, R. 21, which were brought up to this Court in appeal, are analogous to proceedings under O. 9, R. 13 in the case of decrees passed ex parte by the trial Court; and there are several express decisions where it has been held that proceedings of that kind do not postpone the starting point of limitation. In 3 P L J 119[1] it was held by Chamier, C. J. and Sharfuddin, J. that the words "where there has been an appeal" in Art. 182, Limitation Act, mean where there has been an appeal against a decree in the suit, and cannot be held to include an appeal against an order made on an application to set aside that decree. This decision is binding on me sitting singly. Not only is it in accordance with earlier decisions from Bombay and Madras as well as Calcutta, but it has been followed in the Calcutta High Court in such cases as 54 Cal 1052[2] and 35 C W N 155.[3] I do not think that anything said in 6 Pat 780[4] regarding the case from 3 P L J 119[1] has the effect of shaking the authority of that decision. The learned advocate for the appellants has however relied on two Privy Council decisions in support of the contention that the view taken in this Court must be taken to be overruled. One of these decisions is 36 C W N 803.[5] Sir Dinshaw Mulla who delivered the opinion of the Judicial Committee in this case, pointed out that there is no definition of appeal in the Code of Civil Procedure, and added that :

> Their Lordships have no doubt that any application by a party to an appellate Court, asking it to set aside or revise a decision of a Subordinate Court is an appeal within the ordinary acceptation of the terms, and that it is no less an appeal because it is irregular or incompetent.

It is contended on behalf of the appellants that this observation covers the facts of the present case. I am unable to accept this. What their Lordships were dealing with at the time was an appeal which was irregular in form as not being an appeal against the decree of the Subordinate Judge but one against his judgment and what they decided was to overrule the view taken in such cases as 19 C W N 287[6] that the 'appeal' contemplated in Art. 182, Limitation Act, must be an appeal in which the parties to the execution proceedings are directly interested and must be such as to imperil the integrity of the decree. Considerations of that kind do not arise here. What the appeal to the High Court imperilled was the order of the lower appellate Court rejecting the application under O. 41, R. 21 after it had allowed the appeal in the suit and decreed the suit ex parte, but it is not the rejection of that application or the appeal from that rejection that is under execution. The appeal to the High Court was not intended to set aside any decision of the Subordinate Court except the rejection of the application under O. 41, R. 21. The learned advocate for the appellants has also relied on another observation in *Nagendra Nath's case*[5] that :

> It is at least an intelligible rule that so long as there is any question *sub judice* between any of the parties those affected shall not be compelled to pursue the so often thorny path of execution which, if the final result is against them, may lead to no advantage.

But the only question that could be considered to be *sub judice* between the parties while their appeal in the High Court was pending was not the decree under execution, but whether the appellants to the High Court had been duly served with notice of the appeal, in the lower Court or had been prevented from sufficient cause from appearing when the appeal was called on for hearing. The observation of their Lordships of the Judicial Committee must, I think, be taken with the facts of the case before them, and does not seem to cast any doubt on the uniform current of decisions not only in this High Court but in all the other High Courts of the country as far as I am aware with the sole exception of 8 Cal 248,[7] a case which has been repeatedly dissented from. The other case referred to by the learned advocate for the appellants is 60 Cal 662.[8] The facts of that case and the point for decision in that case are entirely different

1. Rai Brijraj v. Nauratan Lal, A I R 1917 Pat 157=44 I C 575=3 P L J 119.
2. Fakir Chand v. Daiba Charan, A I R 1927 Cal 904=104 I C 466=54 Cal 1052.
3. Profulla Kumar Basu v. Mt. Sorojbala Basu, A I R 1931 Cal 332=131 I C 263=52 C L J 594=35 C W N 155.
4. Somar Singh v. Deonandan Prasad, A I R 1927 Pat 215=102 I C 811=6 Pat 780=8 P L T 379.
   Nagendra Nath Dey v. Suresh Chandra Dey, A I R 1932 P C 165=137 I C 529=59 I A 283 =60 Cal 1=36 C W N 803 (P C).
6. Christiana Benshawn v. Benarasi Prosad, A I R 1914 Cal 583=22 I C 685=19 C W N 287.
7. Lutful Huq v. Sumbhudin Pattuck, (1882) 8 Cal 248=10 C L R 143.
8. Abdulla Asghar Ali v. Ganesh Das, A I R 1933 P C 68=142 I C 326=60 I A 83=60 Cal 662 (P C).

from anything we have before us. But the learned advocate has relied on Sir George Lowndes's observation that :

> Their Lordships think that, when an order is judicially made by an appellate Court which has the effect of finally disposing of an appeal, such an order gives a new starting point for the period of limitation prescribed by Art. 182 (2) of the Act of 1908.

This was said with reference to an order of abatement, the question for decision being whether such an order was a judicial order so as to come within the Article. The order of the High Court dismissing the appeal on 1st September 1933 was unquestionably a final order in the miscellaneous case which was based on the defendants' application under O. 41, R. 21 but I am unable to see anything in the case from 60 Cal 662[8] which has any bearing on the question whether the appellate order in the proceeding under O. 41, R. 21, will operate to postpone the starting of limitation for the execution of the decree of the lower appellate Court which was passed on 7th August 1931 and which is now under execution. It is impossible to read the decision of the Privy Council as shaking the authority of *Rai Brijraj* v. *Nauratan Lal*,[1] which as already said, is binding on me sitting singly, and which, if I may say so with all respect, expresses the law correctly. In my opinion the view of the lower appellate Court that the execution case is barred by limitation is correct. The appeal fails and is dismissed with costs. Leave to appeal is given.

Letters Patent Appeal.

Courtney-Terrell, C. J. — The suit out of which this Letters Patent appeal arises was a money claim which was dismissed by the trial Court on 8th January 1931. The plaintiff appealed and on 7th August 1931 the appeal was allowed and the suit decreed ex parte against the defendant. The defendant made an application for restoration under O. 41, R. 21, but this was dismissed on 19th November 1931. The defendant appealed from the order of dismissal to the High Court, but the appeal was dismissed on 1st September 1933. The present application for execution was made on 15th November 1934. The judgment-debtors contended that the execution case was barred by limitation. This contention was rejected by the Munsif, but allowed by the District Judge on appeal. A second appeal by the decree-holder was dismissed by the learned Judge of this Court and the question to be decided by us is whether the execution proceedings are or are not barred by limitation, having been begun more than three years from the decree of 7th August 1931. The matter depends upon the construction of Art. 182, Cls. (2) and (3), Limitation Act ; and it is contended on behalf of the decree-holder appellant that the case comes either under Cl. (2) or under Cl. (3). These clauses are as follows :

> 2. Where there has been an appeal, the date of the final decree or order of the appellate Court, or withdrawal of the appeal, or
>
> 3. Where there has been a review of judgment, the date of the decision passed on the review.

In support of this contention it is urged on the one hand that the dismissal on 1st September 1933 of the Miscellaneous appeal to the High Court is within the meaning of Cl. (2), and even if this argument be not justified, that the dismissal on 19th Novembar 1931 of the application by the judgment-debtor for restoration of the appeal comes within the meaning of Cl. (3), in either event the application for execution is within time.

As to the first argument it is contended on behalf of judgment-debtor that the word 'appeal' in Cl. (2) refers to an appeal from the decree in the suit and to nothing else ; and the decision in 3 P L J 119[1] has been relied upon. The learned Judge of this Court held that this decision was binding upon him. The argument of the appellant before the learned Judge and before us was that the decision must be taken to have been impliedly overruled by their Lordships of the Privy Council in 59 I A 283.[5] In that case one Madan Mohan sued in the Court of the Subordinate Judge to enforce a mortgage. The plaintiff claimed that the appellants (before the Privy Council) who were defendants 11 and 12 in the suit had assigned their interest in the mortgage to him. The Subordinate Judge upheld this claim and declared the liability of these defendants to pay a sum of Rs. 4,000 which they brought into Court. On appeal to the High Court a compromise was effected between the parties and a new preliminary decree was passed in terms of the compromise. Madan Mohan's claim against the appellant was disregarded and the appellants were shown as mortgage creditors for Rs. 14,000, whereupon they applied to the Subordinate Judge for the with-

drawal of the Rs. 4,000 they had brought into Court. This was allowed. Madan Mohan opposed this application but his contention was overruled. He appealed to the High Court, but the appeal was dismissed. The decree by consent in the High Court divided the parties into one of decree-holders and the other of judgment-debtors. Two of the judgment-debtors paid the amount due from them under the decree. Madan Mohan who belonged to the group of decree-holders applied to the Subordinate Judge for a final mortgage decree, claiming again that defendants 11 and 12, who were grouped with him as decree-holders had assigned their interest to him. This was disallowed by the Subordinate Judge and a final decree was passed on 24th June 1920 and declared that in conformity with the judgment, defendants 11 and 12 were entitled to payment of the said sum of Rs. 14,000. On 27th August 1920, Madan Mohan appealed to the High Court and joined as parties to the appeal only, the other decree-holders and not the judgment-debtors and his appeal was insufficiently stamped. It was nevertheless heard by the High Court and was dismissed upon the merits and also on the ground of irregularity on account of the insufficient stamp. The judgment of the High Court to this effect was dated 24th August 1922, and the question before their Lordships was as to the effect of this judgment. The application for execution by sale of the mortgaged properties was dated 3rd October 1923. The respondents before the Privy Council contended that the date of the decree of the Subordinate Judge, that is to say June 1920 was the proper starting time and that the application for execution was out of time. The appellant contended that the critical date was the decree of the High Court of 24th August 1922 dismissing the appeal on the ground of irregularity and upon the merits. It was urged that the appeal, by reason of its irregularity, was not an appeal at all and also that to come within Cl. (2) of Art. 182 the appeal must be one in which the whole decree was imperilled. Their Lordships referred to the difference of opinions in India and said that nothing would be gained by discussing them in detail. They said that the question must be decided upon the plain words of the Article—'where there has been an appeal' and stated :

> There is, in their Lordships' opinion, no warrant for reading into the words quoted any qualification either as to the character of the appeal or as to the parties to it ; the words mean just what they say. The fixation of periods of limitation must always be to some extent arbitrary, and may frequently result in hardship. But in construing such provisions equitable considerations are out of place, and the strict grammatical meaning of the words is, their Lordships think the only safe guide. It is at least an intelligible rule that so long as there is any question *sub judice* between any of the parties those affected shall not be compelled to pursue the so often thorny path of execution which, if the final result is against them, may lead to no advantage.

In applying that principle to the case before us we find that there was in fact an appeal to the High Court in the matter of the judgment-debtor's application for restoration. Had the judgment-debtor been able to show that he had good grounds for not being present when the suit was decreed ex parte, the Subordinate Judge would have set aside the original ex parte decree and would have heard the case on its merits after hearing the judgment-debtor. That is to say the original decree was by the application for restoration put in peril. Similarly until the appeal of the judgment-debtor to the High Court from the Subordinate Judge's decision was decided, the suit was still in peril. Cl. (2) of Art. 182 does not state in its strict grammatical construction, that the appeal must be against the decree in the suit. These are words which we are asked to read into the Article by implication and I see no ground in principle for so reading them. In conformity with the Privy Council decision that the matter must be decided on the plain words of the Article and applying the principle of the rule stated by the Privy Council so as to make it intelligible, the order of the appellate Court of 1st September 1933 should be held the proper date from which the period of limitation should start. In my opinion the contention of the appellants is correct and the case reported in 3 P L J 119[1] must be considered as overruled. This view of the matter was followed in 57 Bom 388[9] the facts of which may be simply related.

Under a decree dated 14th December 1925 Revanshidappa and Sidramappa became entitled to recover a sum of money from Gurushantappa. On 6th April 1926 Sidramappa preferred an appeal against

9. Nagappa Bandappa v. Gurushantappa Shankrappa, A I R 1933 Bom 255=147 I C 1227=57 Bom 388=35 Bom L R 432.

the decree. Meanwhile on 6th March 1926 Gurushantappa had applied for a review of the decree. This was allowed on 15th July 1926 and as a result of the rehearing on the same date and by the same judgment the amount under the decree was reduced. Revanshidappa and Sidramappa then preferred an appeal against the order granting the review but they presented no appeal against the decree of 15th July 1926. On 29th October both the appeals were dismissed as incompetent. Revanshidappa and Sidramappa assigned their rights to Nagappa who applied on 2nd September 1929 for transfer of the decree to another Court for execution. It was contended by Gurushantappa that the application was barred, not having been filed within three years from 15th July 1926. It was held that the application for execution was in time, as time began to run from 29th October 1928 the date of the dismissal of the appellate decree from the order granting the review; and in view of the Privy Council decision the Court refused to accept the contention that the appeal mentioned in Art. 182, Cl (2) must be an appeal from the original decree.

I agree with the learned Judge of this Court in his opinion that the case in 6 Pat 780[4] does not really cover the point. In that case an appeal to the High Court had been lodged from a preliminary decree in a mortgage suit but not from the final decree which was sought to be executed. In that case however the preliminary decree determined the rights of the parties in the suit and the appeal from that decree would in any case be properly regarded as within Cl. (2) of Art. 182. The real distinction between Cls. (2) and (3) of Art. 182 is, in my opinion, really one of the particular tribunal which passes the order by which the original decree is imperilled. If the order is made by the appellate Court, then the period of limitation under Art. 182, Cl. (2) runs from the date of the appellate order. If on the other hand the order imperilling the decree is made by the original Court which passed it, then the date from which the limitation runs is the order of the original Court.

Now there is no essential difference between orders for restoration and orders for review. Notwithstanding the heading in O. 47, the matters dealt with in that order are reviews for which applications are made on certain specified grounds and it is true that in common parlance the term "review" is used for applications based upon the grounds specified in that Order. No Court, having once passed a judgment, can alter the terms of that judgment save upon certain specified grounds and one of those grounds is dealt with under the term "restoration". In both cases however, the Court has first to decide whether on the ground specified, it is justified in law in reconsidering its own decision and it either allows or refuses the application for reconsideration. In some cases after the decision to reconsider it may be necessary at a subsequent and separate hearing to deal with the fresh case on its merits. In some cases the matter is dealt with at the same hearing and in one judgment the Court decides firstly whether the case should be reconsidered and secondly the result of its reconsideration. But all cases in which the Court reconsiders its own judgment are cases of review within the meaning of Cl. (3) of Art. 182, Lim. Act. Applications for restoration and applications for review (using the word in the narrower sense) are, it is true, separately dealt with in the orders appended to the Civil Procedure Code. These are mere questions of procedure and may be altered by any particular High Court; but the entire jurisdiction of any Court to interfere with its own decision once given is derived from S 114 of the Code itself where the single word "review" is used. Therefore, in my opinion if no appeal had been preferred from the order on the application for restoration by the Subordinate Judge the date of his order would have been the starting point for limitation under Cl. (3) of Art. 182, but as an appeal from this order was preferred the start of limitation is the date of the order of the appellate Court. With great respect therefore for the careful judgment of the learned Judge of this Court I am of opinion that it was erroneous and the appeal under the Letters Patent should be allowed with costs throughout.

James, J.—I agree.

S.C./D.S. *Appeal allowed.*

A. I. R. 1937 Patna 341

WORT, J.

Alakhnandan Prosad — Appellant.

v.

Mt. Bibi Salma and *others* — Respondents.

Appeal No. 250 and Civ. Revn. No. 582 of 1936, Decided on 8th February 1937.

Bihar Tenancy Act (8 of 1934), S. 170—Person purchasing holding in execution of rent decree—Same holding put up in execution of subsequent rent decree—Application under O. 21, R. 58, Civil P. C., by purchaser that holding belongs to him and that rent decree is nullity—Application is barred by S. 170.

A third party cannot avail himself of O. 21, R. 58, Civil P. C., against a rent decree merely on the ground that the tenure or holding in suit belonged to him. [P 343 C 1]

A person purchased a holding in execution of a rent decree. In execution of a subsequent rent decree the same holding was put up for sale and an application was made by the purchaser under O. 21, R. 58 that the rent decree was a nullity :

Held : that the application was not competent in view of S. 170, Bihar Tenancy Act : *A I R 1933 Pat 32* and *A I R 1936 Pat 480*, *Rel. on.* [P 342 C 2; P 343 C 1]

Manohar Lal and *C. P. Singha* — for Appellant.

Baldeo Sahay and *K. Dayal* — for Respondents.

Judgment.—The difficulty in this case arises by reason of the fact that the parties seem to have been uncertain as to what the application was that was made to the Munsif. The contention of the petitioner, who was the purchaser in execution which took place in 1934, was that the decision of the learned District Judge was without jurisdiction as the application made to the Munsif was an application purported to be made under O. 21, R. 58, Civil P. C., and from such an order made under that Rule no appeal lay. But on the other hand it is contended by Mr. Baldeo Sahay on behalf of the opposite party that the matter was treated by the District Judge as an appeal from an order made under S. 47, Civil P. C., and therefore an appeal lay. It is difficult to decide between these two contentions. But there are certain matters which are quite clear. I find it difficult to believe that the Munsif treated the matter as an application under S. 47. There is no merit in the placing at the head of an application a particular Order or Rule as I have pointed out on more than one occasion, and it is almost incredible that the Munsif should have treated the application as an application under S. 47 of the Code having regard to the fact that petitioner was a third party so far as the execution which was before him was concerned.

To make the matter clear two facts had better be stated. The appeal before this Court was by the purchaser in execution of a rent decree for rent in respect of the years 1336 to 1339, that was in 1934. Subsequently in September 1934 the respondents who are represented by Mr. Baldeo Sahay, brought another rent suit in respect of rents for the years 1338 to 1341. So it will be seen that so far as two years (1338 and 1339) are concerned, the suits overlap. The holding was put up in execution of that decree and it was during the pendency of that execution that this application was made to the Munsif. Mr. Baldeo Sahay on behalf of the respondents argues that whether there is jurisdiction in the District Judge or not, substantial justice will be done by dismissing the appeal as it is quite clear that for one reason or another the Munsif's order itself was without jurisdiction. If it was or purported to be an application under S. 47, Civil P. C., the Munsif had no jurisdiction for the reason that the present appellant was a third party and therefore was not one of those persons who claim to come within the scope of S. 47 of the Code. If on the other hand it was an application or purported to be an application under O. 21, R. 58, it is contended that the Judge equally had no jurisdiction as the matter was barred by S. 170, Bihar Tenancy Act. The most recent decision of this Court in 17 P L T 385[1] is a clear authority for the last proposition. But it is contended by Mr. Manoharlal on behalf of the appellant that a previous decision referred to in the judgment in *Surpat Singh's case*[1] was against the authority of the later decision. It is impossible for me to come to that conclusion, and on a careful reading of both the decisions I am of the opinion that there is no conflict. One observation made by Dhavle, J. who delivered the judgment in the case of *Dconandan Prasad* v. *Pirthi Narayan*—a case referred by Fazl Ali, J. to a Division Bench (13 P L T 643[2]) was this :

> The section (i. e. S. 170) presupposes a rent decree, and it has been repeatedly held that a claim may be made under O. 21, R. 58 on the ground that the decree is not a decree of the kind pre-supposed in the section. Claims have, for instance, been allowed where it was shown that the subject matter of the suit was not a tenure or holding, or that the decree was not a rent decree

1. Surpat Singh v. Shital Singh, A I R 1936 Pat 480=162 I C 805=17 P L T 385=15 Pat 614.
2. A I R 1933 Pat 32=142 I C 40=11 Pat 790=13 P L T 643.

because the landlord had brought his suit in respect of more than one tenure or holding.

But the learned Judge, from whose judgment I have just read, does clearly state that in the particular circumstances of the case before them an application under O. 21, R. 58 was not competent. He says :

No such claim was made in the present proceedings; the claimant merely said that he was the recorded raiyat and that the defendants against whom the landlord had proceeded were his (the claimant's) under-raiyats.

Again the learned Judge says :

It has been contended that he was entitled to show that the decree under execution was not a rent decree, but it is plain that he was not entitled to show this by establishing that the decree was obtained against a wrong party. That would really be establishing that the decree is a nullity, and establishing it under O. 21, R. 58 which is excluded by S. 170, Bengal Tenancy Act.

Finally the learned Judge says while dealing with the referring order of Fazl Ali, J :

It seems to be absolutely beyond question that a third party cannot avail himself of O. 21, R. 58 against a rent decree merely on the ground that the tenure or holding in suit belonged to him.

That judgment together with that of Agarwala, J. and Rowland, J. in *Surpat Singh's case*[1] seems to me quite conclusive in this case. Whatever might be said in this appeal, the appellant claiming that the holding belonged to him, the application before the Munsif was not competent. Mr. Manohar Lal contends that that was not his claim; his claim merely was that the decree was not a rent decree. But that contention was based on the fact that he (the applicant before the Munsif and the appellant before this Court) was the purchaser of the holding under the rent sale of 1934 and this case was contempleted in both the cases reported in 13 P L T 643[2] and 17 P L T 385[1] already referred to. I have dealt with the matter somewhat elaborately, but one of the matters which seems to me to be quite beyond dispute is that the application before the Munsif was not competent as it was an application (whatever it was stated to be) in substance under O. 21, R. 58, in which event there was no appeal to the District Judge. But I am asked to say that as the District Judge's judgment in substance is right, I should decline to reverse it. I do not think there could be very much doubt about the matter, although I am inclined to accept the argument of Mr. Baldeo Sahay and I feel strongly that had the matter been otherwise, I would have refused to set aside the judgment of the District Judge for the simple reason that the District Judge's judgment was right, but I have no such jurisdiction.

If the application had been an application in revision I could decline to exercise my jurisdiction ; but unfortunately from that point of view I have got this appeal before me and I must decide it not as a matter of discretion but as a matter of law. Coming to the conclusion which I do, so far as the appeal is concerned, I am bound to hold that there was no jurisdiction in the District Judge and therefore to set aside his judgment but in the circumstances without costs. There will be no separate order in the civil revision application.

K.B./A.L. *Order accordingly.*

A. I. R. 1937 Patna 343

FAZL ALI, J.

Abdul Majid — Petitioner.

v.

Ali Ashraf — Opposite Party.

Civil Revn. No. 522 of 1936, Decided on 23rd December 1936, from order of Munsif, Hajipur, D/- 30th September 1936.

(a) Civil P. C. (1908), Sch. 2, Para. 14 (c) — Apparent error — Remittal — Award passed and submitted to Court not bearing signature of one arbitrator absent throughout proceedings — Court remitting award and directing all of them to join in award — Such remittance is proper as objection to its legality is apparent on face of award.

On reference of a certain matter to arbitrators the award was passed and submitted by them to the Court but it was not signed by one arbitrator as owing to illness he was absent throughout the proceedings and the Court remitted the same to the arbitrators with the direction that all of them should join in the award:

Held: that as there was no signature of one of the arbitrators on the award there was an objection to the legality of the award apparent on the face of it and hence the Court was justified in remitting the award under Para. 14 (c) of Sch. 2, Civil P. C.: *A I R 1923 P C 66, Expl.* [P 344 C 1]

(b) Civil P. C. (1908), Sch. 2, Para. 15 — Misconduct—Word 'misconduct' is used in sense of neglect of duties and responsibilities devolving upon arbitrators acting judicially under Code — Absence of arbitrator from proceedings, due to some justifiable cause such as illness, is not misconduct.

The word 'misconduct' as used in Para. 15 of Sch. 2, Civil Procedure Code, does not necessarily imply any corruption or moral turpitude on the part of the arbitrators. The word 'misconduct' is used in the sense of neglect of such

duties and responsibilities as devolve on arbitrators acting judicially under the Civil Procedure Code. Absence of an arbitrator from some of the proceedings due to some justifiable cause, such as illness of the arbitrator, does not amount to misconduct : *12 Mad 113, Dissent.* [P 344 C 2]

Ghulam Mohammad — for Petitioner.

Syed Ali Khan — for Opposite Party.

Order.—This application has been made in connexion with a suit which is pending before the Munsif of Hajipur and in which the dispute between the parties has been referred, at their instance, to the arbitration of five persons. It appears that the award which was submitted to the Munsif had been signed by four of the arbitrators only and so he has remitted it to them with the direction that all of them should join in the award and submit it to him by a certain date. The petitioner now challenges the correctness of the order and it is contended on his behalf that the Munsif ought to have set aside the whole award under Para. 15, Sch. 2, Civil P. C., and proceeded with the trial of the suit. It is however clearly stated in the petition filed in this Court on behalf of the petitioner that the fifth arbitrator could not take part in the proceeding as he had fallen ill.

The first point to be considered is whether the Munsif was competent in the circumstances of the present case to proceed under para. 14 (c), Sch. 2, Civil P. C. Under this paragraph the Court may remit the award or any matter referred to arbitration to the re-consideration of the arbitrator where an objection to the legality of the award is apparent on the face of it. In the present case the award did not bear the signature of one of the arbitrators and it further appears that he had taken no part in the proceedings. In these circumstances it seems to me that the Munsif was fully justified in remitting it to the arbitrators under Para. 14. In this connexion the learned advocate for the petitioner strongly relies on 50 I A 324[1] and contends that a Court can proceed under Para. 14 only when in the award or in a document incorporated with it, for instance, a note appended by the arbitrator stating the reasons for his decision, there is found some legal proposition which is the basis of the award and which is erroneous. In my judgment the observations made by their Lordships of the Privy Council in that case must have been intended by them to apply only to that particular type of cases which they had before them and cannot be taken to be exhaustive.

It was, as I have already stated, also contended on behalf of the petitioner that the present case was governed by Para. 15, Sch. 2, Civil P. C., and that the whole award would have been set aside by the Munsif on the ground of the misconduct of the arbitrators; and in support of this contention reference was made to 12 Mad 113[2] where it was held that the absence of one of the arbitrators at some of the proceedings amounted to misconduct and the other arbitrators who proceeded with the inquiry in the absence of the former were also guilty of misconduct. Now, I fully recognize that the word 'misconduct' as used in para. 15 does not necessarily imply any corruption or moral turpitude on the part of the arbitrators. I doubt however if the proposition that the mere absence of an arbitrator from some of the proceedings will constitute misconduct is not too wide. It is well settled that the word misconduct is used in the sense of neglect of such duties and responsibilities as devolve on arbitrators acting judicially under the Civil Procedure Code and it appears to me that it will be unreasonable to hold that even where the absence of the arbitrator from some of the proceedings is due to some justifiable cause (as it was obviously in this case, the arbitrator being admittedly ill) it will necessarily amount to misconduct. However that may be, even assuming that the present case falls under para. 15 also, it was open to the Munsif to set aside the award acting under Para. 15 or remit it to the arbitrators under Para. 14. In this case he has taken the latter course and it is obvious that the order cannot be interfered with in revision. The learned Munsif has made it quite clear in his order that if after the submission of the award by all the arbitrators any objection is filed by any of the parties to the suit on the ground of misconduct on the part of any arbitrator or arbitrators or any other ground, the objection would be heard and decided in due course. This observation will sufficiently protect the interests of the parties.

1. Champsey Bhara & Co. v. Jivraj Balloo Spinning and Weaving Co., Ltd., A I R 1923 P C 66=73 I C 436=50 I A 324=47 Bom 578 (P C).

2. Thammiraju v. Bapiraju, (1889) 12 Mad 113.

The application is dismissed with costs. Hearing fee one gold mohur.

K.B./A.L. *Application dismissed.*

A. I. R. 1937 Patna 345

WORT, J.

Ganga Prasad Sao and *others* — Plaintiffs — Appellants.

v.

Dulari Saran Singh and *others* — Defendants — Respondents.

Appeal No. 1042 of 1934, Decided on 3rd March 1937, from decision of Sub-Judge, 3rd Court, Patna, D/- 5th April 1934.

(a) Mortgage—Substituted security—Mortgage of undivided share can be enforced against property allotted in lieu of share of actual mortgage under revenue partition — Mortgage by karta of oint Hindu family of property held by family as co-sharer with other persons not being members of such family — In partition between family and other co-sharers, family receiving other property as its share in lieu of mortgaged property—Mortgage being by whole joint family and not by one member of his undivided share, mortgagee can enforce his mortgage against property substituted for mortgaged property.

In the case of a mortgage of an undivided share the mortgage may be enforced against properties "which, under a batwara or revenue partition, have been allotted in lieu of" the share of the actual mortgage. [P 346 C 1]

A karta of a joint Hindu family mortgaged the property in which the family was a co-sharer along with other persons who were not members of the joint family. In a partition between such family and the other co-sharers the family received some other property as its share in lieu of the mortgaged property. The mortgagee sought to enforce his mortgage against the property substituted in lieu of the mortgaged property:

Held : that the mortgage being by the whole of the joint family represented by the karta and not a mortgage of an undivided share by one member or some members out of a number of members of the joint family, the mortgagee had a right to enforce his mortgage against the substituted property : *1 I A 106* (*P C*) and *A I R 1932 P C 235*, *Rel. on* ; *15 All 339* (*P C*), *Disting.* [P 346 C 1,2]

(b) Transfer of Property Act (1882), S. 98—Scope—Provisions in Transfer of Property Act relating to rights and liabilities of mortgagor do not apply to anomalous mortgage—Principle of substitution of mortgaged property by some other property being general principle of law is not affected by S. 98.

The expression "in the case of an anomalous mortgage the rights and liabilities of the parties shall be determined by the deed" in S. 98, T. P. Act, means that the provisions in the Transfer of Property Act relating to the rights and liabilities of the mortgagor do not apply to an anomalous mortgage. An anomalous mortgage is governed by the deed itself. But the principle of substitution of some other property for the mortgaged property being a general principle of law not provided for in the T. P. Act, is not affected by S. 98. [P 347 C 1]

K. P. Jayaswal and *Rajkishore Prasad* —for Appellants.

B.C. De, *J.C. Sinha* and *H R. Kazimi* —for Respondents.

Judgment.—The plaintiffs are the appellants in this appeal which arises out of an action in which they asked for a mortgage decree against certain properties other than those which are the subject of their mortgage which was dated 11th September 1926. This mortgage covered an area of 4.24 acres consisting of plots Nos. 1757, 1759 and 1769. The mortgagor was the karta of a joint Hindu family, a family who were co sharers as regards these properties, and others with other persons not members of the joint family. It is clear therefore that the position of the joint family together with those persons who were their co-sharers and who were, as I say, not parties to this action, was that of tenants-in-common. In 1929 as between the joint family and these other persons a partition took place and in lieu of plots 1757 and the other plots which I have mentioned as the subject matter of the mortgage, they obtained 1759 (which was one of the old plots) and plots 1771 to 1776. These plots were about an acre in excess of the area which the mortgage of 11th September 1926 covered. The defendant-respondent comes in under a purchase immediately after the partition of plots 1771 to 1776 on 30th July 1930. We are not very seriously concerned with this purchase however although the issues which were raised in the Court below on behalf of the respondent had been decided in his favour. The matter is to be determined on the question of law. It is only necessary to state that the lower appellate Court came to the conclusion that the doctrine of substitution did not apply in this case as this was an anomalous mortgage. I should perhaps have stated that under the mortgage deed itself the plaintiffs were to be in possession for five years, and, after that period, to continue to do so if they chose. If they decided not to take that course, they could sue for the mortgage money. The mortgage being an anomalous mortgage as I have stated, the Judge in the Court below held that the matter was governed by S. 98, T. P. Act,

and the general principles of law did not apply : By that I mean the doctrine of substitution. In my opinion, so far as the effect of S. 98 is concerned, the learned Judge is clearly wrong. But in any event the point taken by the Judge in the Court below would not bar the plaintiffs' claim as against what I may call the substituted properties as the mortgage deed itself makes a provision for substitution as will appear from the following clause :

If the said rehandar, after the expiry of the term of the rehan, does not like to keep the rehan intact, in that case the said rehandar shall be competent to realize the said rehan money from the person and the mortgaged and other moveable and immoveable, nami and benami properties of me, the executant, my heirs and representatives by taking proper steps.

But I am not proposing to decide the case on that footing. The term of the bond which I have just read was a point advanced by Mr. Jayaswal but not very seriously pressed. The contention made on behalf of the appellants is that the principle as laid down in the leading case in 1 I A 106[1] and followed subsequently in 59 I A 405[2] applies. The principle there laid down was that in the case of a mortgage of an undivided share the mortgage may be enforced against properties "which, under a batwara or revenue partition, have been allotted in lieu of" the share of the actual mortgage. The same principle as I have said was followed in the later case reported in Vol. 59 of the Indian Appeals. Mr. De on behalf of the purchaser-respondent contends in the first instance that the defendant-mortgagor had no right to mortgage his undivided share and, should he do so, the result would be the same as in 20 I A 116.[3] But the answer to that is the statement which I made at the commencement of my observation, namely, that this was the case of one party being a joint family mortgaging what they were clearly entitled to mortgage having regard to the fact that their co-sharers were not members of the same family but persons other than members of the joint family. They were therefore in a position of tenants-in-common as I have already stated. It was a mortgage, to repeat myself, by the whole of the joint Hindu family represented by the karta and not a mortgage of an undivided share by one member or some members of a number of persons comprising a joint family. It is exactly that case to which their Lordships of the Judicial Committee of the Privy Council in 1 I A 106[1] refer. At p. 119 of the Report Sir Montague E. Smith is reported to have made this statement :

Now, what was the subject of this mortgage ? It was an undivided moiety in two out of three villages forming a joint and undivided estate. The sharers, however, do not appear to have been members of a joint and undivided Hindu family, but to have enjoyed their respective shares (at all events their shares in two villages named in severalty). It is therefore clear that the mortgagor had power to pledge his own undivided share in these villages ; but it is also clear that he could not, by so doing, affect the interest of the other sharers in them, and that the persons who took the security took it subject to the right of those sharers to enforce a partition, and thereby to convert what was an undivided share of the whole into a defined portion held in severalty.

I want to repeat at this stage that this was not a mortgage by one member of a Hindu family ; it was a mortgage by all the members of a Hindu family forming together with their other co-sharers, tenants-in-common. The facts are exactly met by the extract of the judgment of the Privy Council I have just read. Again similar reference is made at p. 411 of 59 I A in the case of *Mohammad Afzal Khan* v. *Abdul Rahman*.[2] It would appear from the facts of the present case that these plots were in separate possession of this family ; whether they were in possession of other plots is quite immaterial. In those circumstances it would quite clearly be a case covered by the authorities to which I have referred supposing that the mortgage had been of the undivided interest in these plots. It does not appear exactly what the interest of the family in the whole property was—I mean what proportion of the 16 annas. But supposing it had been eight annas, if the mortgage had been of eight annas interest in these properties, there is no doubt as I have stated that the principle laid down by their Lordships of the Judicial Committee of the Privy Council would have applied. Does it make any difference if this one co-sharer was one tenant-in-common represented by the joint Hindu family and purported to mortgage 16 annas interest—the interest mortgaged under the mortgage deed? I cannot say that it does. What I understand the

1. Byjnath Lall v. Ramoodeen Chowdry, (1874) 1 I A 106 (P C).
2. Mohammad Afzal Khan v. Abdul Rahman, A I R 1932 P C 235=139 I C 85=59 I A 405 =13 Lah 702 (P C).
3. Balgobind Das v. Narain Lal, (1893) 15 All 339=20 I A 116=6 Sar 313 (P C).

mortgage deed to be is the mortgage of the whole of the joint family's interest in this common tenancy: to put it in other words, the plots mortgaged represented in substance the total share of the joint family in the joint family property or, perhaps more properly described, in the common tenancies. If it represented the whole 16 annas of these plots which was in excess of the mortgagor's share, it might have given rise to certain difficulties; but with that we are not concerned. I repeat myself by stating that I cannot say that the mere mention of 16 annas of these properties makes any difference to the application of the principle, especially having regard to the fact that there is a clear representation and statement at the end of the mortgage deed that these properties were joint with other properties. It is impossible in my judgment to distinguish this case from the facts of the cases of the Privy Council to which I have made reference. It seems to me therefore that the decision of the learned Judge was wrong.

I would add one word as regards S. 98, T. P. Act, which provides that, "In the case of an anomalous mortgage the rights and liabilities of the parties shall be determined by the deed". I understand that to mean that so far as the Act provides for the rights and liabilities of the mortgagor, these provisions do not apply to the case of an anomalous mortgage. An anomalous mortgage is governed by the deed itself; but substitution is a general principle of law not provided for in the Transfer of Property Act and in my judgment S. 98 in no way affects it. It would lead to rather absurd and unjust results if one were to hold otherwise. In my opinion the learned Judge in the Court below was wrong and his proper action should have been to remand the case to the trial Court, as he intimated in the latter part of his judgment, for the purpose of determining what proportion of the substituted plots should be the subject matter of the decree as representing the proportion of the joint property which was mortgaged under the mortgage deed. I should have referred to S. 99, Estates Partition Act. I would therefore allow the appeal with costs throughout as against the contesting respondent 7. Leave to appeal is refused.

W.D./A.L. *Appeal allowed.*

A. I. R. 1937 Patna 347

AGARWALA AND VARMA, JJ.

Emperor

v.

Lalman Tharu — Accused.

Govt. Appeal No. 5 of 1936, Decided on 21st December 1936, against order of Magistrate, First Class, Bettiah, D/- 8th August 1936.

Arms Act (1878), Ss. 14 and 19 (f)—Possession of unlicensed gun by either master or servant to whom it is entrusted is illegal — Where servant in possession has no knowledge that gun was unlicensed, severe punishment should not be given.

In the case of a licensed weapon a person who merely assists the owner of the weapon by carrying it for him or taking it somewhere for him may be said to assist his master in doing a perfectly legal act, for the master being the licensee is entitled to have the gun in his possession. But in the case of an unlicensed weapon neither the actual owner of the gun nor anybody to whom he entrusts it, can be said to be engaged in a legal act, for the possession in that case is illegal whether it be the possession of the master or of a servant. But where it is not proved that the servant had any knowledge that the gun which he was carrying for his master was unlicensed, the offence of which he is guilty does not call for a severe punishment. [P 348 C 1]

Govt. Advocate — for the Crown.

Rajkishore Parsad — for the Accused.

Agarwala, J. — The opposite party, Lalman Tharu, went out with his two employers Bika Diswa and Chhedi Chaudhari and two others from British India into Nepal for the purpose of shooting rhinoceros. With them the party had two muzzle loading guns which were not licensed in British India. On the return of the party into British India they were ambushed by a dafadar and chaukidars who were lying in wait for them having heard that the party was in possession of unlicensed arms. The whole of the hunting party escaped except the respondent (opposite party) who, according to the evidence of the dafadar, was carrying the two guns. The opposite party was charged and tried under S. 19 (f), Arms Act with being in possession of arms in contravention of S. 14, that is to say, being in possession of arms without a license. The learned Magistrate has acquitted the opposite party purporting to follow two decisions of the Judicial Commissioner's Court of Nagpur in which it was held that 'possession' within the meaning of S. 19 (f) does not mean mere temporary possession or control by a servant. In this Court we

have been referred to other decisions in which the same view has been taken. But with one exception all those cases refer to the temporary possession of licensed gun. It has been pointed out in some of those cases that when a master entrusts his gun to his servant for a mere temporary purpose such as holding or carrying it for him or taking it to a gunsmith for repairs, the master in law is not parting with the possession of the gun.

In the case of a licensed weapon a person who merely assists the owner of the weapon by carrying it for him or taking it somewhere for him may be said to assist his master in doing a perfectly legal act, for the master being the licensee is entitled to have the gun in his possession. But in the case of an unlicensed weapon neither the actual owner of the gun nor anybody to whom he entrusts it can be said to be engaged in a legal act, for the possession in that case is illegal whether it be in the possession of the master or of a servant. Technically therefore the opposite party has committed the offence with which he was charged. But it would appear it is not proved that he had any knowledge that the guns which he was carrying for his master were unlicensed and in these circumstances we do not consider that the offence of which he is guilty calls for a severe punishment. We would sentence the opposite party to pay a fine of Rs. 10 (Rupees ten) and in default of payment to undergo simple imprisonment for 15 days under S. 19 (f).

Varma, J.—I agree.

S.C./D.S. *Order accordingly.*

A. I. R. 1937 Patna 348

FAZL ALI AND MADAN, JJ.

Ramlochan Pande — Petitioner.

v.

Ramnarain Singh — Opposite Party.

Civil Revn. No. 138 of 1936, Decided on 18th December 1936, from order of Small Cause Court, Judge, Saran, D/- 11th December 1936.

Accounts – Settled account — Suit on— Fact whether all items are time-barred doubtful—Onus to upset validity of settled account is on defendant.

Where an account has been settled it is immaterial that some of the items were statute-barred and that if it is left in doubt whether all the items were so barred, it would be for the defendants to upset, if they could, the validity of the settled account : *A I R 1934 P C 147, Rel. on.*

[P 348 C 2]

Ganesh Sharma — for Petitioner.

Phulan Prasad Varma — for Opposite Party.

Fazl Ali, J.—In 56 All 376[1] the Judicial Committee has laid down that Art. 64, Lim. Act, which deals with suits "on accounts stated" between the parties applies although the account is not of mutual claims, but on the one side, of sums advanced and interest payable and, on the other side, of payments made. The account upon which the present suit is based is of this description and has been accepted as genuine by the Court below. It appears that the account between the parties used to be periodically adjusted and so in support of his case the plaintiff filed certain accounts of the previous year also in the course of the trial. Two of these accounts purport to bear the thumb mark of the defendant but the learned Subordinate Judge has stated in his judgment that as the identity of the thumb mark has not been proved "the acknowledgment of those accounts has not been established". On this view he has held that the last account was not a stated account within the meaning of Art. 64 and the plaintiff's claim with the exception of Rs. 22-8-0 was barred by limitation.

I am, however, unable to agree with this reasoning. The account upon which the present suit is based includes a sum of Rs. 213 which was brought forward from the previous year's account as well as the fresh advances made in the course of the year in which the account was compiled. On the other side it shows various payments made from time to time by the defendant and at the end a balance is struck which is acknowledged to be correct by the defendant The Judicial Committee has pointed out that where an account has been settled it is immaterial that some of the items were statute-barred and that if it is left in doubt whether all the items were so barred it would be for the defendants to upset, if they could, the validity of the settled account. In this case it was clearly for the defendant to prove, that the dues brought forward from the previous year's account were time-barred and in any case the mere fact that some of the items are statute-barred can be of no avail to him where the suit has

1. Bishun Chand v. Girdhari Lal, A I R 1934 P C 147=150 I C 6=61 I A 273=56 All 376 (P C).

been brought on account stated. In these circumstances I have no hesitation in holding that the view taken by the learned Subordinate Judge is wrong and his judgment and decree must be set aside. I would, therefore, allow this application, set aside the decree of the Court below and direct that a decree be passed in favour of the plaintiff with costs throughout for a sum of Rs. 270. This sum will carry interest at the rate of six per cent. per annum from the date of this decree till realization. Hearing fee will be one gold mohur.

Madan, J.—I agree.

S.C./D.S. *Application allowed.*

A. I. R. 1937 Patna 349

ROWLAND, J.

Jamuna Prasad Rai — Appellant.

v.

Rajballam Rai — Respondent.

Misc. Appeal No. 240 of 1936, and Civil Revn. No. 489 of 1936, Decided on 26th February 1937, from appellate order of Dist. Judge, Shahabad, D/- 9th June 1936.

(a) Civil P. C. (1908), S. 2 (2) and (14)—Distinction between decree and order — Nature of decision is distinguishing feature between the two– Manner of expression is immaterial.

As the words 'formal expression' appear in the definitions of both 'decree' and 'order' as given in S. 2 (2) and S. 2 (14), Civil P. C., the presence or absence of a formal expression cannot be the true criterion of the difference between a decree and an order. The essence of the distinction lies in the nature of the decision whether it is an adjudication of a particular kind or not, rather than in the manner of its expression. [P 350 C 1]

(b) Civil P. C. (1908), O. 41, R. 11 (1) and (2) —Distinction between sub-r. (1) and (2) — Dismissal of appeal under O. 41, R. 11 (1) is appealable as decree — Dismissal of appeal under O. 41, R. 11 (2) does not amount to decree and is not appealable.

The difference between the wording of sub-r. (1) and sub-r. (2) of O. 41, R. 11, Civil P. C., is significant. Sub-r. (2) provides for "an order that the appeal be dismissed", if the appellant does not appear when the appeal is called on for hearing. The intention is clear to make the order under this sub-rule not appealable; and for this there are two good reasons: first, the ground of dismissal under O. 41, R. 11 (2) being non-appearance the Court has not considered and adjudicated on the question whether there is any merit in the appeal; secondly, the Code has provided another remedy under O. 41, R. 19 by application for the re-admission of the appeal, and if that application is refused an appeal lies under O. 43, R. 1 (t). But an appellant has no such remedy when his appeal is dismissed under O. 41, R. 11, sub-r. (1). Such a dismissal has, so far as the Court pronouncing it is concerned, the finality which is an essential ingredient in the definition of "decree" in S. 2 (2); and in substance it expresses an adjudication within that definition, to the effect that the appeal is without merit. [P 350 C 1]

The dismissal of an appeal under O. 41, R. 11 (1) is therefore appealable as a decree whereas the dismissal of appeal under O. 41, R. 11 (2) does not amount to a decree and is therefore not appealable : *A I R 1934 Pat 341, Expl.* [P 350 C 2]

Mojibur Rahman — for Appellant

D. N. Varma — for Respondent.

Judgment. — In Miscellaneous Appeal No. 240 of 1936 Jamuna Prasad Rai, judgment-debtor, presents a second appeal from an appellate decision of the District Judge of Shahabad dismissing under O. 41, R. 11 sub-r. (1), Civil P. C., his appeal from the decision of the Munsif, Third Court, Arrah, disallowing his objection to the execution of the decree on the ground that full payment had been made to the decree-holder out of Court. In Civil Revision No. 489 of 1936 the same Jamuna Prasad Rai asks this Court to revise the above appellate decision in case it is held that no appeal lies. It seems unfortunate that litigants should be in doubt as to the nature of their remedy and should feel themselves compelled to institute two proceedings instead of one.

The order of the first Court being a decision determining a question arising between the parties to the suit and relating to the execution, discharge or satisfaction of the decree, was a "decree" within the meaning of S. 2 (2), Civil P. C., read with S. 47. The determination on merits of an appeal from a decree is also generally regarded as a decree for the purposes of second appeal. The question is whether cases where after full hearing a judgment in conformity with O. 41, R. 31, Civil P. C., has been written, and cases where an appeal has been dismissed summarily under O. 41, R. 11 are on the same footing. In the former class of cases a full and formal decree in accordance with O. 41, R. 35 is drawn up. But when an appeal is dismissed under O. 41, R. 11 the practice is merely to notify the dismissal to lower Court under O. 41, R. 11 (3) and the entry in the order-sheet of the appeal remains as the only expression of the decision. This difference of practice may at first sight create the impression that dismissal under O. 41, R. 11 is not a decree because the words "formal expres-

sion" appear in the definition of a 'decree': S. 2 (2) of the Code. But the same words "formal expression" appear in the definition of an 'order': S. 2 (14). Therefore, the presence or absence of a formal expression cannot be the true criterion of the difference between a decree and an order; and if it be urged that without formal expression there can be no decree, the answer is that the words "appeal dismissed" over the signature of a Judge are a formal expression of a decision : if they were not considered to be that, they would not even amount to an order as defined in S. 2 (14). Reading the two definitions together, the essence of the distinction seems to lie in the nature of the decision—whether it is an adjudication of a particular kind or not—rather than in the manner of its expression.

The view which has generally prevailed hitherto is that the dismissal of an appeal under O. 41, R. 11, sub-r. (1) is appealable as a decree whereas dismissal under R. 11, sub-r. (2) is not. The difference between the wording of sub-r. (1) and sub-r. (2) of O. 41, R. 11 is significant. Sub-r. (2) provides for "an order that the appeal be dismissed", if the appellant does not appear when the appeal is called on for hearing. The intention is clear to make the order under this sub-rule not appealable; and for this there are two good reasons : first, the ground of dismissal under O. 41, R. 11 (2) being non-appearance the Court has not considered and adjudicated on the question whether there is any merit in the appeal; secondly, the Code has provided another remedy under O. 41, R. 19 by application for the re-admission of the appeal, and if that application is refused an appeal lies under O. 43, R. 1 (t). But an appellant has no such remedy when his appeal is dismissed under O. 41, R. 11, sub-r. (1). Such a dismissal has, so far as the Court pronouncing it is concerned, the finality which is an essential ingredient in the definition of "decree" in S. 2 (2); and in substance it expresses an adjudication within that definition, to the effect that the appeal is without merit. How it came about that such different language was used in sub-r. (1) and in sub-r. (2) of O. 41, R. 11 is apparent on reference to the old Code, S. 551. In that section the authority to dismiss for default and to dismiss summarily after hearing the appellant's pleader are conferred in the same terms; and this had led to a conflict of judicial opinion. The one opinion was that both cases were on the same footing, and in both cases the dismissal was a decree; the other was that dismissal for default of appearance was not a decree. It has been generally considered since the amendment that the altered language was intended to contrast these two forms of dismissal. If so, "dismissal" under sub-r. (1) would amount to a decree but 'an order that the appeal be dismissed' under sub-r. (2) would not.

A curious consequence in some cases follows if it were held otherwise. The first Court, let us suppose, has given its findings of fact and has also decided a question or questions of law such as whether a shorter or a longer period of limitation governs the suit. The Code provides for reconsideration of the findings of fact in a first appeal and of the correctness of the law both in first and in second appeal. If, however, no second appeal lies from a dismissal under O. 41, R. 11 (1) the consequence follows that a District Judge by not writing a judgment can give an erroneous decision on a point of law a finality which it would not have if he had given reasons in support of it. It is said, however, that 13 Pat 540[1] is authority for the contrary view, namely, that there is no distinction between the two cases and that there is no appealable decree in either case. It is a well known principle that every case is authority for what it decides and no more ; and the point for decision in *Makhu Sahu's case*[1] was whether the law required the lower appellate Court to write a judgment even while summarily dismissing the appeal. In *Makhu Sahu's case*[1] it was decided that the law does not demand a judgment under O. 41, R. 31, when an appeal is summarily dismissed. For this much *Makhu Sahu's case*[1] is direct authority ; and I have been told by both the learned Chief Justice and the learned Judge who was his colleague that it was not intended to be an authority for more than that. The observations in the judgment (at p. 542 of the report) quote the words "the Court may make an order that the appeal be dismissed" from sub-r. (2), and proceed 'there is thus no appeal from an order made under the rule'. This was said with reference to sub-r. (2). The remark (at

1. Makhu Sahu v. Kamta Prasad Sahu, A I R 1934 Pat 341=150 I C 817=15 P L T 293=13 Pat 540.

p. 546 of the report), 'there is no appeal from such orders', was made inadvertently in a context which made it appear applicable to dismissals under both sub-rr. (1) and (2). *Makhu Sahu's case*,[1] therefore, does not establish that a second appeal is wholly incompetent but that summary dismissal without writing a judgment is not by itself a good ground for second appeal.

I have not, however, in the present case to decide whether from the appellate decision on a case under S. 47 a second appeal lies, because the suit in execution of whose decree the case arose was a suit of the nature cognizable by Courts of Small Causes and the value of the subject matter of the original suit did not exceed five hundred rupees ; and by S. 102, Civil P. C., there is no second appeal in such a case. Second (Misc.?) Appeal No. 240 is on this ground not maintainable. I have to consider whether in the case before me the dismissal of the appeal should be set aside in revision. The judgment-debtor preferred an objection on the ground that he had made a payment of Rs. 478 to the decree-holder out of Court which he asked the Court to record under O. 21, R. 2. The Munsif before whom the execution was pending considered the evidence adduced by the judgment-debtor and found that the witnesses were interested, their statements were discrepant, and the receipt itself was highly suspicious. He decided that the plea of payment was false and rejected the application. The District Judge's decision was limited to these words : "Heard. The appeal is summarily dismissed".

It is clear from the decision in *Makhu Sahu's case*[1] that the law did not require the learned District Judge to write a judgment. But I have been referred to 17 P L T 607,[2] a case in which the summary dismissal under O. 41, R. 11 of an appeal from the decision in a title suit was set aside and the appeal remanded to be reheard. But that case laid down no general rule or principle. I do not read it as extending the grounds for second appeal beyond those stated in S. 100 or the grounds for interference in civil revision beyond those which are to be found in S. 115, Civil P. C.

In the original suit the trial Court had framed a number of issues, and the learned Judges may have felt a difficulty in determining on what findings the lower Court's decree was affirmed by the District Judge and whether those findings were sufficient for the disposal of the suit. District Judges can avoid putting the Court of second appeal in such a difficulty by indicating in a few words what findings of the first Court are accepted and made the basis of the appellate decision. I do not in the present case feel any such difficulty. There was only one point for determination, namely, the question of fact whether the payment alleged by the judgment-debtor had been made or not. I have no doubt that in dismissing the appeal the District Judge intended to accept the finding of the Munsif that the payment was not true, and that finding if accepted was sufficient for the disposal of the matter.

It might have been better if the District Judge had said explicitly that the Munsif's decision appeared to him to be correct for the reasons given therein. But S. 115 of the Code will not justify my interference in revision simply on the ground that had I been in the District Judge's place I should not have dismissed the appeal without expressing in definite words my acceptance of the finding of the first Court. The miscellaneous appeal and civil revision are both dismissed with costs. There will not be a separate hearing fee in the civil revision.

K.B./A.L. *Appeal and revision dismissed.*

2. Mahabir Das v. Sadho Chaudhuri, A I R 1936 Pat 505=163 I C 142=17 P L T 607.

A. I. R. 1937 Patna 351

COURTNEY-TERRELL, C. J.
AND JAMES, J.

Bhagwat Sahay — Appellant.
v.
Ram Sukrit Ram — Respondent.

Letters Patent Appeal No. 7 of 1936, Decided on 3rd February 1937, from decision of Wort, J., D/- 24th January 1936, reported in *A I R 1936 Pat 313*.

Limitation Act (1908), Art. 182 (5)— Order on application for transfer of decree to another Court for execution is step-in-aid.

An order made on an application for transfer of the decree for execution to another Court is a step-in-aid of execution and gives a fresh start for limitation under Art. 182 (5), Limitation Act : *A I R 1927 P C 73, Disting.* ; *A I R 1922 Pat 301, Rel. on.* [P 352 C 1, 2]

D. N. Varma — for Appellant.

Courtney-Terrell, C. J. — In this case the decree-holder obtained his decree on 12th June 1931. On 8th July 1932 on the application of the decree-holder, an order was made for transfer of the decree from the Court in which it was granted to the Court of the District Judge of Shahabad for execution On 5th July 1935, the decree-holder took the next step by filing an application for the execution of the decree in the Court of the District Judge of Shahabad The question for our decision is whether the order for the transfer made on 8th July 1932 was a step-in-aid of execution. The Munsif before whom this matter first came decided that it was a step-in-aid of execution and therefore the application by the decree-holder filed on 5th July 1935 was within time under Art. 182, Cl. (5). From this decision the judgment-debtor appealed to the District Judge contending that the application for execution on 5th July 1935 was out of time. The appeal was summarily dismissed and the judgment-debtor appealed to the High Court. The learned Judge before whom the matter came held that he was bound by the decision of this Court in 3 P L T 298[1] to the effect that the order for transfer was properly termed a step-in-aid of execution within the meaning of Art 182, Cl. (5), but he gave leave to appeal in Letters Patent because he was of opinion that a decision of their Lordships of the Privy Council in 54 I A 129[2] had in effect overruled that decision and the learned Judge had himself expressed this view in an earlier decision of his own in A I R 1934 Pat 662.[3] It seems however quite clear that the distinction has been recognized by many of the other High Courts that the decision of their Lordships of the Privy Council dealt only with Art. 183. Moreover the fact that the order for transfer is in the nature of a ministerial act has nothing whatever to do with the material question for our decision as to whether that order was a step-in-aid of execution. In my opinion the decision of this Court in 3 P L T 298[1] was not affected in the least by the decision of the Privy Council and the order for transfer was a step-in-aid of execution and the subsequent proceedings by the decree-holder were consequently within time under Art. 182, Cl. (5). For this reason I would dismiss this appeal. As there has been no appearance on behalf of the respondent the appeal will be dismissed without costs.

James, J.—I agree.

S.C./D.S. *Appeal dismissed.*

1. Ramchandra Marwari v. Krishna Lal Marwari, A I R 1922 Pat 301=65 I C 332=1 Pat 328=3 P L T 298.
2. Banku Behari v. Naraindas Datt, A I R 1927 P C 73=101 I C 24=54 I A 129=54 Cal 500 (P C).
3. Gopal Tewari v. Ramdhari Pandey, A I R 1934 Pat 662=152 I C 987.

A. I. R. 1937 Patna 352

AGARWALA, J.

Haluman Sah — Petitioner.

v.

Motihari Municipality — Opposite Party.

Criminal Revn. No. 537 of 1936, Decided on 5th January 1937, against order of Dist. Magistrate, Champaran, D./ 7th September 1936.

Criminal Trial—Sentence— Fine cannot be imposed in anticipation of commission of offence—Person convicted under Ss. 197 and 203, Bihar and Orissa Municipal Act—Magistrate directing accused to remove encroachment within one month from order — Magistrate further imposing daily fine after expiry of month until removal of encroachment — Order of Magistrate held illegal and could be set aside.

A fine in respect of an offence which has not yet been committed cannot be imposed in anticipation of the commission of offence. [P 353 C 1]

On the conviction of a person under Ss. 197 and 203, Bihar and Orissa Municipal Act, it is competent for a Magistrate under S. 203 to impose a daily fine on the accused in respect of an offence which has already taken place on the date of the order, i. e., on the failure of the accused to comply with the Municipal order directing him to remove the encroachment and the fine can be imposed from the date of such failure. But when the Magistrate directs the accused to remove the encroachment within a particular period and to pay a fine daily on the expiry of such period until removal of the encroachment, the Magistrate cannot impose such fine, as no offence has been committed on the date of the order. The Magistrate's order is therefore illegal and can be set aside. [P 353 C 1]

K. P. Upadhaya — for Petitioner.

B. P. Sinha — for Opposite Party.

Order.—The petitioner has been convicted under S. 197 read with S. 203, Bihar and Orissa Municipal Act, the allegation against him being that he erected some huts on a portion of land belonging to the Municipality. He was given notice to vacate the land by the end of December 1935, but he failed to do so. The learned

Honorary Magistrate who tried him sentenced the petitioner to a fine of Rs. 15 and directed him to remove the huts within one month from the date of the Magistrate's order, and further went on to direct that failing to comply with the order regarding the removal of the huts, the petitioner was to pay a fine of Re. 1 per day until the encroachment was removed. This order was upheld on appeal. A learned Judge of this Court directed a rule to issue with regard to the legality of the sentence.

It has been held in a series of cases that a fine in respect of an offence which has not yet taken place cannot be imposed in anticipation of the commission of offence. That is precisely what the learned Magistrate has done in the present case by directing the petitioner to pay a fine of Re. 1 a day after the expiry of one month from his order if the hut has not been removed by that time. The learned Government pleader points out that under S. 203 of the Act it was competent for the Magistrate to impose a daily fine. This, however, is in respect of an offence which has already taken place, that is to say, it was open to the Court to impose a daily fine from the date when the petitioner failed to comply with the Municipal order directing him to vacate the land. The learned Magistrate, however, did not apparently see fit to impose that fine, but has imposed a fine in respect of an offence which had not been committed at the date of the order. The order directing the petitioner to pay a fine of Re. 1 a day till the encroachment is removed is, therefore, set aside and if any part of this daily fine has been realized, it will be refunded.

W.D./A.L. *Order set aside.*

A. I. R. 1937 Patna 353

ROWLAND, J.

Mt. Jasodar Dusadhin — Defendant — Appellant.

v.

Mt. Sukurmani Mehtrani and *another*, Plaintiffs and *another*, Defendant 1 — Respondents.

Appeal No. 833 of 1934, Decided on 12th January 1937, from appellate decree of Judicial Commissioner, Chota Nagpur, D/- 23rd June 1934.

1937 P/45 & 46

(a) Practice—Duty of Court—First appellate Court must determine all questions of fact necessary for decision of case and determine all issues of fact, which have been decided by Court of first instance.

The primary duty of the first appellate Court is to determine all the questions of fact which are necessary for the decision of the case, and it is desirable to determine all the issues of fact on which a decision has been given by the Court of first instance. By doing so, the High Court in second appeal is enabled to apply the law to a set of ascertained facts; and if this is not done, there is every likelihood of the case having to be remanded for findings on the issues which have been left open. [P 354 C 2]

(b) Transfer of Property Act (1882), S. 41—Property acquired in name of one member of joint Hindu family instead of all — Such member is not ostensible owner thereof—Persons dealing with such member must make enquiry to ascertain title—Specific circumstances should be pointed out as starting point of enquiry.

As between members of a joint Hindu family the fact that the name of one member rather than that of another or of all the members is used in acquisition of property, does not amount to holding out of that member as the ostensible owner and a person dealing with one member of a Hindu family can hardly say that he was misled unless he proves that he has made full inquiries and could not ascertain his title. Of course, it is not enough to assert generally that enquiries should be made or that a prudent man should have made further enquiries, but some specific circumstances should be pointed out as the starting point of an enquiry which might be expected to lead to some result: *A I R 1915 P C 103*; *A I R 1929 Pat 305* and *I A Sup Vol 40 (P C)*, *Rel. on*; *Case law discussed.* [P 355 C 1, 2]

(c) Hindu Law — Widow—Succession — Widow unchaste and not living with husband —Property in name of husband till his death —Widow may still succeed to husband's property — Daughter of deceased allowing unchaste widow to succeed and sell property of deceased husband — Sale cannot be impeached on ground of unchastity—Purchaser is protected by S. 41, T. P. Act, as widow is allowed to present possession during her lifetime.

The fact of the property having been the property of the deceased husband till his death is by no means inconsistent with his widow having succeeded to it thereafter, even though she has been previously unchaste and had not been living with the deceased, as in the ordinary way a Hindu widow does succeed to the possession of the property of her husband. If she is allowed so to succeed in the presence of the daughter living and enter into his property, it will hardly avail the reversioners to impeach a transaction of sale entered into by her on the ground that she was by reason of previous unchastity not lawfully entitled to succeed. If this is so, S. 41, T. P. Act, may be of assistance to the purchaser from the widow to this extent: that the daughter by her conduct led the pur-

chaser to believe that the widow was the person entitled to present possession of the property during her lifetime. [P 356 C 1]

(d) **Attestation—Attestation estops person from denying only that he witnessed execution of deed—It conveys no knowledge of contents of document — Attestation with other circumstances and evidence may prove knowledge of contents of deed on part of attestor.**

Attestation of a deed by itself estops a man from denying nothing whatever excepting that he has witnessed the execution of the deed. It conveys neither directly nor by implication any knowledge of the contents of the document, and it ought not to be put forward alone for the purpose of establishing that a man consented to the transaction which the document effects: *A I R 1922 P C 20, Foll.* [P 356 C 1]

Of course, there may be cases in which attestation is made in circumstances when, coupled with other evidence of consent and acquiescence in the execution of a document, it is relevant to the question whether the attesting witness had knowledge of the contents and agreed to them: *A I R 1928 P C 20, Rel. on*; *A I R 1922 P C 20, Foll.* [P 356 C 2]

G. C. Mukharji and *L. K. Chaudhuri* — for Appellant.

K. K. Banarji — for Respondents.

Judgment.—The subject matter of the suit giving rise to this appeal was one room in a house in Ranchi town bearing plot No. 439 and holding No. 223. The plaintiffs-respondents bought this house in 1931 from Mt. Bhuini. Bhuini had been the wife of Damri Dusadh who died in 1926. They had a daughter Jasoda who is defendant 2 and is married to Kuar Ram Dusadh, defendant 1. The house was purchased in 1908 for Rs. 60, the deed being taken in the name of Bhuini, and there has been controversy whether she or Damri was the real purchaser. The Munsif held that the real purchaser was Damri and the Judicial Commissioner thought that this was doubtful. After Damri's death there was in 1929 a Municipal Survey and Record of Rights was prepared. The house was entered in the name of Bhuini. The sale deed by Bhuini to the plaintiffs was, as I have said, in 1931 and in 1932 the brothers of Damri brought a suit to set aside the transfer alleging the house to have been Damri's and not Bhuini's and alleging themselves to be the reversioners of Damri. In deciding the suit, the Court came to a finding that the house had been Damri's but that his brothers were not the next reversioners, the daughter being a nearer heir and therefore they could get no relief.

The present suit was instituted by the purchasers from Bhuini on 26th November 1932, alleging that they had bought the house from Bhuini and had got possession except for one room which the defendants were occupying. They allowed the defendants to remain as tenants in one room at Rs. 1-4-0 rent per month. They are now suing to eject the defendants after notice to quit. The plaintiffs claimed the house, alleging, first, that Bhuini was the purchaser in 1908 and the absolute owner of it and that by purchase from her they had acquired an indefeasible title. In the alternative they alleged that as Damri's widow she was his next heir and had those powers which a Hindu widow has to alienate property for purposes of necessity and that the transfer was for necessity. The munsif dismissed the suit being of opinion that the house was purchased by Damri from his own money; that on his death Bhuini was not legally entitled to inherit the property having become unchaste and left his protection; and, thirdly, that legal necessity for selling the house to the plaintiffs was not established. The learned Judicial Commissioner expressed himself as doubtful of the correctness of the finding of the Munsif on the first issue but has not recorded any finding. On the second point he has come to no finding whether Mt. Bhuini was entitled to inherit Damri's property after his death and on the third question he has not examined the evidence of legal necessity at all. He regards the case as concluded by the provisions of S. 41, T. P. Act, being of opinion that the defendants of this suit held out Mt. Bhuini to be the ostensible owner of the property and, therefore, are estopped from impeaching a transfer by her.

It is unfortunate that the learned Judicial Commissioner has so misconceived the functions of a first Court of appeal. The primary duty of the first appellate Court is to determine all the questions of fact which are necessary for the decision of the case, and it is desirable to determine all the issues of fact on which a decision has been given by the Court of first instance. By doing so, the High Court in second appeal is enabled to apply the law to a set of ascertained facts; and if this is not done, there is every likelihood of the case having to be remanded for findings on the issues which have been left open.

A distinguished Judge once said : " Take care of the facts and the law will take care of itself" and though this may be an over statement it is sound advice in nine cases out of ten. In second appeal it is contended that no case under S. 41, T. P. Act, was set up in the plaint, and that if it had been, the learned Judicial Commissioner has failed to appreciate the considerations which ought to have been borne in mind in coming to a finding whether S. 41 was applicable to the facts of the case before him. The learned Judicial Commissioner has quoted from S. 41, T. P. Act, but in applying the proviso regarding bona fide action of the transferee, he has not observed the importance of the words "after taking reasonable care to ascertain that the transferor had power to make the transfer". In 20 C W N 265[1] the Privy Council approved a decision of the High Court in which it had been observed that:

> The learned Subordinate Judge apparently relies on the provisions of S. 41, T. P. Act, but he overlooks the proviso to that section which is to the effect that a transferee from an ostensible owner can defeat the real owner only if after taking reasonable care to ascertain that the transferor had power to make the transfer, he acted in good faith. There is nothing in this case to show that the plaintiff made any inquiry whatever to ascertain the title of his mortgagor, Rudra Narain Singh.

Similarly in 10 P L T 254[2] after observing that the elements necessary to constitute equitable estoppel under S. 41, T. P. Act, should be clearly pleaded in the written statement, Jwala Prasad, J., observed that :

> Proof of inquiry is an essential element and a preliminary condition enjoined by S. 41 in order to protect a bona fide purchaser for value from an ostensible owner . . . . . The mere keeping of one's name over a property either in Government records or in private papers does not relieve the purchaser from the ostensible owner from the duty and responsibility of making an inquiry into the title of that owner.

As between members of a joint Hindu family the fact that the name of one member rather than that of another or of all the members is used in acquisition of property, has repeatedly been held not to amount to the holding out of that member as the ostensible owner, and a person dealing with one member of a Hindu family can hardly say that he was misled unless he proves that he has made full inquiries and could not ascertain his title. Of course, as pointed out by the Judicial Committee in I A Sup Vol 40[3] it is not enough to assert generally that inquiries should be made, or that a prudent man should have made further inquiries, but some specific circumstances should be pointed out as the starting point of an inquiry which might be expected to lead to some result. Now so far as the title to this property in Damri's lifetime was concerned, there were the following facts known or capable of being known to the plaintiffs ; first, that Damri had been in possession ; secondly, that Bhuini had left Damri and been out of possession since 1916 or so while Damri remained in possession ; thirdly, that a creditor of Bhuini in 1916 had attached the house for her debt, but Damri brought a claim case and obtained a decision that the house was his ; fourthly, there was the fact that the house had been mortgaged to one Chhedi Hajam and not by Bhuini only but by Bhuini and Damri both, which is exactly what one would expect if the former had been benamidar and the latter the real owner.

Then there is the fact that apparently Bhuini was unable to make over the original sale deed to the plaintiffs and the judgments of the Courts below do not show that any explanation was offered for its non-production. Indeed it seems clear that so far as the dealings with the property in Damri's lifetime were concerned, there was nothing which could amount to a representation or a holding out that Bhuini was the ostensible owner. The lower appellate Court ought to have come to a definite finding as to who was the real owner, but indeed as between Damri and Bhuini the matter was conclusively decided by the claim case in 1916. The decision which was in favour of Damri's title became final on the failure of Bhuini to institute a suit within one year to set it aside. The position after Damri's death is different. The question propounded by the Munsif was whether on Damri's death she was entitled to succeed to his property ; but it would have been more appropriate to inquire whether she did in fact succeed to his property, that is to say, not only whether she had become liable to forfeit her right of in-

1. Nageshar Prasad v. Pateshri Partab Narain Singh, A I R 1915 P C 103=34 I C 673=20 C W N 265 (P C).
2. Sheogobind Ram Barai v. Anwar Ali, A I R 1929 Pat 305=116 I C 779=10 P L T 254.
3. Ram Coomar Koondoo v. John & Maria McQueen, (1872) I A Sup Vol 40=11 Beng L R 46=18 W R 166=3 Sar 160 (P C).

heritance but whether it was in fact forfeited. For the fact of the house having been the property of Damri till his death is by no means inconsistent with Bhuini having succeeded to it thereafter as in the ordinary way a Hindu widow does succeed to the possession of the property of her husband. If she was allowed so to succeed and enter into his property it would hardly avail the defendants to impeach a transaction entered into by her on the ground that she was by reason of previous unchastity not lawfully entitled to succeed, and if this was so, S. 41 might be of assistance to the plaintiffs to this extent, that the daughter by her conduct led plaintiffs to believe that Bhuini as widow of Damri was the person entitled to present possession of the property during her lifetime. It is unfortunate that neither of the Courts have come to a finding as to whether Bhuini did in fact succeed to Damri's property including the house. The learned Judicial Commissioner thinks that there was a representation as to title because defendant 2, Jasoda, the daughter of Bhuini, is said to have given her thumb-impression on the sale deed of the plaintiffs, and the learned Judicial Commissioner regards this as in some way establishing her knowledge of and consent to the transaction. This view, though popularly held in some backward tracts of the country, is contrary to a long line of decisions both of the High Courts and of the Judicial Committee of the Privy Council. In 49 Cal 334[4] the Judicial Committee have observed that :

> They think it is desirable to emphasize once more that attestation of a deed by itself estops a man from denying nothing whatever excepting that he has witnessed the execution of the deed. It conveys neither directly nor by implication any knowledge of the contents of the document, and it ought not to be put forward alone for the purpose of establishing that a man consented to the transaction which the document effects.

And their Lordships quoted, only to condemn, the observations of the learned Judicial Commissioner's Court. The learned Judges had said :

> We think that attestation by a person who has or claims any interest in the property covered by the document must be treated in the absence of any evidence to show that he was tricked into making the signature prima facie as a representation by him that the title recited in the document is true and will not be disputed by him as against the obligee under the document.

The Judicial Committee commented :

> Their Lordships are bound to point out that that is an entire misapprehension of the law of estoppel, and if that misapprehension be not corrected, much mischief may be done in the administration of justice in India.

And they said :

> If in fact there be a practice, as is suggested from the evidence, that when the consent of parties to transactions is required, it can be obtained by inducing them by one means or another, to attest a signature of the executing parties, the sooner that practice is discontinued the better it will be for the straightforward dealing essential in all business matters.

Of course, there may be cases in which attestation is made in circumstances when coupled with other evidence of consent and acquiescence in the execution of a document, it is relevant to the question whether the attesting witness had knowledge of the contents and agreed to them. For instance, in 32 C W N 538[5] their Lordships found that besides the fact of his attestation of the deed there was abundant evidence to prove *aliunde* that Bhagwan Singh had consented to and acquiesced in the execution of it. There was evidence to show that he not only consented to the transaction but took an active part in the consultations which resulted in the mortgage.

In the present case there was evidence of other matters bearing on the question whether Jasoda had knowingly acquiesced in Bhuini acting as ostensible owner and transferring the property ; but the learned Judicial Commissioner has unfortunately abstained from telling us what he thinks of this evidence. I repeat that it is above all things desirable that the Court of first appeal should determine all the necessary questions of fact. The learned Judicial Commissioner has referred to the evidence that in 1929 an entry in the Municipal Survey register was made in the name of Bhuini. Her name had also been mutated in the sharista of the landlords and she paid Municipal tax and rent. On the other hand, none of these matters is conclusive when it is found as both sides are agreed in evidence that immediately before the transaction of sale both the plaintiffs and defendants 1 and 2 were residing in the house. Bhuini was also there. It is extremely unlikely that any of these residents were in ignorance as to who was the person in possession of the house as ostensible owner. The plaintiffs were in

4. Pandurang Krishnaji v. Markandeya Tukaram, A I R 1922 P C 20=65 I C 954=49 I A 16=49 Cal 334 (P C).

5. Bhagwan Singh v. Ujagar Singh, A I R 1928 P C 20=107 I C 20=32 C W N 538 (P C).

fact there as tenants and they must have known to whom they were paying rent. If they paid rent to defendant 2, nothing in the entries in the Municipal register or the landlord's sharista could deceive them and whatever else is clear regarding S. 115, Evidence Act, or S. 41, T. P. Act, one thing is certain: that there can be no estoppel in favour of a person who is not deceived. Neither of the Courts below have come to a finding as to whether it was Bhuini or defendant 2 who was in receipt of the rent from the plaintiffs.

I am of opinion therefore that the appeal must go back to the learned Judicial Commissioner for findings whether Mt. Bhuini had inherited the property or had forfeited her rights by reason of her having left Damri ; whether with her daughter's consent she was held out as the ostensible owner and plaintiffs were led to believe her to be the real owner; and whether the purchaser had taken reasonable care and bona fide believed in her title. The remand will be under O. 41, R. 25, Civil P. C., and the record should be returned to this Court as soon as possible with the findings. It will be for the Court below to decide whether to take further evidence or not regard being had to the provisions of O. 41, R. 27.

V.B.B./A.L. *Case remanded.*

A. I. R. 1937 Patna 357

ROWLAND, J.

Gaya Prasad Singh and *others* — Petitioners.

v.

Parichhan Sahu and *others* — Opposite Parties.

Civil Revn. No. 423 of 1936, Decided on 21st December 1936, from order of Dist. Judge, Muzaffarpur, D/- 14th July 1936.

Civil P. C. (1908), S. 115—High Court cannot interfere on ground that findings of fact are perverse or view of law erroneous—Application under O. 21, R. 90, Civil P. C., to set aside sale—Court setting aside sale without determining whether substantial injury is caused to applicant—Such order amounts to error of jurisdiction and High Court can interfere in revision.

The High Court cannot under S. 115, Civil P. C., interfere with the orders of the Courts below on the ground that the findings of fact are perverse or the view of law is erroneous. But where upon an application under O. 21, R. 90, Civil P. C., to set aside the sale the Court has lost sight of Proviso to O. 21, R. 90 and has set aside the sale without determining whether the applicant has sustained substantial injury, there is an error of jurisdiction in setting aside the sale contrary to express provisions of law and so the High Court can interfere in revision.

[P 358 C 1, 2]

Hareswhar Prasad Sinha and *P. Jha* — for Petitioners.

S. N. Rai — for Opposite Parties.

Order. — The petitioners were the sixteen annas landlords of an occupancy holding of 4 bighas 18 kathas. About half of this holding was given in usufructuary mortgage by the tenants on 4th June 1929, to the opposite party. In 1931 the petitioner obtained a rent decree on 14th May, for the rent of the holding. The decree was put into execution and the holding sold on 7th March 1934. The petitioners themselves purchased the holding and according to the record, delivery of possession was given to them on 7th July 1934. On 17th November 1934, the tenant-judgment-debtors applied under O. 21, R. 90, Civil P. C., to set aside the sale alleging suppression of processes and fraud by which they were kept in ignorance of the proceedings until 27th October 1934. The application was contested and after a hearing in which the usufructuary mortgagee, Parichhan gave evidence on behalf of the tenants-applicants, was dismissed on 3rd May 1935. The tenants did not appeal. The usufructuary mortgagees of half the holding who are now the opposite party, thereafter on 15th May 1935, presented their application under O. 21, R. 90, to have the sale set aside alleging suppression of the processes, irregularity leading to under-valuation and sale at an inadequate price and fraud by which they were kept in ignorance of the proceedings until 21st April 1935, when Parichhan received summons to appear as witness in the application which had been presented by the judgment-debtors. The Munsif allowed the application and set aside the entire sale.

On appeal the District Judge affirmed his decision. The District Judge's findings were that the property had fetched less than its real value, that the processes had not been properly served, that fraud did not need to be proved but might be presumed and that the Munsif was justified in believing that the usufructuary mortgagees were kept in ignorance through fraud. There is no finding here that the alleged usufructuary mortgagees had suffered any loss through the sale of the

property. The decree-holders opposite parties had contended that the alleged usufructuary mortgagees were in fact merely farzidars on behalf of the tenant-judgment-debtor. But the Munsif had said that the question whether the bharna was farzi or not could not be gone into in this case. The other findings of the Munsif were that the sale price was inadequate, that the processes were fraudulently suppressed and that "it is no wonder if the applicant came to know of the sale on receiving summons in Balgobind's case". He infers ignorance of the appellants from the fact of their not depositing the decretal amount. In review it is contended that the Courts should have placed the burden of proof of non-service on the applicants and not the burden of proof of service on the decree-holders, that the Courts have erred in law in presuming fraud which is a matter that ought to be alleged not generally but with particulars and fully proved, and it is said that the finding that the applicants remained in ignorance till the date stated by them is, in the circumstances, perverse. On the other hand, it is pointed out for the opposite party that in a proceeding in revision under S. 115, Civil P. C., the High Court can only interfere where there has been an error affecting jurisdiction or an irregular exercise of jurisdiction. Therefore, I do not think I can interfere with the orders of the Court below on the ground that the findings of fact are perverse or the view of law erroneous. But the Courts below have lost sight of the Proviso to O. 21, R. 90:

> No sale shall be set aside on the ground of irregularity or fraud unless upon the facts proved the Court is satisfied that the applicant has sustained substantial injury by reason of such irregularity or fraud.

If, as the petitioners contend, the applicants who allege themselves to be mortgagees were mere farzidars of the judgment-debtor, then several consequences would follow : one for instance, would be that as the questions of fraud, suppression of processes, etc., have already been tried out between the decree-holders and the judgment-debtor, the applicants being merely nominees of the judgment-debtor are debarred from prosecuting this application by the principle of res judicata. Another would be that they not having a genuine substantial interest in the property could not have sustained substantial injury. It was for them to show in the first place, that the bharna transaction in its inception was a genuine transaction for consideration and I observe that the attesting witness who was called by the applicants to prove the bharna, said nothing in support of the passing of consideration for it. The applicants do not appear to have offered the Court any evidence as to where they got the money to pay the consideration for the usufructuary mortgage. The Courts below have not come to any finding whether the applicants were in possession of the mortgaged property. It is noticeable that the applicants did not produce the original deed from their custody but instead came with an excuse, that it had been destroyed. In these circumstances, I am clear that there has been an error of jurisdiction in setting aside the sale contrary to the express provision of law without determining whether the applicants have sustained substantial injury. The judgment of the District Judge is set aside, the appeal must be re-heard *de novo* and it will be within his discretion to permit the parties to adduce further evidence on the question whether the applicants have sustained substantial injury but not on the other issues. Costs—hearing-fee two gold mohurs will abide the result.

S.C./D.S. *Order set aside.*

A. I. R. 1937 Patna 358

COURTNEY-TERRELL, C. J. AND JAMES, J.

Jamuna Das — Plaintiff — Appellant.

v.

Ram Kumar Ji and *others*—Defendants — Respondents.

Appeal No. 450 of 1934, Decided on 17th February 1937, from appellate decree of Sub-Judge, Muzaffarpur, D/- 6th February 1933.

(a) Contract — Consideration — Hatchita — Defendant agreeing to pay certain sums to charitable society, proportionate to value of goods imported by him — Such sums being in arrears defendant executing hatchita promising to pay sum due with interest—Society suing on such hatchita — Promise to contribute out of one's own pocket held was unenforceable as being without consideration —Hatchita held was only repetition of voluntary promise.

The defendant had agreed to pay from time to time, out of his own pocket certain sums proportionate to the value of goods imported by him, to a charitable society. As such sums were in arrears, he executed a hatchita in favour of the

society promising to pay the sum due with interest. In a suit by the society for the recovery of amount due on the hatchita :

Held : that in respect of the promise to make a contribution to come out of his own pockets on the value of the goods imported the promise was not enforceable against the defendant, being without consideration, and that the hatchita to the extent that the sum mentioned related to this form of contribution was no more than a repetition of the voluntary promise. [P 359 C 2; P 360 C 1]

(b) Trusts—Liability of trustee—Defendant agreeing to collect sums for charitable society from customer proportionate to every sale of goods — Defendant proved to have been bargaining with customer to add such percentage to bills in credit transaction — Such sums being in arrears defendant executing hatchita promising to pay sum due — Society is entitled to account of money received by defendant for use of society — Society is entitled to such money whether already paid or to be paid in future.

A person who collects money for a charity, whether or not the person from whom the money is collected pays it willingly or with any sympathy or interest in the charity in question, becomes a trustee of such money for the charity and it is entirely immaterial that the charity or society has made any arrangement with the collector authorizing him to collect because the trust is constituted by the payment by the member of the public on the representation by the collector that the money is for a specific charitable purpose.
[P 360 C 1, 2]

A shopkeeper agreed to collect from his customers a certain sum proportionate to every sale of goods made and hand it over to a charitable society. In respect of credit transaction he bargained with the customer that a percentage of the costs of the goods was to be added to the bill. When such sums were in arrears he executed a hatchita in favour of the society promising to pay the amount due. On a suit by the society to recover such amount :

Held : that the society was entitled to an account from the defendant of all moneys received by him for the use of the society from subscribers. The society is entitled to such money whether already paid or whether to be paid in future.
[P 360 C 2]

P. R. Das and *S. N. Bose* — for Appellant.

Sultan Ahmed and *A. K. Mitra* — for Respondents.

Courtney-Terrell, C. J.—In the town of Muzaffarpur there is a 'Pinjrapole Gaushala,' that is to say a home and hospital for decrepit cows which is maintained by the Agarwala and allied communities in accordance with what they conceive to be their pious duty. The members of these communities are in the main traders and shopkeepers. The particular Gaushala in question is situated in Mahalla Kanhauli. The plaintiff is an official of the society and sues on behalf of himself and his fellow members. The defendants are also members of the same community, being a Hindu joint family and engaged in trade. The Gaushala in question was founded about the year 1900 and the members, including the defendants, (who joined the society in about the year 1917), were in the habit of maintaining the Gaushala by collecting from their customers a small sum proportionate to every sale of goods made. This custom of the community is widely known throughout India and the purchasers are aware that the small additional percentage which is known as *biti* is to be devoted by the shopkeeper or merchant to the maintenance of the Gaushala. The members of the society appear also to have agreed to contribute a small percentage of the cost of bales of cloth imported by them. The society settles up its accounts with each individual member from time to time and the percentage collected on behalf of the Gaushala on each purchase and credited to the Gaushala in the books of the merchant would be handed over to the society for the charitable purpose referred to. The rate of *biti* charged by the defendants to customers, after they had become members in 1917, was according to the resolution of the society, two annas and six pies per hundred rupees of the sales effected. For some time the defendants paid up the money collected by them, and also the agreed percentage on importations contributed by themselves to the officials of the Gaushala. After a time, however, the defendants were found to be in arrears and were reproached by the members of the society. Ultimately in January 1928 the defendants made out a hatchita admitting that the amount due to the Gaushala in respect of the transactions carried through was a sum of Rs. 2,643 which the defendants promised to pay with interest. The plaintiff on behalf of the other members of the Gaushala sues the defendants for the amount so admitted to be due with interest.

The Subordinate Judge dismissed the suit, holding that it was not shown how much of the said sum of Rs. 2,643 was attributable to the payments which the defendants had received from customers on transactions of sale and how much of the said sum was attributable to the promise by the defendants to pay out of their own pockets on the value of goods imported by them. He held, and to this limited extent in my opinion rightly held,

that in respect of the promise to make a contribution to come out of their own pockets on the value of the goods imported the promise was not enforceable against the defendants, being without consideration, and that the hatchita to the extent that the sum mentioned related to this form of contribution was no more than a repetition of the voluntary promise. The plaintiff appealed to the District Judge who dismissed the appeal, agreeing with the Subordinate Judge in the matter of the irrecoverable nature of such part of the amount due as was attributable to the promise by the defendants out of their own pockets and further held that there was no evidence to satisfy the Court that the defendants had in fact received from the public subscriptions by way of *biti* in connexion with sales of merchandise. The Judge, however, held that with respect to credit transactions the defendants had in fact credited in their books a levy of *biti* to the Gaushala but it had not been shown that with respect to such transactions *biti* had been realized from customers.

A great deal of discussion before the Courts below and before this Court was directed to the question of whether the defendants had declared a trust in favour of the Gaushala and whether the entries in their books and the hatchita in question constituted such a declaration. In my opinion this is irrelevant. It is true that neither a promise, nor a written acknowledgment that in respect of such promise a sum had been set aside by the defendants with a promise to hand it over to charity can be the basis of a suit by the society to recover on account of such promise. It might be that if the defendants had actually placed the amount promised to the credit of the society so as to hand over the property in such account to the society, the society could retain the amount. But in the case before us there has been no such handing over. When we come, however, to the matter of subscriptions collected from the public the position is entirely different. A person who collects money for a charity whether or not the person from whom the money is collected pays it willingly or with any sympathy or interest in the charity in question, becomes a trustee of such money for the charity and it is entirely immaterial that the charity or society has made any arrangement with the collector authorizing him to collect because the trust is constituted by the payment by the member of the public on the representation by the collector that the money is for a specific charitable purpose.

The learned District Judge has failed to observe the significance of the evidence that in respect of credit transactions the defendants had bargained with the customer that a percentage of the cost of the goods was to be added to the bill, and he has failed to give effect to the admission by the defendants by means of the hatchita that some sum at any rate was owing to the Gaushala. On the establishment of these facts the society is entitled to an account from the defendants of all moneys had to its use from subscribers. The case is analogous to the state of affairs in which a person openly purports to collect money for a home or hospital. It might well be that the hospital would not be in a position to prove as a fact that any person had put money into the collecting box held out by the collector, but the fact that a collecting box was held out is quite sufficient to justify the charity in suing for an account and for payment over of such money as may have been found to be due.

In default of agreement between the parties the Subordinate Judge will be directed to take an account as between the plaintiff and defendants of all money collected by the defendant on behalf of the Gaushala and further of any money already agreed to be paid in the future by the defendants' customers to the plaintiff. This Court declares that as regards such money whether already paid or whether to be paid in future the plaintiff is entitled to the same; if already paid then immediately and if to be paid in the future then as and when paid by the customer to the defendants. The appeal should, in my opinion, be allowed and the defendants should pay the plaintiff's costs throughout.

James, J.—I agree.

W.D./A.L. *Appeal allowed.*

A. I. R. 1937 Patna 360

FAZL ALI AND MADAN, JJ.

Chairman and *Commissioners of Chaibassa Municipality*—Petitioners.

v.

Gobind Sao — Opposite Party.

Civil Revn. No. 295 of 1936, Decided on 20th January 1937, from order of Small Cause Court Judge, Chaibassa, D/- 6th February 1936.

Limitation Act (1908), Arts. 115, 120 — Applicability—Limitation Act applies to suits for recovery of dues under Bihar and Orissa Municipal Act, as no special period of limitation is provided for such suits in the latter Act—Municipality settling right to collect tolls in market with defendant for two years for certain sum—Defendant making partial payment of such sum—Municipality filing suit for balance more than three years after such sum became due — Art. 115 and not Art. 120 held applied as defendant committed breach of contract to pay sum agreed upon —Suit held was barred by limitation.

As no special period of limitation is provided in the Bihar and Orissa Municipal Act for the recovery of dues under the Act, the Limitation Act applies to suits for the recovery of such dues. [P 361 C 2]

The right to collect the tolls in a market was settled by a Municipality governed by Bihar and Orissa Municipal Act, with the defendant for two years for a certain sum. The defendant made over to the Municipality a partial payment of the recoveries made by him. The Municipality brought a suit for the recovery of the balance but more than three years after the sum became due:

Held: that Art.115, and not Art. 120, Limitation Act, applied to such suit as the sum sought to be recovered was due to the plaintiff under a contract by which the defendant had bound himself to pay a certain amount annually and the suit had to be brought by the plaintiff, because there had been a breach of this contract by the defendant. The suit was therefore barred by limitation: *A I R 1933 Pat 65* ; *A I R 1926 Mad 615* and *A I R 1934 Pat 148, Disting.* ; *A I R 1916 P C 182, Rel. on.* [P 362 C 1]

G. C. Mukherjee — for Petitioners.

R. S. Chatterji — for Opposite Party.

Fazl Ali, J.—This is an application by the Chairman and the Commissioners of the Chaibassa Municipality whose suit for the recovery of Rs. 233-4-0 has been dismissed by the Small Cause Court Judge of Chaibassa. It appears that in exercise of the powers conferred by the Bihar and Orissa Municipal Act, the Municipality has established a market in Chaibassa and the right to collect the tolls in that market was settled with the defendant for the years 1931 and 1932 for a sum of Rs. 560. The defendant paid Rs. 326-12 out of this sum and so the Municipality brought the present suit to recover the balance, that is to say Rs. 233-4. The suit was admittedly brought more than three years after the sum sought to be recovered had become due and thus a question arose in the Court below whether Art. 115 or Art. 120, Lim. Act, was the proper Article to be applied to the present case. It is clear that if the suit came under Art. 115, which provides as the period of limitation a period of three years from the date when the cause of action in the suit covered by the Article arose, the suit was barred by limitation. On the other hand the limitation would be saved, if the suit is held to fall under Art. 120, Lim. Act, which provides a period of six years from the date when the right to sue accrues. The learned Small Cause Court Judge being of the opinion that the suit was governed by Art. 115, held that it was barred by limitation and dismissed the suit. The present application is directed against this decree of the learned Small Cause Court Judge.

Now, the learned advocate for the appellant in pressing his contention that the view taken by the learned Small Cause Court Judge is not correct relied upon the following cases, A I R 1933 Pat 65;[1] 49 Mad 468[2] and A I R 1934 Pat 148.[3] In *Dip Narain Choudhry's case*[1] the suit had been instituted to recover certain taxes due to the Municipality and upon a discussion of the various provisions of the Municipal Act it was held that to a suit for the recovery of dues under S. 130, Municipal Act, there being no other limitation provided for in the other Articles of the Schedule, Art. 120, Lim. Act, applied and the suit in question having been brought within six years of the date when the taxes became due, ought to be decreed. The learned advocate for the appellant has referred us to Ss. 268, 275, 368 and 130, Municipal Act, for the purpose of showing that the dues which are sought to be recovered in the present suit are covered by S. 130, Municipal Act. It appears to me, however, that as no special period of limitation is provided in the Municipal Act for the recovery of dues under that Act, we have to fall back upon the Limitation Act and the question to be decided therefore is whether the present suit falls under any of the special Articles of the Limitation. If it does not fall under any of the special Articles it must be held to be governed by the residuary Art. 120. Now, I have no doubt in my mind that the Article which is

1. Dip Narain Choudhry v. Additional District Magistrate, A I R 1933 Pat 65=141 I C 792= 13 P L T 771.
2. Venkata Gurunatha Rama Seshayya v. Sri Tripura Sundari Cotton Press, A I R 1926 Mad 615 = 94 I C 515 = 49 Mad 468 = 50 M L J 520 (F B).
3. Lalji Singh v. Ramrup Singh, A I R 1934 Pat 148=150 I C 975=13 Pat 192.

applicable to the present suit is Art. 115 Lim. Act.

In 44 Cal 759[4] it was made clear by the Judicial Committee that the word "compensation" as used in the Contract Act has been used in a very wide sense and Art. 115 in that case was applied to a suit to recover royalty under a lease of certain land with the right to the coal therein. If the dues which are sought to be recovered from the defendant could have been described as rent, the appropriate Article would have been Art. 110 but there is some authority for the view that such a due cannot be properly described as rent and therefore we have to fall back upon Art. 115. There can be no doubt that the sum sought to be recovered was due to the plaintiff under a contract by which the defendant had bound himself to pay a certain amount annually and the present suit had to be brought by the plaintiff, because there had been a breach of this contract by the defendant. Art. 115 has been made applicable to similar suits and I have no doubt that it is the appropriate Article to be applied to the present case also. The last two cases relied upon by the learned advocate for the appellant do not appear to be of much assistance to us. In *Venkata Gurunatha's case*[2] a suit was brought by a shareholder against a company for recovery of the dividend and in *Lalji Singh's case*[3] the suit was brought to recover nazarana from a lessor who had failed to grant a lease. Whatever view may be taken with regard to these particular dues, it appears to me that the present case is covered by Art. 115. I think therefore the suit was rightly dismissed and this application must also be dismissed with costs. Hearing fee one gold mohur.

Madan, J.—I agree.

W.D./A.L. *Application dismissed.*

4. Tricomdas Cooverji Bhoja v. Gopinath Jiu Thakur, A I R 1916 P C 182=39 I C 156=44 I A 65=44 Cal 759 (P C).

A. I. R. 1937 Patna 362

COURTNEY-TERRELL, C. J. AND JAMES, J.

Rambali Prasad Singh—Appellant.

v.

Mt. Kishori Kuer—Respondent.

Appeal No. 56 of 1935, Decided on 31st March 1937, from decision of Dist. Judge, Muzaffarpur, D/- 5th February 1935.

Pardanashin Lady—Will—Person wishing to prove will need not prove independent advice—Undue influence—Exercise of advice by close friend or relative is not undue influence — It means domination of weak mind by stronger one.

It is not incumbent upon a person wishing to prove the will of a pardanashin lady of her own separate property to prove that the will has been executed under independent advice. The mere fact that she took the advice of the father of the person to whom she proposed to leave the property is no evidence of undue influence. Undue influence does not mean the exercise of advice by a close friend or relative. It means the domination of a weak mind by a stronger mind to an extent which causes the behaviour of the weaker person to assume an unnatural character.

[P 363 C 1]

Manohar Lal—for Appellant.

Sambhu Parmeshwar Prasad —for Respondent.

Courtney-Terrell, C. J.—This is an appeal from the order of the District Judge refusing a grant of probate. One Kodai Singh died in the year 1897 leaving two widows. The senior widow Deoratan Kuer had no issue. The junior widow had issue by Kodai Singh—three daughters —Gena who is a widow and issueless, Anar who is dead and Kishori who is the caveator. The deceased Anar married one Mun Prasad and by him had a son who is the applicant Rambali. The two ladies Deoratan and Uchanti widows of Kodai Singh, made a will which will of course operate only upon their separate stridhan property bequeathing the entire property to Rambali, the son of the deceased daughter of Uchanti. Later on, Deoratan died and the surviving widow Uchanti then purported to execute a further will by which she stated that having regard to the fact that her daughter Gena was a widow and issueless whereas Kishori the caveator was married and was living with her husband, she considered that Gena was entitled to 5 as. 4 pies share in the estate bequeathed by her and her co-widow and therefore she purported to give effect to this view of the matter and to give to Gena 5 annas 4 pies share of the property left by the co-widows, Rambali being named as the executor. The caveator Kishori raised no question of undue influence on either Uchanti or Deoratan in respect of the earlier joint will. The learned Judge however seems to have been under the impression that it was incumbent upon the person asking for probate of a will executed by a pardanashin lady to prove affirmatively that

the will was executed under separate independent and disinterested advice. The evidence before him showed that the ladies had been advised by Man Prasad, the father of Rambali; but there is nothing in such evidence which would give rise to any inference that he exercised undue influence. It is not incumbent upon a person wishing to prove the will of a pardanashin lady of her own separate property to prove that the will has been executed under independent advice. The tendency seems to be for the Courts to place a pardanashin lady under a condition of almost total disability and the mere fact that she took the advice, if she did take the advice of the father of the young man to whom she proposed to leave the property, is no evidence at all of undue influence. Indeed the learned District Judge's finding that the applicant's witnesses had deposed that the widows were of sound mind and in full possession of their faculties when they signed the will negatives the very suggestion of undue influence. Undue influence does not mean the execrise of advice by a close friend or relative. It means the domination of a weak mind by a stronger mind to an extent which causes the behaviour of the weaker person to assume an unnatural character. The bequest itself was not in the least unnatural in the circumstances. Rambali, the applicant, has very properly intimated through the learned Advocate appearing on his behalf that he wishes to give effect to the wishes of the ladies and in particular to the wish of Uchanti and voluntarily consents to a declaration that the lady Gena is under the will entitled to 5 annas 4 pies share which the later will of Uchanti purported to bequeath to her. I would therefore set aside the decision of the District Judge, direct the grant of letters of administration with the will annexed to the applicant and grant the declaration in the form to which the applicant consents. The caveator must pay the costs of this appeal and of the Court below.

James, J.—I agree.

U.S./K.S. *Appeal allowed.*

A. I. R. 1937 Patna 363

MOHAMAD NOOR AND ROWLAND, JJ.

Emperor

v.

Gedka Goala — Accused.

Govt. Appeal No. 7 of 1936, Decided on 24th February 1937, from decison of Sess. Judge, Purnea, D/- 8th October 1936.

Penal Code (1860), S. 84 — Scope — Mere probability of accused's temporary insanity at time of offence is not enough —Proof in affirmative of accused's insanity is necessary—Accused shutting door of house before murdering his wife, daughters and son —Accused threatening brother-in-law of his life and proceeding to kill his brother and sister-in-law—Accused subsequently making confession as to what he has done—Medical evidence merely showing likelihood of accused's committing murders in fit of temporary insanity—No proof in affirmative of accused's insanity—Accused held was conscious of his acts and knew what killing was—Accused, held must be presumed to be conscious of his criminal responsibility for his acts.

It is only unsoundness of mind which materially impairs the cognitive faculties of the mind that can form a ground of exemption from criminal responsibility, the nature and the extent of the unsoundness of mind required being such as would make the offender incapable of knowing the nature of the act, or that he is doing what is wrong or contrary to law. But where there is a mere possibility that the accused may have been insane at the time of commission of the act of murder, then in the absence of proof in the affirmative of the kind of insanity referred to in S. 84, I. P. C., the presumption is that the accused is responsible for his act. [P 364 C 2; P 365 C 1; P 366 C 2; P 367 C 1]

The accused murdered his wife, daughters and one son and caused grievous hurt to his other son and mother, and before beginning to commit murders he shut the door of his house. He also threatened the life of his brother-in-law saying that he had killed others and would kill him too and on meeting a stranger after the commission of these acts, he told him that he wanted poison to kill himself as he had finished with others and saying this he left to meet his brother and sister-in-law to kill them. The accused subsequently made a confession which showed that he had a clear recollection of what he had done. The medical evidence merely showed that the accused might have committed the offence in a temporary fit of insanity. The accused pleaded insanity in defence:

Held: that the evidence showed that the accused knew what killing was and meant to do it, knew what he had already done, knew who his brother and sister-in-law were and where they lived and the way to their place. So far as the nature of the act was concerned the accused not only was capable of knowing it but did know it as well as any sane man. The accused was thus conscious of the nature of his act and must therefore be presumed to have been conscious of its criminality. In the absence therefore of proof in the affirmative of his insanity, the

mere probability of his being insane at the time of the murders perpetrated by him, would not be enough to absolve him of the criminal liability for them: *Case law referred.* [P 366 C 1; P 367 C 1]

Govt. Advocate — for the Crown.

L. K. Chaudhuri — for Accused.

Rowland, J.—Gedka Goala was put on his trial before the Sessions Judge of Purnea and four assessors charged with murder of his wife Mt. Reshmi, his daughters Budhsar and Dilsar and his son Sadhu, with causing grievous hurt to his son Budhu and with causing hurt to his mother Mt. Neno. The accused was living in Patharghatti, and on Friday, 19th June 1936, he was in his own house with his wife Reshmi, his daughters Budhsar and Dilsar and his sons Budhu and Sudhu. He attacked all these persons with a heavy cutting knife dao. He was interrupted by the return to his house of his mother Neno whom also he attacked and wounded with the dao. The next to come was his brother-in-law Nunu Lal, seeing whom he said he had killed others and would kill him (Nunu Lal) too. Nunu Lal saved himself by flight. Gedka then picked up the boy Budhu and went out carrying him to the house of Ahmad Ali. He asked Ahmad Ali for water and poison "to kill himself as he had finished everybody" but went away to Murhi Bechi to the house of his brother Ledka announcing his intention of killing the latter and his wife. They, however, concealed themselves. At about 3 p. m. he came to Bibiganj where he met an excise peon Mir Ekbal who had the presence of mind to disarm and arrest the accused and made him over to Kharkhara Manjhi, dafadar, along with the blood-stained knife. The occurrence was proved by the boy Budhu Gope, who survived his injuries and accused's mother Neno who was not seriously wounded and accused's father Hathia and the subsequent movements of the accused by Ahmad Ali, Mir Ekbal and Kharkhara Manjhi.

The medical evidence proved that the death of the wife, two daughters and son was due to incised injuries inflicted with a sharp weapon such as the dao produced (Ex. 2) and the injuries on Neno and Budhu could be inflicted by the same weapon. The accused made a confession before a Magistrate on 22nd June 1936, but at the trial his statement is that he was not in his sense and does not know what he did and what he did not do and cannot remember whether he made a confession. The Sessions Judge and all four assessors were of opinion that the facts were proved and no other view of the case is possible and the only defence that could be taken at the trial was that by reason of unsoundness of mind the accused was not responsible for his actions. This defence was accepted by the Sessions Judge in agreement with all the assessors and the learned Judge on finding that the accused committed the acts charged but is not guilty in view of the provisions of S. 84, I. P. C., acquitted the accused but has directed that he be detained in custody pending orders from the Local Government under S. 471, Criminal P. C. The Local Government have preferred this appeal, and it is contended that the learned Sessions Judge has proceeded on a wrong view of the law regarding criminal responsibility, that it should have been held that the accused at the time of doing the acts knew what he was about and was liable to be convicted. For the respondent it has not been contended that accused did not do the acts charged and the evidence abundantly establishes those facts. Therefore, the only question that remains is whether the Court below was right in the view taken regarding the absence of criminal responsibility by reason of unsoundness of mind. The law is in S. 84, I. P. C.:

> Nothing is an offence which is done by a person who at the time of doing it, by reason of unsoundness of mind, is incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law.

This provision was examined in 23 Cal 604,[1] a leading case which has been repeatedly followed. The learned Judges point out that the rule is in substance the same as that laid down in the answers of the Judges to the questions put to them by the House of Lords in *Daniel M'Naghten's case.*[2] It is pointed out that:

> Insanity affects not only the cognitive faculties of the mind which guide our actions, but also our emotions which prompt our actions and the will by which our actions are performed.

And they say that:

> It is only unsoundness of mind which materially impairs the cognitive faculties of the mind that can form a ground of exemption from criminal responsibility, the nature and the extent of the unsoundness of mind required being such as would make the offender incapable of knowing the

1. Queen-Empress v. Kedar Nasyr Shah, (1896) 23 Cal 604.
2. (1843) 10 C & F 200=8 Scott N R 595=1 C & K 130=4 St Tr N S 847.

nature of the act, or that he is doing what is wrong or contrary to law. Instances of unsoundness of mind of this description would be such as these: A person strikes another, and in consequence of an insane delusion thinks he is breaking a jar. Here he does not know the nature of the act. Or he may kill a child under an insane delusion that he is saving him from sin and sending him to heaven. Here he is incapable of knowing by reason of insanity that he is doing what is morally wrong. Or he may under insane delusion believe an innocent man whom he kills to be a man that was going to take his life; in which case by reason of his insane delusion he is incapable of knowing that he is doing what is contrary to the law of the land.

Apart from such delusions the Judges were not prepared to accept the view that a person is entitled to exemption from criminal liability in cases in which it is only shown that he is subject to insane impulses while the cognitive faculties remain, so far as can be judged from his acts and words, unimpaired. In the case before them the learned Judges though finding that the circumstances indicated that the accused must at the time of the acts charged have been suffering from mental derangement of some sort, upheld the conviction on the ground that the circumstances did not show him to have been devoid of knowledge of the nature of his act or that he was doing what was wrong and contrary to law. In that case there had been evidence of mental derangement both before and after the occurrence. The murder was committed without any sane motive, and at the time when the case came up for preliminary inquiry the accused was found to be not in a fit state of mind to be able to make his defence and a delay of a year intervened before the inquiry was resumed. Two English cases have been referred to at the hearing before us as illustrative of the manner in which a Court should address itself to the question of criminal responsibility: one is 175 E R 514=3 Car & K 185.[3] The prisoner Stokes was charged with murder for which no rational motive was apparent. It was argued in his defence that there was a class of lunatics "who are driven to commit homicide by a sudden and merely blind and instinctive impulse, without consciousness of the nature of the act". Baron Rolfe impressed upon the jury that every man is held responsible for his acts if he can discern right from wrong. He said:

It is true that learned speculators, in their writings have laid it down that men, with a consciousness that they were doing wrong, were irresistibly impelled to commit some unlawful act. But who enabled them to dive into the human heart, and see the real motive that prompted the commission of such deeds? . . . . . It is true that there is no motive apparent, but a very inadequate one; but it is dangerous ground to take to say that a man must be insane because men fail to discern the motive for his act. It has also been said by the prisoner's counsel that the conduct of the prisoner was that of a mad man in committing the offence at such a time, in the presence of the woman's husband, who had arms within his reach; but it would be a most dangerous doctrine to lay down, that because a man committed a desperate offence, with the chance of instant death, or the certainty of future punishment before him, he was therefore insane, as if the perpetration of crimes was to be excused by their very atrocity.

A similar case was 175 E R 898=1 F & F 666.[4] Baron Bramwell told the jury:

It has been urged for the prisoner that you should acquit him on the ground that, it being impossible to assign any motive for the perpetration of the offence, he must have been acting under what is called a powerful and irresistible influence, or homicidal tendency. But I must remark as to that, that the circumstance of an act being apparently motiveless is not a ground from which you can safely infer the existence of such an influence. Motives exist unknown and innumerable which might prompt the act. A morbid and restless (but resistible) thirst for blood would itself be a motive urging to such a deed for its own relief. But if an influence be so powerful as to be termed irresistible, so much the more reason is there why we should not withdraw any of the safeguards tending to counteract it. There are three powerful restraints existing, all tending to the assistance of the person who is suffering under such an influence, the restraint of religion, the restraint of conscience, and the restraint of law. But if the influence itself be held a legal excuse, rendering the crime dispunishable, you at once withdraw a most powerful restraint, that forbidding and punishing its perpetration. We must therefore return to the simple question you have to determine, did the prisoner know the nature of the act he was doing? and did he know that he was doing what was wrong?

Now the Sessions Judge has said that there was a mental derangement beyond doubt and,

the very nature of the act goes to show that the derangement was such that the accused could not have known the nature of the act he was doing.

And he says:

I cannot believe that a man in his senses can commit a murder like this. The very act itself shows that there was a serious derangement of the brain of the accused at the time he committed the act.

The test, which the learned Sessions Judge applied is plainly in view of the pronouncements above cited, inadequate.

3. Regina v. Michael Stokes, (1848) 3 Car & K 185=175 E R 514.

4. Regina v. Haynes, (1859) 175 E R 898=1 F & F 666.

A crime is not excused by its own atrocity. One must look outside the act itself for the evidence as to how much the accused knew about it. The central point for examination is whether the accused knew that he was killing human beings, or was under a disorder which made him unaware that he was doing so. The sole eye-witness of the first assault is Budhu. His evidence does not disclose that the accused said anything at the time of the assault in his own house but he shut the door before beginning it, and this agrees with what the prisoner himself said in his confession on 22nd June. It has the look of a preparation for the deed. The accused does not appear to have said anything to his mother Mt. Neno whom he struck on her coming into the house, but he threatened the life of his brother-in-law, Nunu Lal, saying he had killed others and will kill him too. Then, when he met Ahmad Ali he first asked for water and poison "to kill himself as he had finished everybody"; but as Ahmad Ali said he should hand over the dao first the accused did not take the water or the poison saying that he would go on to Murhi Bechi and kill his brother and sister-in-law. He did go to Murhi Bechi, but his proposed victims escaped and hid. On this evidence I see no room to doubt that accused knew what killing was and meant to do it, knew what he had done already, knew who were his brother and his sister-in-law and where they lived and the way to that place. Therefore, so far as the nature of the act is concerned, the accused not only was capable of knowing it but did know it as well as any sane man. The confession of 22nd June is to be considered in this connexion. The confession shows that the accused had a clear recollection of what he had done. He says : "After feeding my children I began to cut them"; and "after shutting the window of the house I began to inflict cuts". With this clear statement of what he had himself done, the accused joins a curious explanation of why he did it. He says the neighbours used to call his wife a witch and himself an ojha, that they wanted to kill him and his wife and used to catch them and bring them back when they tried to escape, that his wife used to say "if you will die, I shall be free" ; that Dhan Lal Barhi's brother said to accused's brother-in-law "He has become mad. Bring pigeons and make him eat (them) and he will be cured". The accused says "We ate pigeons". Unfortunately the evidence gives little assistance in determining whether these are true statements of fact or are the outcome of a delusion from which the accused was suffering or are invented or imagined by him to excuse acts which he knew to be wrong. He says : "Then what did God do to me, whether some evil spirit possessed me, or what happened (I do not know)".

From this we can learn that at the time of the confession he knew the act to be evil, but was unable to account for the impulse which drove him to it, except by imagining some external interference with his will. The accused's brother-in-law, Nunu Lal, was not asked whether Dhan Lal Barhi's brother proposed to feed accused on pigeons to cure him. Accused's father Hathia says that Reshmi was not believed to be a witch nor was the accused an ojha; that it is not a fact that the villagers wanted to take the life of the accused and his wife or chased them, and he never heard Reshmi saying to the accused that it were better if he were dead. There is evidence that at the time of the occurrence the alarm was raised and people spoke of accused as a madman. That was an opinion, not an expert diagnosis. Assuming it to be a natural inference from his acts, it does not assist us in drawing the line which has to be drawn between insane impulses and delusions affecting the cognitive faculties. There is evidence as to the condition of accused during the four or five days immediately preceding the occurrence. Prior to that no sign of madness had been observed, but for four or five days before the occurrence we have it from the accused's mother Neno that he did no work and used to sit still and behave as if he was dumb. Shaikh Ghistu says that during these days accused used to look vacantly and would only speak to himself. Hathia, the father, says that the accused would sit at one place and would speak to no one. The Assistant Surgeon in the course of his evidence says :

> I cannot say what the state of the mind of the accused was before I kept him under observation. It is possible the accused committed the occurrence in a temporary fit of insanity. Such a fit may come all on a sudden and disappear after a short while.

This does not help us very much. If it is an open question, a mere possibility that accused may have been insane, the

presumption is that he was responsible for his action unless the kind of insanity referred to in S. 84 is affirmatively proved. Neither the Assistant Surgeon nor the Civil Surgeon Dr. G. C. Bhaduri was asked what inference he would draw regarding the state of mind of the accused from such symptoms as sitting down at one place behaving as if he was dumb, not stirring or speaking, or speaking only to himself, and wearing a vacant expression. These are symptoms from which the local witnesses inferred that accused's state of mind was not normal; and some disturbance of the melancholia type may be a reasonable inference. But for the reasons given above, it is clear that the accused was conscious of the nature of his act and as stated in 10 Bom 512:[5]

If he was conscious of its nature he must be presumed to have been conscious of its criminality.

This distinction is drawn in 8 Lah 114[6] between paralysis of the will by insane impulses and paralysis of the mind in the sense of being incapable of knowing the nature of the act or that it was wrong or contrary to law. In that case the Judges found: (1) the absence of any motive, (2) the absence of secrecy, (3) multiple murders, (4) want of pre-arrangement and (5) want of accomplices. These circumstances were in that case held insufficient to support the inference that the accused suffered from unsoundness of mind of the kind referred to in S. 84. The position in the present case is similar.

I have dealt with the evidence of accused's mental condition before and on the day of the occurrence. After that date nothing abnormal was observed. He was clear-headed at the time of his confession. He was kept under medical observation by the Assistant Surgeon, Dr. R. K. Bose, who found no signs of insanity. The accused was behaving throughout the period of observation like a normal person. Later on, he was also under special observation of the Civil Surgeon from 23rd September onwards. The Civil Surgeon found nothing abnormal about the state of the mind of the accused. I would allow the appeal and convict the respondent Gedka Goala of the charges under Ss. 302, 326 and 324, I. P. C. I would sentence him under S. 302, I. P. C. to transportation for life, and would pass no separate sentence for the other offences. I would at the same time follow the course taken in 23 Cal 604[1] and direct that the case be reported to the Local Government with a recommendation that it may be dealt with under S. 401, Criminal P. C., in such manner as may be judged fit, the accused having committed the murder without any apparent sane motive and while suffering from mental derangement of some sort.

Mohamad Noor, J. — I agree.

W.D./A.L. *Appeal allowed.*

5. Queen Empress v. Lakshman Dagdu, (1886) 10 Bom 512.
6. Mani Ram v. Emperor, A I R 1927 Lah 52= 99 I C 328=28 Cr L J 120=8 Lah 114=27 P L R 823.

A. I. R. 1937 Patna 367

AGARWALA AND MADAN, JJ.

Bara Chhatu Rajwar — Appellant.

v.

Ananda Rajwar and *others* — Respondents.

Appeal No. 854 of 1933, Decided on 13th October 1936, from appellate decree of Sub-Judge, Purulia, D/- 15th February 1933.

Chota Nagpur Tenancy Act (6 of 1908), Ss. 66 and 64—Suit by occupancy raiyat for declaration of his title and for possession of part of his occupancy holding alleging his dispossession by defendant — Suit brought within 12 years from such dispossession — Such holding proved to be cultivated for considerable time before dispossession —Defendant contending that by conversion of land in suit to paddy land, he acquired occupancy rights in it under S. 64—S. 66 held bar to such defence.

An occupancy raiyat should nct be deprived of his land by a person who trespasses upon it and converts it into paddy land, unless the trespasser acquires a title by adverse possession for the period prescribed by the general law of limitation. [P 368 C 2]

The plaintiff, an occupancy raiyat brought a suit for declaration of his title and for recovery of possession of a plot of land which formed part of his occupancy holding, alleging that he was dispossessed by the defendant. The plaintiff brought the suit within 12 years from such dispossession. It was proved that the land was cultivated for a considerable time before such dispossession. The defendant contended that he converted the land into paddy land and therefore he acquired occupancy rights in it under S. 64 of the Act. It was admitted that the land was part of the occupancy holding of the plaintiff :

Held : that S. 66 was a bar to such a defence as defendant could not acquire such rights in the land in dispute : *A I R 1917 Pat 243* and *A I R 1928 Pat 87, Expl.* [P 368 C 1]

S. C. Mazumdar — for Appellant.

G. C. Mukharji and *N. N. Ray* — for Respondents.

Agarwala, J. — The plaintiffs-respondents sued for a declaration of their title to and for recovery of possession of survey plot No. 315 of mauza Daldali which they alleged was a part of their raiyati holding and from which they alleged they had been dispossessed by the defendants two years before the final publication of the Record of Rights in 1925. The Court of appeal below has held that the plaintiffs were dispossessed two years before the preparation of the draft Record of Rights which was in 1329 Fasli and has accordingly held that the plaintiffs were dispossessed in 1920. The present suit was instituted on 27th February 1931 within 12 years from the dispossession. The question that has been agitated before us is one that has not been dealt with by the Courts below; but it is contended that the question arises on the findings. The defendant-appellant contends that he has converted the land in dispute into paddy land and has therefore acquired occupancy rights in it by reason of the provisions of S. 64, Chota Nagpur Tenancy Act, relating to korkar. Apart from the question whether occupancy rights can be acquired by this method within the occupancy holding of another raiyat, S. 66 in the present case is a bar to the defence. That section provides that nothing in S. 64 shall authorize any cultivator to convert into korkar any cultivated land in the direct possession of any other person. Admittedly the disputed land was a part of the occupancy holding of the plaintiff and the only question is whether it was cultivated land. Both parties led evidence on this point alleging that the land had been cultivated for some considerable time before the Record of Rights was prepared. S. 66 therefore is a bar to the acquisition of korkar rights in the disputed land.

It is unnecessary, in the circumstances, to discuss certain decisions of this Court relating to the scope of S. 64. They are 38 I C 478[1] (Atkinson, J.), 105 I C 58[2] (Allanson, J.), *Second Appeal No. 89 of 1925*[3] (Ross, J.) and *Second Appeal No. 1183 of 1932*[4] (Dhavle, J.). The appellant contends that these cases decide that occupancy rights may be acquired by the process of korkar in the lands of a tenant. They are however not authorities for the proposition that occupancy rights may be acquired by the process of korkar in cases where S. 66 clearly bars such acquisition, namely, where the land in dispute is cultivated land in the direct possession of another. This appears to be indicated in the judgment of Allanson, J : 105 I C 58.[2] That was a suit by mundari khuntkattidars to eject a person who had converted a nala into a paddy field. In dismissing the suit Allanson, J. said :

> It is not their case that the defendant encroached on their tenancy . . . . They are not suing as tenants on whose holding another person has trespassed, because this land was admittedly a nala, and as the plaintiffs' case that they reclaimed it has not been believed, the nala did not form part of their tenancy.

Further, an aspect of the matter not considered in the cases referred to is this : When korkar rights are acquired in the lands of a proprietor, the cultivator merely acquires a certain subordinate right, i. e., the right of occupancy. He does not eliminate the proprietary right of the owner of the land. But what right does he acquire when he encroaches upon and converts into paddy land the land of an occupancy raiyat ? By analogy with the case of a proprietor's uncultivated land he should acquire a right subordinate to that of the occupancy raiyat. But the statute confers occupancy rights on a person to whom S. 64 applies. This, in my view, indicates that it was not intended that an occupancy raiyat should be deprived of his land by a person who trespasses upon it and converts it into paddy land, unless, of course, the trespasser acquires a title by adverse possession for the period prescribed by the general law of limitation. In a proper case it may therefore be necessary in the future to consider whether S. 64 applies to the land of a tenant. The appeal is dismissed with costs.

Madan, J.—I agree.

W.D./A.L. *Appeal dismissed.*

1. Rahamali Kalal v. Chintamon Kumar, A I R 1917 Pat 243=38 I C 478.
2. Lal Sahai Palian v. Deba Munda, A I R 1928 Pat 87=105 I C 58.
3. Akshay Mandal v. Phalari Bhumij, Second Appeal No. 89 of 1925.
4. Doman Mia v. Gunaram Mahata, *Reported in* A I R 1936 Pat 39=159 I C 350.

A. I. R. 1937 Patna 369

FAZL ALI AND DHAVLE, JJ.

Bipat Gope and *others* — Appellants.

v.

Emperor.

Death Ref. No. 29 and Criminal Appeal No. 198 of 1936, Decided on 18th September 1936, made by Addl. Sess. Judge, Patna, D/- 11th August 1936.

Criminal Trial—Trial by jury—Discharging of jury during trial — Inherent power of Sessions Judge to discharge jury is not confined only to cases of misconduct on part of jury but extends to cases where impartiality of jury is doubted—Even where this power is exercised wrongly, High Court can order fresh trial only before another jury.

Though the Code of Criminal Procedure does not provide for discharging a jury during the continuance of a trial except in the circumstances mentioned in Ss. 282 and 283 yet where the question of misconduct on the part of the jury or other similar cause arises the Sessions Judge has inherent power to discharge a jury and empanel another : *A I R 1923 Cal 724, Rel. on.* [P 371 C 1]

But this inherent power of a Sessions Judge to discharge a jury is not confined to cases of misconduct only but extends to cases where the Judge finds reason for doubting the impartiality of the jury. Even where an order discharging a jury in the exercise of the inherent power of a Sessions Judge were to be found unjustified, the only relief that the High Court could give would be to order a fresh trial before another jury. [P 371 C 1, 2; P 372 C 1]

Yunus, Kamla Sahai and *R. J. Bahadur* — for Accused (Appellants).

Ag. Govt. Advocate — for the Crown.

Judgment.— The twelve appellants were tried by jury before the Additional Sessions Judge of Patna on charges of rioting with murder and causing hurt individually with bhalas. The jury returned a unanimous verdict of guilty on all the charges except the direct charge of murder under S. 302, I. P. C. The Additional Sessions Judge accepted this verdict, and under S. 302, I. P. C., read with S. 149, I. P. C., sentenced eight of the appellants to death and the other four appellants Karamchand, Ramu, Chintaman and Sheolochan to transportation for life, and considered it unnecessary to pass any separate sentences under S. 147, S. 148 or S. 324, I. P. C. The matter is now before us under S. 374, Criminal P. C., for confirmation of the death sentences and also on appeal by the twelve convicted persons. Bikku Kahar, the son of a Kurmi father and a Kaharin mother, according to the case of the prosecution, used to side with the Kurmis of his village Jamuara in the disputes that had been going on between them and the Goalas of the village. The appellants are all Goalas, appellant Bipat being the barahil of the entire body of landlords of the village. Nakat Mahto, nephew of Bikku's father, was jethraiyat under M. Shamsuddin, one of the landlords of the village, and had been repeatedly complaining (along with other Kurmi raiyats) to him of the Goalas uprooting and destroying their crops. On the morning of the 29th of February last, Bikku was going past the house of Bipat when appellant Karamchand, son of a cousin of Bipat's began to cough loudly, Bikku responding to the gesture by twisting his moustaches. An actual assault was, however, prevented by the intervention of the two villagers.

In the afternoon, at about 2 O'clock, Bikku happened to be going towards his 'but' field, plot No. 1651, in the block called Punai Khandha. Immediately to the east of this field was a plot of one Karmu Mahto, plot No. 1650, which was lying fallow at the time. Four of the appellants—Sunder, Karamchand, Chintaman and Ramu were grazing their buffaloes in this parti field and feeding them with gram plants uprooted from Bikku's plot. Bikku protested against this and was assaulted by Sundar and Karamchand with lathis. He fled north east towards his khesari field, plot No. 1750, in Bahera Khandha, about 110 bans (say 300 yards) away, chased by the four appellants who had been grazing the buffaloes. The other eight appellants then came up—Bipat from Bighapar on the north east, and the remaining seven from beyond a stream called the Lokain river which lay to the south. Four of these eight men—Ghuram, Raghu, Bimal and Sheolochan had bhalas, and the rest lathis. The appellant Sundar caught Bikku in the Khesari field, Bipat ordered an assault, Raghu and Ghuran felled Bikku with their bhalas, and then all the appellants surrounded him and assaulted him with bhalas and lathis. They next carried him from the khesari field past the stream to the sandy portion on the south, and then dragged the body to a mirchai field, plot No. 1808, about 50 paces farther off. The commotion brought several Kurmis of the village to the northern side of the stream, and when Khublal Mahto, who after working as dafadar of the Circle for 26 years had on account

of old age been replaced by his son, began to cross the stream, the appellants ran away, leaving the body of Bikku in the mirchai field. Bikku expired as the ex-dafadar fetched some water in his gamcha from the Lokain and put it into Bikku's mouth. Information of the occurrence was given at the thana of Hilsa, five miles away, at 5-30 that afternoon by Firangi Kahar, son of Bikku, who happened to have heard of it from Firangi Mahto, a man who had protested against the appellants' assault on Bikku and had thereupon been struck by the appellant Sheolochan on the right leg with a bhala. The Sub-Inspector arrived on the scene in due course and had the dead body of Bikku sent for the post mortem examination. The Assistant Surgeon of Bihar who made the post mortem examination found a very large number of injuries "probably caused by a hard and rough blunt substance and a pointed sharp-edged weapon", and pronounced the death to be due to the consequent shock and hæmorrhage.

The defence was that the appellants had been falsely implicated on account of the enmity with the Kurmis, and that they were none of them except Ghuran in the village at the time of the murder but were working in khandhas at a distance from the village. As to appellant Ghuran, the story given by him in his examination before the Sessions Judge, was that he and one Bakhori had found the buffaloes of Bikku and Motar Mahto grazing, unattended by any cow-herd, in Ghuran's "but" field in Punai Khandha and an adjoining field of Bakhori in Bahera Khandha, that they were taking the trespassing cattle to the pound, when Bikku came and raised a hullah which brought eight or nine other men, presumably Kurmis, on the scene, that Firangi Mahto aimed a blow at Ghuran with a khanti, which, however, was snatched away by Bakhori and used upon Firangi, that on cries of Ghuran eight or nine men came up from the neighbouring tolas of Gosainpur, Maheshpur, etc., and that there was an exchange of lathi-blows between them and Bikku in the mirchai field, while Ghuran went away and impounded the cattle in the Hilsa pound. We have already referred to the verdict of the jury. As death sentences have been passed, the appeal is not, as in ordinary cases tried by jury, confined to matters of law but extends to matters of fact as well, even in respect of persons not sentenced to the extreme penalty of the law. This does not however, mean that the verdict of the jury is to be lightly ignored. Generally speaking no exception has been taken to the charge of the learned Judge to the jury, nor have we been able to find any misdirection in it or any misunderstanding of the law, as laid down by the Judge, in the verdict of the jury.

The only point of law raised on behalf of the appellants is that the Judge, so it is contended, erred in the exercise of his discretion in discharging the jury before which the trial had begun and proceeded for five days and trying the case with a fresh jury. It is further contended that this error on the part of the learned Judge entitles the appellants to another trial by jury. What appears to have happened is that after the cross-examination of M. Shamsuddin, one of the landlords of the village, the foreman of the jury then trying the case sought to put to the witness the question "do you belong to Nataul where the Mahomedan landlords have been fighting with the Goalas of the village?" Asked why he wanted to put this question, the foreman said that he desired to find if the witness was to be believed or not, and further, that if the witness was from the village of Nataul, he would be disbelieved because he was giving evidence against the Goala accused in the case out of previous enmity. The learned Judge then stopped the trial and took time to consider the position. On the following day the foreman was further questioned; and as a result, the learned Judge came to the conclusion that while there was no ground for holding that the foreman had been guilty of any misconduct, "his position in the jury box must be viewed with concern", and that the circumstances gave "cause for apprehension that absolute impartiality which is expected of the jury may not be evinced while giving the verdict at the end of the trial".

He accordingly discharged the jury and summoned a fresh jury for the trial to begin a week afterwards. A petition was at once filed on behalf of the accused persons, praying for legal assistance at the cost of the Crown, and further praying that the advocates who had already worked on their behalf be appointed for the defence at the re-trial; and the Judge

ordered that a copy of the petition be forwarded to the District Magistrate for necessary action. On the day fixed for the new trial none of the defence lawyers was present, nor had the District Magistrate appointed any lawyer to defend the accused on the ground, as appeared from the reply subsequently received from him, that the accused did not appear to be entitled to the concession prayed for as they had so far been defending themselves at their own cost. The Public Prosecutor drew the attention of the learned Judge to a rule in the Treasury Manual under which the Sessions Judge was empowered to engage a pleader for the defence at the cost of the Crown, and the learned Judge exercised this power and appointed the seniormost lawyer from the Crown list found willing to defend the accused, who was also agreed to by the accused. So far, therefore, as it has been contended on behalf of the appellants that they were prejudiced by the second trial because they could not be properly defended, it is clear that the appellants have no reasonable grievance, and indeed it was conceded that the learned Judge had done the best he could for the accused in the circumstances.

It is beyond question that while the Code of Criminal Procedure does not provide for discharging a jury during the continuance of a trial except in the circumstances mentioned in Ss. 282 and 283, "where the question of misconduct on the part of the jury or other similar cause arises", as Buckland, J. put it in 50 Cal 872,[1] "the Sessions Judge has inherent power to discharge a jury and empanel another". It has, however, been argued for the appellants that the case referred to is no authority for discharging the jury except for misconduct, that in the present case the Judge had expressly found that there was no misconduct on the part of the Foreman but had merely acted on the apprehension of the Public Prosecutor that "the Foreman may be prejudiced against the prosecution case on account of his personal knowledge of facts outside the scope of the trial", and that this was no valid ground for discharging the jury. It was further urged that it was open to this Court to consider the sufficiency of the reasons which led the Judge to discharge the jury, and if the reasons be found insufficient, to order a fresh trial. In support of these contentions, reliance was placed on the observations of Graham, J. in 56 Cal 1032,[2] that :

> Suspicion in the mind of a Public Prosecutor can never be recognized as a good and valid ground for discharging a jury. Something much more tangible and definite than that is necessary;

and of Suhrawardy, J. in the same case that :

> In view of the wide provision of S. 439, Criminal P. C., it is difficult to say that this Court is debarred from enquiring into the validity of the reasons for discharging a jury.

But Graham, J. himself went on to observe : "But though, I think, the order (discharging a jury) cannot be supported, it seems to me to be quite out of the question to set it aside" and later on :

> There may be some doubt as to whether we can set aside such an order when once it has been made. But we can, and I think ought, to direct a de novo trial before a fresh jury, and if possible before another Judge.

This was in a case where a Rule had been obtained against the order discharging the first jury and before the accused had been tried by a fresh jury. Suhrawardy, J.'s view that the order discharging a jury during the continuance of a trial can be questioned in the High Court does not seem to have been shared by any other Judge of the High Court, though the matter has been considered in Calcutta on various occasions. And in any case it is obvious that even if an order discharging a jury in the exercise of the inherent power of a Sessions Judge were to be found unjustified, the only relief that the High Court could give would be to order a fresh trial before another jury. The appellants have had such a trial already, so that there can be no further grievance in the matter of the discharge of the first jury. Nor is the contention that the learned Judge acted merely on the apprehension of the Public Prosecutor that the foreman may be prejudiced supported by the facts on record, as was the case in the decision from 56 Cal 1032.[2] The learned Judge only referred to this contention of the Public Prosecutor and said that there was some force in it, but it is quite clear that he came to his own conclusion that there was in the circumstances "cause for apprehension" that the jury

1. Rahim Sheikh v. Emperor, A I R 1923 Cal 724=73 I C 773=24 Cr L J 677=50 Cal 872 =37 C L J 595.

2. Abdur Rashid v. Emperor, A I R 1929 Cal 343 =122 I C 194=31 Cr L J 366=56 Cal 1032 =33 C W N 425.

may not evince absolute impartiality. The inherent power of a Sessions Judge to discharge a jury is not confined to cases of misconduct, as is clearly shown by the dictum of Buckland, J. already quoted, and plainly extends to cases where the Judge finds reason for doubting the impartiality of the jury. It is also clear that the learned Judge below did not lightly arrive at such a finding. Both the sides were agreed in the lower Court that "if the impartiality of the foreman of the jury is doubted, all the jurors should be discharged," and it cannot be, and has not been suggested that the Judge should have discharged the foreman only. The only point of law raised on behalf of the appellants thus fails altogether. (Their Lordships after discussing the evidence came to the conclusion that the case for the prosecution as to the origin of the occurrence was substantially true and then proceeded further.) We will now turn to the most important question, namely, whether any of the appellants and if so, which of them has taken part in the assault on Bikku. In this connexion we shall deal first with the cases of the three appellants namely, Bipat, Sheolochan and Chintaman whose names were not mentioned in the first information report. As we have already stated, the information was lodged by Firangi Kahar a son of the deceased and one Deolal Mahto (P. W. 3) was also with Firangi Kahar when he lodged the information. It is true that Firangi Kahar was not an eyewitness of the occurrence but at the same time it cannot be overlooked that Firangi Kahar had derived his information from Firangi Mahto who not only claims to have seen the occurrence but had himself been assaulted. Firangi Mahto himself has stated that he named all the assailants of Bikku to Firangi Kahar and that he had done so in the presence of Deolal. He further states that he had named all the 12 appellants to him. From the evidence of the Sub-Inspector, however, it appears that Deolal Mahto also had named those persons only who had been mentioned by Firangi Kahar in his first information report. If Firangi Kahar alone had gone to the thana it was possible to hold that he might not have remembered the names of some of the accused persons who had been named to him by Firangi Mahto. In the present case, however, Firangi Kahar and Deolal went together to the thana and it seems very unlikely that they would have made the same mistake and that both of them would have mentioned only nine persons although they had been furnished with the names of 12 assailants. As we have already stated the appellant Bipat Gope is a barahil of the maliks and to him the prosecution witnesses have also assigned the important part of ordering the assault on Bikku. It seems to us very unlikely that the name of this important accused person would have been omitted by both Deolal and Firangi Kahar, if his name had been mentioned in the first instance to them by Firangi Mahto. Curiously enough Pragash Mahto who was also one of the eyewitnesses and who has stated before the Sessions Judge that Bipat had come from Bighaper and ordered the assault did not implicate him before the investigating officer. Besides Deocharan Mahto (P. W. 8) and Gobind Mahto (P. W. 12) two of the witnesses who were on the scene of the occurrence soon after the assault on Bikku have also not named Bipat although they say that they saw a number of accused persons with bhalas and lathis on the south of the river. In this state of the evidence it appears to us that the conviction of Bipat cannot be substained.

The case against Sheolochan also appears to us to be not free from doubt. As we have already stated, the prosecution case is that Firangi Mahto was assaulted by Sheolochan with a bhala soon after the occurrence. Both Firangi Kahar and Deolal have stated that when they met Firangi Mahto they noticed a bleeding injury on his leg and it is not likely that if he had named Sheolochan specifically to them as having inflicted the injury they would not have mentioned his name at all to the police. It is true that Firangi Kahar has stated in the first information report that he did not remember the name of the person who had assaulted Firangi Mahto, but on a careful reading of the document it would appear to be implied that his assailant was one of the nine persons who had been named by him. Another remarkable fact which may be mentioned in this connection is that the injury which was found on Firangi Mahto was an incised injury and according to the medical report it was caused by a sharp cutting weapon. The case however which is put forward in Court is that it was caused by a bhala.

It is true that the doctor has stated that the injury might be caused by a bhala if the blade of the bhala was sharp, but it appears to us that in this respect the statement made by Ghuran that the injury on Firangi Mahto had been caused by means of a khanti is more probable than the statement of Firangi Mahto that it was caused by a bhala. We think that both Bipat Das and Sheolochan are entitled to the benefit of the reasonable doubt which has arisen in their case and should be acquitted. We cannot also reasonably differentiate their cases from the case of Chintaman, a young man of 22, whose name also does not appear in the first information and we think that in the circumstances of the case it would be unsafe to uphold the conviction of this appellant also.

We shall now deal with the case of two other appellants, namely, Ramu and Bimal, who belong to the same family as Aklu, Bipat and Raghu, the other appellants before us. The fact that these five appellants exhaust the entire stock of the direct descendants of Mangal Bhagat must put us on our guard in scrutinizing the evidence against these two men. We cannot therefore lightly pass over any palpable discrepancy relating to their participation in the occurrence. The only discrepancy which need be mentioned here with regard to these accused persons is a two-fold one. In the first place we find that according to one version Ramu was armed with a lathi and Bimal with a bhala and according to another version Ramu was armed with a bhala and Bimal with a lathi. This by itself is a small point and would not have weighed with us; but we further find that while on the one hand Pargash and Rambaran, two of the eyewitnesses, have definitely stated that Ramu was one of the four persons who were grazing the buffaloes in the field of Karmu Mahto and that he was also one of the four persons who had chased Bikku in the first instance, Firangi Mahto, who is the most important eyewitness in the sense that his presence at the time of the occurrence has been admitted even by Ghuran Gope, has stated in his evidence that this accused person had come from the side of the Lokain river along with Ghuran, Raghu and several other appellants and there is a similar discrepancy in the case of Bimal also. In the case of Ramu there is the further fact that he does not appear to have been named by Pargash one of the eyewitnesses, before the police, or by prosecution witnesses Nos. 8, 12 and 15 in Court. In our opinion the cases of Ramu and Bimal are so inter-connected with each other that it is not possible to reject the evidence as against the one and accept the evidence as against the other. In these circumstances we think that both these accused persons should be given the benefit of doubt and acquitted.

As regards the remaining seven appellants the evidence against them appears to be fairly strong and we think that they have been rightly convicted. On a reference to the post mortem report it would appear that although none of the injuries on Bikku taken by itself was fatal, yet he had numerous injuries on his body and had been assaulted in a most merciless manner. Among the more serious injuries on him may be mentioned punctured wounds on the top of his head and on the right side of his face, compound fractures of the left ulna and the left tibia and a fracture of the left fibula. Having regard to the number of injuries on Bikku and the manner in which he was assaulted we have no doubt in our mind that his assailants must have either intended to cause his death or were at least aware of the fact that the injuries inflicted upon him were likely to cause his death and were also sufficient in the ordinary course of events to cause death and the jurors were therefore justified in holding that an offence under S. 302 read with S. 149, I. P. C., was committed by such of the persons as were members of the unlawful assembly in prosecution of the common object of which Bikku has been so brutally assaulted.

Now turning to the question of sentence we have no hesitation in confirming the sentence of death on Raghu Gope and Ghuran Gope who are both proved to have been armed with bhalas and to have taken a prominent part in the assault. With regard to the remaining appellants the evidence is of a somewhat general character and it is possible that some of them may not have actually assaulted the deceased. In any case as these persons were armed with lathis only and as none of the blows said to have been caused by lathis was either fatal by itself or was delivered on a vital part of the body, we think that the ends of justice will be

served by sentencing them to transportation for life. The result is that the appeals by Bipat Gope, Sheolochan Gope, Chintaman Gope, Ramu Gope and Bimal Gope are allowed, their convictions and sentences are set aside and they are acquitted. As to the remaining seven appellants while the sentences of death on Raghu Gope and Ghuran Gope are confirmed, the remaining five persons are sentenced to transportation for life.

S.C./D.S. *Order accordingly.*

A. I. R. 1937 Patna 374

COURTNEY-TERRELL, C. J.
AND JAMES, J.

Rani Bhuneshwari Koer — Plaintiff—Appellant.

v.

Secretary of State — Defendant—Respondent.

Appeal No. 64 of 1933, Decided on 2nd March 1937, from original decree of Sub-Judge, Gaya, D/- 27th June 1933.

(a) Hindu Law—Widow—Representation of estate—Admission of fact by widow creating estoppel—Such admission is binding on reversioners in absence of fraud or collusion—Widow admitting lease granted by her husband in suit for possession by lessee — Such admission is binding on reversioners, decree in lease suit being fairly and properly obtained.

An admission of fact by a widow creating an estoppel as opposed to an admission of law will, in the absence of fraud or collusion, create an estoppel which will bind the reversioners. [P 376 C 2]

Where in a suit by a lessee against the widow for possession of property leased to him by her husband, the widow admits the lease, the decree having been obtained fairly and properly in the suit, the admission is binding on the reversioners and creates estoppel against them. Such admission does not operate as an alienation by the widow as there is no analogy between an admission of a matter of fact in litigation and an alienation : *A I R 1919 Bom 146, Disting.*; *A I R 1918 P C 87, Rel. on*; *A I R 1925 All 339, Ref.* [P 377 C 1]

(b) Record of Rights — Presumption of correctness — Entry as to tenant's possession based on particular document — Such document if found to be false by Court, presumption of correctness of such entry is rebutted — Document referred to in judgment of civil suit not being proved by plaintiff suing thereon—In absence of any other evidence proving falsity of document, reference in judgment is not enough to rebut presumption of correctness of entry in Record of Rights based on such document.

Where an entry purports to record the basis of the tenant's possession as founded upon a particular document and where the Court finds that the document is false, the presumption attaching to the Record of Rights is rebutted. [P 377 C 2]

Where however a person was entered in the Record of Rights as a permanent tenant on the basis of a certain document and there was no other evidence disproving its genuineness except the reference made in the judgment of the civil Court in a suit brought on the basis of such document that plaintiff in such suit failed to prove the document:

Held : that inasmuch as it could not be concluded from the judgment referred to that the document in question was found to be false by the civil Court with the effect that its validity was destroyed, it could not be said that the presumption as to the correctness of the entry in the Record of Rights was rebutted : *A I R 1934 Bom 194, Ref.* [P 377 C 2]

(c) Landlord and Tenant — Permanent tenancy—Trespasser claiming to hold land as permanent tenant — Landlord and his predecessors allowing such person to remain in possession and accepting rent from him on basis of permanent tenancy—Landlord held was estopped from denying permanent nature of such tenancy.

Where a person trespassed on the land of the landlord and claimed permanent possession of the same and the landlord and his predecessors allowed such person to remain in possession and accepted rent from him on the basis of a permanent tenancy:

Held: that the landlord was estopped from setting up a claim that the tenancy of such person was a tenancy-at-will or a mere tenancy from year to year. The landlord was also estopped from denying the permanent nature of such tenancy : *27 Cal 156 (P C), Ref.* [P 379 C 1, 2]

P. R. Das, S. N. Ray, G. P. Sahai, R. K. L. Nandkeolyar, J. M. Ghosh and *A. Sen*—for Appellant.

Govt. Advocate and *Govt. Pleader*—for Respondent.

Courtney-Terrell, C. J. — This appeal arises out of a suit by Rani Bhuneshwari Koer to eject the Secretary of State from possession of lands which constitute 8½ annas of Mahal Dakhner situated in what is known as the 7 annas share in the Tikari Raj. The plaintiff is admittedly the zamindar of the estate. The Secretary of State claims to be a permanent tenant of the estate and in such cases the onus is upon the defendant to establish his permanent right. The history of the plaintiff's title has been succinctly summarised by the learned Subordinate Judge and the following is a reproduction of that part of his judgment. Maharaja Mitterjit Singh Bahadur was the 16 annas proprietor of Tikari Raj:

he died in 1840 and in the same year his two sons Maharaja Het Narain Singh and Raja Mode Narain Singh partitioned the entire Tikari Raj into two blocks so that the former got a 9 annas share and the latter the abovementioned 7 annas. The Dakhner Mahal consisting of about 31 villages was allotted to Raja Mode Narain Singh with other properties in respect of his 7 annas share. Raja Mode Narain Singh died in 1857 leaving two widows, Rani Asmedh Koer and Rani Sunet Koer, who jointly inherited his entire property and came into possession *inter alia* of Mahal Dakhner.. In 1861 the two Ranis divided the entire inheritance, the 8½ annas share being taken by the Senior Rani Asmedh Koer and the 7½ annas share was taken by the junior Rani Sunet Koer. Mahal Dakhner was also divided in the same ratio, that is to say 8½ annas share in Mahal Dakhner came into the possession of Asmedh Koer and 7½ annas share came into the possession of Sunet Koer. Sunet Koer died in 1872 and her 7½ annas share devolved on her co-widow Rani Asmedh Koer, who, by two deeds of 1872 and 1873, respectively, surrendered the 8½ annas share and the 7½ annas share in favour of Raja Ranbahadur the nearest agnate of her deceased husband so that Raja Ran Bahadur Singh came into possession of the 7 annas Tikari Raj as an absolute proprietor. In 1890, Raja Ran Bahadur Singh bequeathed the entire 7 annas Tikari Raj to Raj Kumari Ratan Kuer, the daughter of his predeceased son. She in turn, in 1895, bequeathed the entire estate to her only daughter the plaintiff who thus became the absolute proprietress of the 7 annas Tikari estate including Mahal Dakhner.

Now Raja Mode Narain Singh had had a Mahomedan mistress Mt. Barati Begum by whom he had two illegitimate sons, Mirza Himat Bahadur and Mirza Ekbal Bahadur. In 1860 Mirza Ekbal Bahadur instituted criminal proceedings against Rani Asmedh Koer and Rani Sunet Koer in respect of Mahal Dakhner, alleging that on 2nd December 1850 Raja Mode Narain Singh had granted a permanent lease to him of Mahal Dakhner which was to take effect from the beginning of 1262 Fasli. The criminal Court found that Ekbal Bahadur was not in possession. Therefore Ekbal Bahadur brought a regular suit in the same year against the two Ranis for a declaration of his title as a permanent mokarraridar and for recovery of possession of Mahal Dakhner.

The meaning and effect of the decisions in this suit have been a matter of much controversy before us, and a correct decision is vital to the case, so at this stage I must digress from the narrative of events to deal with the matter. Rani Asmedh Koer did not appear and did not file any written statement in the suit and did not appear at the trial. Rani Sunet Koer, however, contested the suit on the ground that the mokarrari deed of 1850 was not genuine and that Ekbal Bahadur was never given possession. The case came before the Sadar Amin and his judgment or rather a translation into English thereof forms Ex. I in this case. The Sadar Amin seems to have found that the plaintiff had failed to prove the deed as against Rani Sunet Koer; but inasmuch as in the criminal case Rani Asmedh Koer had admitted the deed and the plaintiff's mokarrari right and as she had not disputed it in the suit before him, he held that it must be taken to have been admitted by her and therefore the plaintiff's claim must succeed as against Rani Asmedh Koer in respect of the 8½ annas share in Mahal Dakhner. The plaintiff appealed to the High Court in Bengal and a separate appeal was preferred by Rani Asmedh Koer. The judgment of the High Court, dated January 1865, is Ex. I (a). It is not easy to understand. In discussing the genuineness of the deed the arguments in favour thereof and against it are set forth and it was held that the plaintiff failed to prove the deed but that the separate appeal preferred by the elder Rani Asmedh Koer could not be heard as she had not defended the case in the lower Court. The learned Judges held that the two Ranis had been entirely opposed to each other and that the acts of the elder Rani could not bind the younger. They upheld the view of the Sadar Amin that the elder Rani was bound by her admission of the deed of 1850 and the suit failed as against the younger Rani.

It was contended before us that the effect of these judgments was to decide that the deed of 1850 had not been proved at all either as against Rani Sunet Koer or as against Rani Asmedh Koer and that the judgment (to quote the phrase used by Mr. P. R. Das in support of the appellant) "proceeded upon the admission of Asmedh Koer," and he relied upon the case, 43 Bom

869[1] as an instance of the principle that a decision on a widow's admission will not affect the reversioner but the decision in that case distinctly recognizes the principle that a decree against a widow in relation to her husband's property may bind the reversioners as well and that this notwithstanding that the decree was based on an admission of fact, always provided that the decree was properly obtained and that there was nothing unfair in the trial. It was a case of a suit by a reversioner to redeem a mortgage created by a Hindu widow. There had been a previous suit by the widow to redeem the mortgage. The mortgage had contained a clause that if the money was not paid within a year the mortgagee should become the owner. The earlier suit by the widow had been dismissed by the Munsif on the ground that the plaintiff had admitted in another suit by the mortgagee against the tenant that the mortgagee had become the owner of the property by the operation of the clause in question. There had been an appeal from the Munsif's decision but it was recorded as "adjusted" before the hearing.

It will be seen that the alleged admission was one of law only and it was rightly held that such an admission could not found any plea of estoppel. In the case before us the learned Subordinate Judge has found that the decree was properly and fairly obtained by Ekbal Bahadur against Rani Asmedh Koer and having regard to the fact that some 80 years had passed and that every one concerned was dead, I do not see how he could have found otherwise. In Ekbal's suit judgment was given against Asmedh Koer on the basis of an admission of fact which created an estoppel. The two widows were sued as representing the estate and the judgment turned not upon the validity of alienations by Asmedh Koer but upon the genuineness of an alienation by the last male holder Raja Mode Narain Singh. Had the question been whether Asmedh Koer was estopped from denying the validity of alienations made by her of her $8\frac{1}{2}$ annas share then the decision would not have bound the reversioners beyond her lifetime, for certainly Asmedh Koer could only effect alienations for the term of her own life. Nor was the decree based on the basis of a compromise by Asmedh Koer. Had it been so, the appellant might justly have urged that it was one which did not bind the reversioners. The distinction is illustrated by the case in 47 All 490[2] at p. 492 :

> It is urged that this Court has held that a compromise decree between a Hindu widow and a third party would not necessarily bind a reversioner. A compromise decree is merely an embodiment of a private contract entered into by a widow and private persons. There is clearly in such a case no adjudication by the Court. An ex parte decree however stands on a different footing. There is no confession of judgment by her and the plaintiff has to prove by evidence and satisfy the Court that he has got a good case. We therefore think that an ex parte decree, unless there be anything special which would suggest that it was not fairly and properly obtained would be binding on the reversioners.

It has been argued that the admission of Asmedh Koer was something personal to herself which could not bind the reversioners but an admission of fact creating an estoppel as opposed to an admission of law will, in the absence of fraud or collusion create an estoppel which will bind the reversioners; and the case in 40 All 593[3] before the Judicial Committee illustrates the difference. In that case a widow had in a former case admitted the fact of an adoption by her. It was contended (as in the present case) that the estoppel could not bind the reversioners in a subsequent case because it was something personal to herself. Their Lordships of the Privy Council rejecting this argument said :

> It has been urged by the learned counsel for the appellants here that Rani Dharam Kunwar cannot be regarded as having represented the estate in her suit against Balwant Singh, as by her acts she was personally estopped from denying that she had validly adopted him to Raja Raghubir Singh. In the absence of all authority, their Lordships cannot decide that a Hindu lady, otherwise qualified to represent an estate in litigation, ceases to be so qualified merely owing to personal disability or disadvantage as a litigant, although the merits are tried and the trial is fair and honest. The principle is that reversioners must risk that, so that there may be an end to litigation.

It was however further contended that Asmedh Koer was only one of two co-widows and that she could not alone burden the estate even for necessity; but the case before us is not one of alienation by a co-widow; it is a case of the effect of a judgment against a co-widow in a suit

1. Bai Kanku v. Bai Jadav, A I R 1919 Bom 146 =53 I C 164=43 Bom 869=21 Bom L R 837.

2. Sarju Prasad Rao v. Mangal Singh, A I R 1925 All 339=87 I C 294=47 All 490=23 A L J 254.

3. Risal Singh v. Balwant Singh, A I R 1918 P C 87=48 I C 553=45 I A 168=40 All 593 (PC).

against both co-widows and the principle upon which the argument is founded has no application. The learned Subordinate Judge found that the decree was properly and fairly obtained by Ekbal Bahadur against Rani Asmedh Koer in respect of her 8 annas share; but he entirely failed to understand the case reported in 43 Bom 869[1] to which I have above referred and did not notice that in that case the admisssion by the widow in the previous suit was one of law and not of fact. He has held, and I do not see how he is justified on the evidence in holding that the admission 'was made on account of her bitter feeling against Rani Sunet Koer in order to injure her'. Nor did he notice the circumstance that Rani Asmedh Koer had made an admission of fact which had estopped her from raising that question of fact in the subsequent litigation. Labouring under these errors he held that the reversioners were not bound. He made the further mistake of holding that the admission by Asmedh Koer operated as an alienation by her and being an alienation by one widow without the concurrence of the co-widow was wholly void, whereas there is no analogy between an admission of a matter of fact in litigation and an alienation.

In my opinion the true legal interpretation of the judgment in Ekbal's suit is that Asmedh Koer was estopped from denying the genuineness of the deed and that judgment proceeded against her on the basis that the deed was genuine and that to the extent of her 8½ annas share she failed in the suit and, therefore, title and possession to the land in suit were awarded to the plaintiff and to that extent the reversioners were bound by the judgment. The narrative of events may now be resumed in order that the position of the Secretary of State may be ascertained. On 29th October 1878 Asmedh Koer died. On 3rd May 1878 the Secretary of State began three suits to recover the properties of Ekbal and Barati Begum. The suits were against one Jalaluddin who was alleged to be the adopted son of Ekbal and who was in possession of the estate. The suits were based on the allegation that Barati and Ekbal had died without heirs, that the property had escheated to the Crown, and there was a claim for 11 years' mesne profits. On 7th May 1879, the Secretary of State obtained a decree and since then has been in possession. Ex. K is the Record of Rights relating to mahal Dakhner. In this the Secretary of State is recorded as mokarraridar of 8½ annas share. The plaintiff is recorded as the landlord ; the tenure-holder's interest is recorded as "mokarrari". The mode in which the rent was fixed is recorded as 'under patta dated 12th Pous 1258 Fasli (11th December 1850)', and the period for which the rent has been fixed is recorded as 'permanent'. This was published on 19th February 1897.

It is argued on behalf of the respondent that this is an entry of possession by virtue of the rights conferred by a particular document 'i. e., the document of 1850' and that the effect of the judgments of the Sadar Amin and of the High Court in the suit by Ekbal was to destroy the validity of this document. Reliance was placed upon the authority in 58 Bom 419[4] for the proposition that, where an entry purports to record the basis of the tenant's possession as founded upon a particular document and where the Court finds that the document is false, the presumption attaching to the Record of Rights is rebutted. I have no doubt that this proposition is entirely sound ; but in the case before us the contention that the document has been proved to be false is founded entirely upon the judgment referred to and no other evidence has been offered on either side with regard to the facts relevant to its genuineness. Had there been such other evidence it might have been material to inquire whether the respondent had proved that the document was invalid, but no such conclusion can be reached from the judgment referred to and it must be remembered that there has been no attempt since 1850 to attack the grant made by Raja Mode Narain Singh to Barati Begum and her children.

In my opinion the presumption attaching to the Record of Rights has not been rebutted by the plaintiff and the suit should have failed on this ground. The learned Subordinate Judge, however, held, having regard to his view of the admissions made by Asmedh Koer and of the judgments in Ekbal's suit, that the plaintiff had succeeded in showing that the entry in the Record of Rights was erroneous. It was frankly conceded by Mr. Das on behalf of the plaintiff-appellant

4. Datto Shivram v. Babasaheb Malhar Deshpande, A I R 1934 Bom 194=150 I C 555=58 Bom 419=36 Bom L R 359.

that if the document of 1850 were not displaced his suit must necessarily fail and it was, therefore, a vital matter that he should support the judgment of the learned Subordinate Judge that the presumption of the Record of Rights was rebutted, and in the event of our decision being against him on this point the further grounds upon which the learned Subordinate Judge decided to dismiss the suit were of no importance. In view, however, of the fact that this case may go further and that a higher tribunal may not support the decision of this Court which I have set forth above, it becomes necessary to refer briefly to further arguments raised on behalf of the defendant upon which the Subordinate Judge dismissed the plaintiff's suit. He found that the defendant had established a defence of adverse possession to the knowledge of the plaintiff and that the plaintiff's suit was, therefore, barred by limitation.

The learned Judge approached this question on very clear and logical grounds, having held that the tenancy created by Raja Mode Narain's deed of 1850 failed. He held that the possession by the Secretary of State was from its inception that of a trespasser and he examined the facts since that possession began and found that from the very beginning the Raja was well aware of the nature of the claim made by the supposed trespasser and notwithstanding such claim the Raja and his successors forbore for a time, much exceeding the statutory period of limitation, to sue the defendant and submitted to the defendant's possession, so that the defendant's claim became established as a title. The Judge's survey of the facts under issues 5, 9 and 10 is clear, concise and admirably arranged and I desire to adopt it as part of this judgment. There are some minor points with regard to the reception of evidence whose admissibility is to my mind doubtful but even if these are excluded they make no difference to the conclusion.

The Raja assisted the Government in the suit for possession founded on escheat and inasmuch as only a permanent tenancy can escheat and tenancies for shorter period revert to the landlord, the Raja clearly knew the nature of the defendant's claim. He never took possession of the 8½ annas share of the Dakhner mahal in suit and he must have known why he did not do so. There are extant a number of documents mentioned in the Judge's decision on this point which show clearly that he had full knowledge of all that had happened regarding the Dakhner mahal. It is true that for a very short period he seemed inclined to contest the claim of the Government but he soon abandoned this attitude and made no attempt whatever to enforce any claim on his part. Indeed he very soon asked for a settlement by the Government upon himself rather than upon the illegitimate children of Barati Begum and his temporary attitude was in all probability founded upon his dislike of these people whose sentimental claim at this time seems to have attracted the notice of Government. But in June 1881 the Raja registered the name of the Secretary of State in his sharista as a tenant and continued to receive the very rent which was reserved by the grant of 1850. The precise nature of the entry is not now known but from the fact that the Raja and his successors have never until the present time asserted that the Secretary of State was anything less than a permanent tenant, it may safely be assumed that he was entered in the landlord's sharista as a tenant of that kind. Since the hearing of this case I have again read carefully through the learned Subordinate Judge's judgment and have examined the documents to which he makes reference in support of his findings. I find that his comments are entirely justified and I do not wish to elaborate what he has so carefully and thoroughly set forth.

The argument on behalf of the plaintiff-appellant has proceeded on the basis that the defendant's possession as a permanent tenant came to an end on the death of Asmedh Koer, that the defendant continued in possession without any title and that the payment and acceptance of rent merely created a tenancy from year to year under S. 116, T. P. Act, and that once having become a tenant the mere further acceptance of rent by the landlord would not constitute a new grant or an admission by the Raja and his successors of permanent rights, and it is further urged that no mere assertion of such a right coupled with payment of rent would justify a claim by the tenant to a title by adverse possession. Of course the whole of this argument fails as was admitted by Mr. P. R. Das if the Secretary of State was in possession by virtue of the docu-

ment of 1850 and had a title under that document as a permanent tenant. But unless the defendant had by some means become a tenant-at-will or a tenant from year to year of the Raja, the principle to which the argument has recourse has no application. The facts referred to in the judgment of the Subordinate Judge clearly establish that at no time did the Raja treat the Secretary of State as a tenant-at-will or a tenant from year to year or as otherwise than as a permanent tenant, and that state of affairs has prevailed until this suit began. If the Secretary of State came on to the land as a trespasser with an open claim to permanent possession the acceptance of rent by the landlord would not create a tenancy-at-will or a tenancy from year to year. There is another aspect of the facts which to my mind is conclusive against the claim by the plaintiff. The plaintiff and her predecessors having for many years been aware of the claim of the defendant to hold in perpetuity and having accepted rent from the defendant on that basis are now estopped from denying the perpetual nature of the defendant's tenancy. On behalf of the plaintiff we were referred to the case in 26 I A 216.[5] The facts of that case are as follows :

In the year 1836, the plaintiff's ancestors granted the estate in question to one Lal Barmeswar Singh for life. In 1849 the grantee purported to execute a permanent lease to one Ram Golam Raut. In 1855 Lal Barmeswar Singh surrendered his estate to the plaintiff's ancestor who allowed Ram Golam to remain in possession. The defendant was one Dudnath Roy, the representative of the purchaser from Ram Golam. Their Lordships held that Ram Golam's tenure came to an end at latest on the death of Lal Barmeswar and that the perpetual lease by Lal Barmeswar was void as against the successors to the plaintiff's ancestor and that the mere receipt of rent by the plaintiff's ancestor after the death of Lal Barmeswar would not have the effect of confirming the perpetual lease by Barmeswar and if matters had rested there Ram Golam was a mere tenant-at-will ; but their Lordships agreed with the finding of the Subordinate Judge on the evidence that Ram Golam was allowed to enjoy the village as a mokarrari tenant for his life and not as a tenant-at-will; and in these circumstances no suit could have been brought for recovery of possession until Ram Golam's death. It is true that in that case it was contended on behalf of the purchaser from Ram Golam that he had given notice to the plaintiff that he held on a perpetual tenure which would make his possession adverse within the meaning of the Limitation Act. Their Lordships held that a mere notice by a person holding for his life that he claimed to be holding on a perpetual or hereditary tenure would not make his possession adverse so as to bar a suit for possession on the expiration of the life tenancy. So in the case before us if the defendant held a mere tenancy for the life of Asmedh Koer terminable on her death or if he held on a tenancy-at-will or from year to year,no mere claim by the defendant accompanied by the payment of rent would suffice to found a claim to adverse possession, for it is correctly contended by the plaintiff that a landlord, provided he gets his rent, is entitled to ignore such claims made by a tenant. This may be expressed shortly by saying that the landlord may properly ignore the bark of the tenant though he might not be able to ignore his bite. But the case is useful by reason of their Lordships' discussion of the position of Ram Golam and finding on the facts that Ram Golam was allowed to remain in possession on the basis that his tenancy was to endure for his life, held that during Ram Golam's life the landlord would not have been entitled to eject him. In other words the landlord if he had raised the contention that Ram Golam held otherwise than on a life tenancy would have been estopped. So in the case before us the plaintiff and her predecessors in any case allowed the Secretary of State to remain in possession and to pay rent on basis of a permanent tenancy, and in these circumstances they are estopped from setting up a claim that the tenancy of the Secretary of State is a mere tenancy from year to year. I would therefore dismiss this appeal with costs.

James, J. — I agree.

W.D./A.L. *Appeal dismissed.*

5. Maharani Beni Pershad Koeri v. Dudh Nath Roy, (1899) 27 Cal 156 = 26 I A 216=4 C W N 274=7 Sar 580 (P C).

A. I. R. 1937 Patna 380

FAZL ALI AND MADAN, JJ.

Anand Das — Petitioner.

v.

Ram Bhusan Das — Opposite Party.

Civil Revn. No. 656 of 1936, Decided on 14th December 1936, from order of Sub-Judge, Darbhanga, D/- 3rd December 1936.

(a) Appeal—Competency of—Order of Subordinate Court accepting security as sufficient — Question whether appeal lies from such order arises when it is passed by that Court as execution Court on its own initiative — No such question arises when it is passed on direction from appellate Court.

The question whether an appeal lies against an order of a Subordinate Court accepting the security as sufficient can arise only if the order is passed by the Subordinate Court *suo motu* as a Court of execution, and not when the order is passed on a direction from the appellate Court : *A I R 1919 Cal 471* and *A I R 1914 Cal 149*, *Ref.* [P 381 C 1]

(b) Civil P. C. (1908), O. 41, R. 6 — Scope—Appellate Court directing Subordinate Court to take security is directly interested in seeing whether its orders have been properly complied with or not — Appellate Court has in spite of such delegation of duty, power to intervene when Subordinate Court misdirects itself while inquiring about sufficiency of security — Duty of Subordinate Court is to satisfy itself on carefully examining titles of sureties.

The Court which directs security to be furnished is directly interested in seeing whether its orders have been complied with or not and though it may have delegated the function of enquiring into the sufficiency of security to a Subordinate Court and left it entirely to that Court to decide the sufficiency or otherwise of the security, it can always intervene if the Subordinate Court misdirects itself in conducting the enquiry. At the same time if certain matters have been left to the discretion of the Subordinate Court the appellate Court will interfere only when the Court below has acted perversely or either misconstrued or misdirected itself on any principle of law and justice. It is the duty of the Subordinate Court to examine the titles of the sureties carefully and be reasonably satisfied as to the validity and the sufficiency of the bonds so that no difficulty may arise in their enforcement if it becomes necessary to enforce them in future. [P 381 C 1; P 382 C 1]

(c) Civil P. C. (1908), O. 41, R. 6—Security bond by member of joint Mitakshara family including minors should not be accepted.

Security bond executed by a member of a joint Mitakshara family when it consists of other members including minors should not be accepted by the Court : *A I R 1920 Pat 433*, *Rel. on*; *A I R 1932 Pat 162*, *Disting.* [P 381 C 2]

Sultan Ahmad, *S. M. Mullick*, *S. N. Rai*, *Ganesh Sharma* and *B. N. Rai* — for Petitioner.

P. C. Manuk, *B. C. De*, *Mehdi Imam* and *L. K. Choudhury* — for Opposite Party.

Order.—The opposite party who claims to be the lawful mohanth of a math in the district of Darbhanga has obtained a decree for possession of the property of the math against the petitioner. The petitioner after having appealed against the decree moved this Court to stay the delivery of possession and on 14th August 1936 this Court rejected the petition but directed that before any order for delivery of possession is made, the respondent should furnish security to the satisfaction of the Subordinate Judge for 3 years' income of the math property together with such additional security as the Subordinate Judge may think necessary on account of the moveables. The Subordinate Judge after some calculation directed the opposite party to furnish security to the extent of Rs. 1,53,473 and such security has been offered on behalf of the opposite party by five persons and has been accepted by the learned Subordinate Judge by his order dated 3rd December 1936. It is this order which is the subject of the present application.

A question arose at the time of the argument whether the order of the learned Subordinate Judge should be deemed to be one under S. 47, Civil P. C., and whether an appeal or an application in revision lay against it. It appears that there has been some difference of opinion in the Calcutta High Court on this question. In 22 C W N 657,[1] it was held that such an order was not an interlocutory order and an appeal lay against it. A contrary view was, however, taken in 41 Cal 160.[2] The learned Judge who decided the case held that an order for security to stay execution was not an order determining the rights of the parties and that it being neither an order under S. 47 nor a decree within the meaning of S. 2, Cl. 2, Civil P. C., was not appealable. The facts of the two cases somewhat differ from each other. In the first case it had been ordered that upon furnishing security of a certain value specified in the order the decree-holder was at liberty to proceed with the execution. In the latter case the order was that the execution was to be stayed on the judgment-debtor furnishing security to the satisfaction of the Subor-

1. Rudra Narain Jana v. Naba Kumar Das, A I R 1919 Cal 471=44 I C 156=22 C W N 657.
2. Saraswati Barmonya v. Moti Barmonya, A I R 1914 Cal 149=20 I C 72=41 Cal 160 =17 C W N 1240.

dinate Court. It has been contended before us, on behalf of the opposite party that the two cases are hardly distinguishable from each other in principle because in both cases the order of the Subordinate Court may be said to be an order relating to the execution of the decree and it would thus not be quite logical to hold that an appeal lay in the first case but it did not lie in the other. However that may be, the view which we are inclined to take in the matter is quite a different one. In our opinion the question whether an appeal lies against the order of the Subordinate Court in such a case can arise only if the order is passed by the Subordinate Court *suo motu* as a Court of execution. Here the Subordinate Judge has passed an order not on his own initiative but under the direction of this Court.

It is true that the order has been passed in the course of an execution proceeding, but this Court had jurisdiction as an appellate Court having seisin of the appeal from the decree sought to be executed to order the decree-holder to furnish security before taking possession of the disputed property. In our opinion the Court which directs security to be furnished is directly interested in seeing whether its orders have been complied with or not and though it may have delegated the function of enquiring into the sufficiency of security to a Subordinate Court and left it entirely to that Court to decide the sufficiency or otherwise of the security it can always intervene if the Subordinate Court misdirects itself in conducting the enquiry. This Court while making the original order can always direct the Subordinate Court to apply the principles which it would have itself applied if it had not delegated its function to the latter and if the Subordinate Court has committed any error of principle it can also correct such error. At the same time if certain matters have been left to the discretion of the Subordinate Court, this Court will interfere only when the Court below has acted perversely or either misconstrued or misdirected itself on any principle of law and justice. It will do so on the principle that it cannot suffer any wrong or unreasonable order to be passed when such order has in law the same force and sanctity as an order passed by the Court.

In the present case the most important point raised on behalf of the petitioner is that the learned Subordinate Judge has accepted securities offered by a single member of the joint Mitakshara family even where it consists of other members including minors. Now, the persons who have furnished security are Lakshminarain Gupta, Ram Sewak Thakur, Bhuvaneshwar Prasad Choudhury, Nathu Choudhury, and the Mohant of Marghoghi. As to Bhuvaneshwar Prasad Choudhury, it has been stated that he has two adult brothers and they have either joined or are going to join with him in the execution of the necessary bonds and if these facts be correct no difficulty arises in his case. It has, however, been stated on behalf of the petitioners that Lakshminarain Gupta has 3 minor sons, Ram Sewak Thakur has one minor son and Nathu Choudhury has 3 minor and 2 major sons. If these facts, which ought to have been fully investigated by the learned Subordinate Judge are correct, the bonds executed by these persons should not be accepted. It has been clearly pointed out in 5 Pat L J 605,[3] that a mortgage by an individual member of a Mitakshara family of the whole or a share of the joint family property where no family necessity or antecedent debt is proved, is void and inoperative as against a property hypothecated and gives the mortgagee no right even against the mortgagor's undivided share. This view has been affirmed by the judicial committee in several cases and therefore its correctness is beyond question. The learned Subordinate Judge proceeded upon a decision of this Court in 10 Pat 94[4] where various forms of surety debts have been discussed. In that case the particular surety bond which was in question was held to be unenforceable and on a reference to the report of that case at p. 100 it will appear that in the bond the sureties apart from hypothecating certain properties had also undertaken to be personally liable for a sum of Rs. 10,000. It therefore became necessary to discuss whether the bond could be enforced against the sons of the sureties. As the learned Subordinate Judge has, so far as this question is concerned, proceeded on a mistaken view of

3. Amar Dayal Singh v. Har Pershad Sahu, A I R 1920 Pat 433=58 I C 72=5 Pat L J 605=1 P L T 511.

4. Govind Chandra Das v. Hayagriba Upadhaya, A I R 1932 Pat 162=138 I C 414=13 P L T 473=10 Pat 94.

law, his order will have to be set aside. Since the whole matter will have to be reconsidered by him, I think that it is proper that his attention should be directed to the following points :

(1). In ascertaining the value of the property of the Mahant of Marghoghi the learned Subordinate Judge has instead of trying to ascertain the value of the property upon the basis of the income has valued it on the basis of the Government revenue and cess payable in respect of the property. That is clearly wrong. If, therefore, the learned Subordinate Judge is satisfied that the property going to be hypothecated by this person is not math property and he is entitled to hypothecate it, he will have to ascertain the income of the property and value it on the basis of the income. (2). The learned Subordinate Judge should require the sureties to file their title deeds and examine their title with reference to them instead of resting his decision on their oral statement as to their title. (3). In some cases the learned Subordinate Judge has proceeded upon somewhat slender materials in assessing the value. He has, for example, in valuing the lands of Bhuneshwar Prasad Choudhury and Nathu Choudhury near the Dalsingh Sarai Bazar proceeded merely on the basis of a patta (Ex. 4) which relates to 5 kathas 18 dhurs of land. It appears to us that one solitary document cannot form a satisfactory basis for the valuation of the land and the learned Subordinate Judge should require the parties to place before him further materials before arriving at his final conclusion as to the value of these lands. We are fully aware of the fact that the opposite party have in the present case to furnish security in landed property for a very large amount and nothing should be done to add to their difficulties. It may also be that the security bond may not have to be enforced at all. At the same time it is the duty of the Subordinate Judge to examine the titles of the sureties carefully and be reasonably satisfied as to the validity and the sufficiency of the bonds so that no difficulty may arise in their enforcement if it becomes necessary to enforce them in future.

With these observations we set aside the order of the learned Subordinate Judge against which this application has been directed and remit the matter to him for further investigation upon the lines indicated by us. If no security is furnished by the opposite party to the satisfaction of the learned Subordinate Judge within two months the matter should be reported to this Court which will then take such action as may be deemed necessary. Until the security is furnished the petitioner will continue to be in possession as a receiver as before and will also be as such receiver accountable to the Court for the profits and income realized from the property.

W.D./A.L. *Order accordingly.*

A. I. R. 1937 Patna 382

ROWLAND, J.

Somar Ram Kahar and *others* — Defendants — Petitioners.

v.

Babu Jagdeo Singh — Plaintiff — Opposite Party.

Civil Revn. No. 655 of 1936, Decided on 2nd March 1937, from decision of Munsif, Bihar, D/- 4th September 1936.

Provincial Small Cause Courts Act (1887), Sch. 2, Art. 41—*A* buying portion of holding from *B* and undertaking to pay proportionate rent—Rent decree for whole holding passed and *A* paying whole amount—Suit by *A* against *B* to recover amount excluding his share—Suit held was for contribution but not one falling under Art. 41 and was cognizable by Small Cause Court.

A bought from *B* a portion of the holding and undertook to pay the proportionate rent. A rent decree for the whole holding was paid off by *A*. *A* then brought a suit for recovering the amount from *B* excluding the proportionate amount for which he himself was liable. The suit was instituted in a Small Cause Court :

Held: that the suit was one for contribution but did not fall under Art. 41, Sch 2, Provincial Small Cause Courts Act, and was therefore cognizable by the Small Cause Court : *Case law referred.* [P 383 C 1; P 384 C 1]

N. C. Ghosh — for Petitioners.

C. P. Sinha — for Opposite Party.

Order.—This is an application under S. 25, Provincial Small Cause Courts Act, arising out of a suit to recover money paid by the plaintiff in satisfaction of a rent decree obtained by the landlord against petitioners who are the recorded tenants of a holding. The point for determination is whether the suit was cognizable by a Court of Small Causes or was exempt from the cognizance of such a Court by Art. 41, Sch. 2, to the Provincial Small Cause Courts Act. The holding was

khata No. 131 having an area of 1·61 acres with a rent of Rs. 32-2-10 dams. It stood in the name of petitioners 1 and 2 who are uncle and nephew. The plaintiff bought from 1st petitioner, one plot bearing No. 1235 with an area ·49 and rent Rupees 9-15-0. At the time of his purchase the plaintiff undertook responsibility for rent to this extent. The landlords of the holding are, to the extent of eight-annas the plaintiff himself and to the extent of the remaining eight-annas Hanif, Umar and Amir. The share of rent payable to Hanif and Umar was Rs. 13-10-0 and of this the proportionate share payable by the defendants was Rs. 9-7-10 and by the plaintiff Rs. 4-2-10 dams. The decretal amount which was for the rent of four years came to Rs. 89-5-3 dams of which the plaintiff claimed to recover from the defendants Rs. 62-2-3 dams as their share, that is to say, he made no claim in respect of the remaining Rs. 27-3-0 virtually acknowledging that for this amount he himself was liable.

The suit was at first decreed by the Munsif, but the defendants came to this Court in revision: and the matter was remanded for a decision on the question whether Art. 41, Sch. 2, applied to the facts of the case or not: *vide* judgment in *Civil Revn. No. 95 of 1936*.[1] The Munsif on this remand has come to a finding that Art. 41 does not apply because the suit is not really a suit for contribution but one for recovery of money paid by the plaintiff for the benefit of the defendants, and therefore, he thinks that the Court had jurisdiction to try it as a Small Cause Court suit. Now from the facts that I have just stated, it is manifest that the Munsif was in error in saying that this was not a contribution suit. If the plaintiff had sought to recover the entire amount which he had paid in satisfaction of the rent decrees alleging that no part of the amount was payable by himself, then it might have been said, as the Munsif has said, that the suit was one to recover money paid on behalf of the defendants; but as the figures given show the plaintiff in substance admitted his own liability to the extent of Rs. 27 so it was clearly a contribution suit. But Art. 41 does not apply to every suit for contribution but only to a suit of the nature described in that Article; that is to say, for the purpose of this case, we have to see whether this is a suit by a sharer in joint property in respect of a payment made by him of money due from himself and another co-sharer of joint property. It was settled by the Full Bench decision of the Calcutta High Court in 15 Cal 652[2] that a suit of the nature of a contribution suit might be cognizable in a Court of Small Causes; and in 15 Cal 713,[3] it was further explained that suits for contribution which the Small Cause Court had no jurisdiction to try are those specified in Arts. 41 and 42 or Art. 44.

The point, therefore, is whether the plaintiff is a co-sharer with the defendants in respect of the property to save which the payment was made. If he was, then the suit would not be cognizable by a Small Cause Court, as was held in 23 Cal 189.[4] In this case the plaintiff had a four annas share in a tenure and the defendants a twelve-annas share. The decree-holder of a decree against the tenure executed it against two-annas of the plaintiff's four-annas share and the plaintiff had to pay the entire amount of the decree. This suit was held to come within Art. 41. On the other hand, in 12 Mad 349,[5] where the plaintiffs had been granted some lands and the defendants other lands and the plaintiffs were compelled to pay the assessment of both, it was held that as the lands, the assessment of which had been paid by the plaintiffs, were in the exclusive enjoyment of the defendant and the plaintiffs had no right to those lands therefore, the property was not joint property and the suit was not a suit referred to in Art. 41. That is, in my opinion a correct statement of the law. But it is pointed out that it was not followed by Chamier, J. in 13 A L J 452.[6] But this was a case in which there had been a single tenancy, and the parties were all descendants of the original tenants and that for purpose of convenience different parties were in the enjoyment of different plots of the holding. Chamier, J. said:

1. Somar Ram v. Jagdeo Singh, Civil Revn. No. 95 of 1936.

2. Krishno Kamini v. Gopi Mohun Ghose, (1888) 15 Cal 652 (F B).

3. Biswa Nath Shah v. Naba Kumar, (1888) 15 Cal 713.

4. Bhatoo Singh v. Ramoo Mahton, (1896) 23 Cal 189.

5. Srinivasa v. Sivakolundu, (1889) 12 Mad 349.

6. Fatima Bibi v. Mt. Hamida Bibi, A I R 1915 All 118=28 I C 587=13 A L J 452.

I cannot hold that the property has ceased to be joint property because for the sake of convenience each party cultivates separate fields.

That is clearly distinguishable from the Madras decision on the facts. 55 Cal 1193,[7] was a case in which the plaintiff had been the purchaser of a portion of the mortgaged property who deposited the decretal amount to save the property from sale and his suit was for contribution against the other purchasers of the same property. Cuming, J. held that the suit did not fall under Art. 41 and with that view I respectfully agree. The contrary opinion expressed by Mukharji, J. does not appear to me to be so well-founded. The learned Judge thought that the words "share" and "joint property" were to be understood with reference to the common liability that has been discharged, this common liability being the essence of a right of contribution. If that were the correct position, there would not be room for any contribution suit which could fail without the exemption contained in Art. 41. The words "share" and "joint property," in my opinion, are words, which in their plain meaning refer to ownership and ought not to be read in any other than their plain meaning. In my opinion the suit does not fall under Art. 41, and is not exempt from the cognizance of a Court of Small Causes. The decision of the Small Cause Court Judge decreeing the suit is correct, though not for the reasons given in the judgment. The application is dismissed with costs, hearing fee two gold mohurs.

S.C./D.S. *Application dismissed.*

7. Mahendra Nath v. Khetra Mohan, A I R 1928 Cal 593=109 I C 247=55 Cal 1193.

A. I. R. 1937 Patna 384

Wort, J.

Badri Narain Mandar—Defendant—Appellant.

v.

Parsoti Pasban — Plaintiff — Respondent.

Appeal No. 1068 of 1934, Decided on 19th February 1937, from a decision of Sub-Judge, Monghyr, D/- 27th September 1934.

Decree—Setting aside—Decree in former suit — Subsequent suit to set it aside on ground of fraud—Onus is on plaintiff to prove that non-service of processes in former suit was due to fraud—If non-service is not found in itself to be fraudulent then it is necessary to go into question whether original claim was fraudulent or not.

A decree passed by a competent Court cannot be set aside by a suit simply on the ground that it was based on a false claim nor on the ground that there was no service of summons or notices. In a case to set aside a decree on the ground of fraud, the plaintiff has got to establish that there was non-service of the processes upon him and that the non-service was the result of active fraud in the former action. It may be from the circumstances of a case established that the non-service in itself was fraudulent. If that is not found, then it is absolutely necessary to go into the question whether the original claim was a fraudulent one or not : *A I R 1927 Pat 183, Rel. on.* [P 384 C 2; P 385 C 1, 2]

G. P. Das — for Appellant.

Sant Prasad — for Respondent.

Judgment.—This is an appeal from a decision of the Subordinate Judge of Monghyr arising out of an action in which the plaintiff claimed to set aside a judgment of a Small Cause Court, contending that that judgment had been obtained by fraud. Both Courts have held in favour of the plaintiff. It is contended by the learned advocate who appears on behalf of the defendant-appellant that the Judge has misdirected himself in point of law in throwing the onus upon the defendant to establish the fact that the judgment was not obtained by fraud. There is no doubt that in a case of this kind the plaintiff has got to establish that there was non-service of the processes upon him and that the non-service was the result of active fraud in the former action. As was pointed by Kulwant Sahay, J. in 8 P L T 193[1]:

> A decree passed by a competent Court cannot be set aside by a suit simply on the ground that it was based on a false claim nor on the ground that there was no service of summons or notices. But once it is established that there was no service of summons or notices, it is in my opinion open to the plaintiff in the subsequent suit to show that the claim in the previous suit was a false claim and the Court can go into the question with the object of determining as to whether there was a wilful and fraudulent suppression of the notices and summons in order to obtain a decree.

Now it might be sufficient in certain cases to prove non-service of summonses so long as that proof is combined with a proof that that non-service was produced by the active fraud of the plaintiff in the earlier suit. In this case the learned Judge has stated in the course of his judgment:

1. Ramchandra Prasad v. Parbhulal Ram Ratan, A I R 1927 Pat 183=101 I C 718=6 Pat 458=8 P L T 193.

But after the Court comes to a finding as to the non-service of the summons it is open to the Court to go into the question as regards the merit of the previous suit with the object of determining whether there was a motive for wilful and fraudulent suppression of the summonses in order to obtain a decree.

The learned Judge has not quite correctly stated the position in law and to that extent has misdirected himself as it is not a question of going into the merits of the earlier suit for the purpose of determining whether there was a motive for fraudulent suppression of summonses, but perhaps going into the merits of the suit to see whether the conduct of the plaintiff in the former suit was fraudulent. If it is once held that his conduct was fraudulent, there is an end of the matter. In this case the Judge proceeds to state that "an investigation of the merits of the case is unnecessary where the non-service of the summons is not sufficient in itself to prove fraud." It is rather unfortunate in this case that there appears to be a mistake in the judgment of the Judge when he stated :

In the present instance the failure to prove due service of summons does not by itself go to prove fraud and hence I do not wish to record any finding on this, that is, on point 2 (that is, the merits of the case).

It seems to me that the word 'not' is there by mistake, but I looked at the original judgment and the word 'not' also appears. But the subsequent statement of the Judge in coming to the conclusion that the merits are not to be investigated, is only consistent with the Judge finding that the non-service in this case was sufficient to prove fraud. I think the word 'not' should have been omitted therefore, and, as I have stated, it is there by mistake. If that be the position in law, it is clear that the Judge has wholly misdirected himself. It may be from the circumstances of the case established that the non-service in itself was fraudulent. If that is not found, then, it is absolutely necessary to go into the question whether the original claim was a fraudulent one or not. I am repeating myself by saying that the Judge has not gone into the second question because he appears to have come to the conclusion that the non-service was fraudulent. But here he has misdirected himself. The plaintiff's witnesses upon whom the onus lay, have been wholly disbelieved. The defendant's witnesses have also been disbelieved: and it is the contention of the learned advocate appearing on behalf of the respondent in those circumstances that, as both parties have given evidence, the question of onus is academic. That is not so in this case. The defendant was certainly there to prove service, but he was not there to prove his own fraud. The only person upon whom the obligation to prove fraud lay was the plaintiff and his witnesses have been disbelieved. He has therefore failed to establish that fact which it is necessary to establish if the question of the merits of the original suit is not to be investigated. It is impossible for me to hold in this case that the question of onus was an academic one because the mere disbelief of the defendant's witnesses when they came to prove the service of processes would not be sufficient from which to imply fraud in favour of the plaintiff; and I repeat myself again by saying that it was undoubtedly upon the plaintiff to establish that fraud, as all the authorities have pointed out.

In the circumstances, therefore, the judgment of the lower appellate Court cannot stand. The case must go back for the Judge to re-hear the case on the point whether there was fraud on the part of the plaintiff in the original suit. I suppose it is impossible now for the Judge to come to the conclusion that there was any fraud in the suppression of the notices for the reason that he has already disbelieved the plaintiff's witnesses. It will be necessary therefore to go into the question which the Judge thought it unnecessary to investigate in this case, namely, the question of the merits of the original claim, and in doing so he may come to the conclusion that although there was no clear proof of fraud with regard to service the fraudulent nature of the claim (if that is proved) points to fraud throughout. The appeal is allowed and the case remanded to be heard and determined according to law, costs of this appeal abiding the result of the hearing in the Court below.

S.C./D.S. *Case remanded.*

S. N. Dar
Advocate High Court
Jammu & Kashmir
Srinagar.

A. I. R. 1937 Patna 386

AGARWALA AND MADAN, JJ.

Raja Bahadur Sir Rajendra Narain Bhunj Deo — Petitioner.

v.

Debi Choudhary and *others* — Opposite Parties.

Civil Revn. No. 506 of 1936, Decided on 17th March 1937, from order of Dist. Judge, Monghyr, D/- 25th April 1936.

Civil P. C. (1908), O. 21, R. 69 — Sales on same list held in accordance with rules of Patna High Court — Such sales though continuing beyond first day cannot be deemed to have been held in contravention of O. 21, R. 69.

Order 21, R. 69, Civil P. C., does not refer to a case where sales on the same sale list held in accordance with the rules of the Court continue beyond the first day. [P 387 C 1]

Hence the sales on the same sale list held in accordance with the rules of the Patna High Court and continued beyond the first day cannot be deemed to have been held in contravention of O. 21, R. 69 : *39 Cal 26* and *17 Cal 152, Rel. on* ; *A I R 1937 Pat 20* and *A I R 1937 Pat 104, Foll.* [P 386 C 1 ; P 387 C 1]

G. C. Das — for Petitioner.

K. N. Lal — for Opposite Parties.

Madan, J. — This civil revision comes before us on a reference by a Single Judge. The facts are that a sale in execution of a rent decree obtained by the appellant was fixed for 4th January 1935. The sale was included in the sale list for that day, but as the sales could not be finished on that day, the Nazir in charge continued them on the following day, on which date the holding of the judgment-debtor was brought to sale and purchased by the appellant. On objection filed by the judgment-debtor under O. 21, R. 90 the Munsif set aside the sale holding that it was in contravention of O. 21, R. 69, having been held on a date not advertised in the sale proclamation and without an express order of the Court adjourning the sale. This order of the Munsif was affirmed by the District Judge on appeal, and this civil revision has been filed against that order of the District Judge and has been referred for decision by a Division Bench. The procedure adopted in this case was in accordance with Rr. 14 and 15 of the High Court General Rules and Circular Orders, Vol. 1, Part 1, Ch. 6, but these rules must be held to be invalid if, as contended by the judgment-debtor, they contravene the express provisions of O. 21, R. 69, which runs as follows :

69. (1) The Court may, in its discretion, adjourn any sale hereunder to a specified day and hour, and the officer conducting any such sale may in his discretion adjourn the sale, recording his reasons for such adjournment : Provided that, where the sale is made in, or within the precincts of, the court house, no such adjournment shall be made without the leave of the Court. (2) Where a sale is adjourned under sub-r. (1) for a longer period than 14 days, a fresh proclamation under R. 67 shall be made, unless the judgment-debtor consents to waive it: Provided that the Court may dispense with the consent of any judgment-debtor who has not appeared in the proceedings. (3) Every sale shall be stopped if, before the lot is knocked down, the debt and costs (including the costs of the sale) are tendered to the officer conducting the sale, or proof is given to his satisfaction that the amount of such debt and costs has been paid into the Court which ordered the sale.

The question for our decision is whether or not this rule applies to the present case. For the petitioner we were referred to the Privy Council decision in 39 Cal 26[1] which refers to R. 291 of the old Code. In that case the property was included in the monthly sales fixed for 13th July, but the sales did not begin until 17th July owing to the absence of the presiding officer from the station, and the property was actually sold on 20th July. Their Lordships held that there was no irregularity as the sale was held in the course of the monthly sales. In that case the sale appears to have been held by the presiding officer himself and not by a subordinate officer acting under his direction, but their Lordships do not appear to have contemplated that the various postponements of the sale were adjournments within the meaning of S. 291. In 17 Cal 152[2] a Division Bench of the Calcutta High Court pointed out that it was the practice of that Court to place all properties intended to be sold in execution on a list and to proceed with the sales from day to day. It was held that when sales commenced on the appointed day but continued on the following day there was no adjournment within the meaning of O. 21, R. 69. The same view was taken by Single Judges of this Court in 17 P L T 712[3] and 17 P L T

1. Rang Lal Singh v. Ravaneshwar Pershad Singh, (1912) 39 Cal 26=12 I C 174=38 I A 200 (P C).
2. Lalmohun Chowdhuri v. Nuru Mohamed Talukdar, (1890) 17 Cal 152.
3. Nand Kishore Singh v. Nagendra Bala Debi, A I R 1937 Pat 20=166 I C 503=17 P L T 712.

852.[4] Following these decisions I would hold that R. 69 does not refer to a case where sales on the same sale list held in accordance with the rules of the Court continue beyond the first day. I allow this civil revision accordingly and direct that the executing Court should now proceed to consider the other objections raised by the judgment-debtors in their application for setting aside the sale. Parties will bear their own costs in this Court.

Agarwala, J.—I agree.

W.D./A.L. *Revision allowed.*

4. Deonandan Thakur v. Mt. Hanso Koer, A I R 1937 Pat 104=167 I C 63=17 P L T 852.

A. I. R. 1937 Patna 387

MOHAMAD NOOR AND ROWLAND, JJ.

Muhammad Shaiait (Sic) — Appellant.

v.

Nithali Ram and *others* —

Respondents.

Appeal No. 429 of 1934, Decided on 16th March 1937, from appellate decree of Sub-Judge, Arrah, D/- 5th March 1934.

Bihar Tenancy Act (8 of 1934), S. 26-N—Tenant transferring holding before 1st January 1923 without landlord's consent—Landlord purchasing same holding in execution of money decree in 1932—Purchaser from tenant suing landlord for possession of holding—Act coming into force during pendency of such suit—S. 26-N being retrospective landlord must be deemed to have consented to tenant's transfer—Purchaser from tenant, held, had complete title over holding when Act came into force.

When the Legislature has deliberately made a certain provision retrospective, that is to say, legalised all the transfers which took place prior to a certain date, all those persons who were holding lands by virtue of those transfers must get complete title to them in the same way as if they had purchased them with the full consent of the landlord. [P 388 C 2]

The Bihar Tenancy Amendment Act of 1934 is retrospective in effect: *A I R 1936 P C 49, Foll.* [P 388 C 1]

A tenant transferred his holding without the landlord's permission before 1st January 1923. The landlord purchased the same holding in execution of his money decree and took possession in 1932 in his capacity as a purchaser. The purchaser from the tenant sued the landlord for the possession of the holding. During pendency of the suit the Bihar Tenancy Act of 1934 came into force :

Held : that S. 26-N being retrospective in effect the landlord must be deemed to have given his consent to the transfer of the holding by tenant. The purchaser from the tenant had a complete title over the holding by virtue of S. 26-N when the Act came into force. [P 388 C 1]

Brahmdeva Narayan — for Appellant.

Manohar Lal and *D. N. Varma* — for Respondents.

Mohamad Noor, J.—This second appeal arises out of a suit instituted by the plaintiffs for recovery of possession of a holding which originally belonged to the defendants second party some of whom sold it to plaintiffs 1 and 2 in 1921. Plaintiffs 3 and 4 are sikmidars of plaintiffs 1 and 2. The principal defendant is the landlord of the holding who purchased it in execution of a decree (which has now been held to be a simple money decree) on 2nd December 1931 and got delivery of possession on 21st February 1932. That the decree was a simple money decree has not been questioned before us. The plaintiffs therefore instituted this suit on 26th July 1933 for recovery of possession of the holding on the ground that what the landlord purchased in execution of his money decree and of which he got delivery of possession was the right, title and interest of the judgment-debtors and not the holding itself. The suit was resisted on various grounds and was dismissed by the trial Court; but on appeal by the plaintiffs it has been decreed by the lower appellate Court and the principal defendant has preferred this second appeal.

The learned advocate for the appellant has attempted to secure the dismissal of the suit on the ground that the principal defendant being the landlord is entitled to retain possession of the holding unless the plaintiffs show a good title to it as against him. In other words the principal defendant wants to defend the suit not in his capacity as auction-purchaser in execution of the money decree but as a landlord. The argument is this. The defendants second party, the original raiyats of the holding, having sold it to the plaintiffs must be taken to have abandoned it and therefore the landlord, that is to say, the principal defendant was entitled to re-enter into it. It is contended that though he has obtained possession of the holding under the sale and delivery of possession in execution of a simple money decree but once he has taken possession of it he cannot be ousted as he was entitled to take possession of it independent of his purchase in execution of his decree. In my opinion this argument would have been

unassailable but for the fact that in the meantime the Legislature has intervened by amending the Behar Tenancy Act. S. 26-N of the newly added sections runs thus :

> Every person claiming an interest as landlord in any holding or portion thereof shall be deemed to have given his consent to every transfer of such holding or portion by sale, exchange, gift or will made before the first day of January 1923, and etc. etc., ...

The transfer in favour of the plaintiffs was on 26th June 1921 and therefore prior to the date specified in the section and by its clear words as soon as the Act came into force the landlord must be deemed to have given his consent. This being the case the plaintiffs have complete title to the land. It was held by the Privy Council in 15 Pat 268[1] that the Act has got retrospective effect and in that case it was applied to a pending litigation. Their Lordships observed :

> The object of this section can only be to quiet titles which are more than 10 years old, and to ensure that if during those 10 years the transferee has not been ejected he shall have the right to remain on the land. Within this class the Legislature has not thought fit to discriminate against tenants whose right is under challenge in a suit, a course which it may well have regarded as invidious or unnecessary. As substantive rights of landlords and their accrued causes of action were to be abrogated, respect for pending suits over old transfers cannot be assumed.

In this particular case the defendant landlord did not enter into possession of the holding in his capacity as landlord having treated it as an abandoned holding. He entered into it as the purchaser in execution of a simple money decree. Now when he is called upon to surrender its possession to the plaintiffs who have purchased it from the original raiyats and whose title has become complete by the operation of law, he contends that he is entitled to remain on the land because he is the landlord. He cannot be allowed to do so, as there was no abandonment. He must be deemed to have given his consent to the transfer. I think the clear meaning of the section is that when the Act came into force, the plaintiffs' title to the land which they had purchased from the original raiyats became complete. There is no answer to the suit since then. The learned advocate however contended that as the plaintiffs had no title on the date when they instituted the suit, they cannot get a decree on the basis of title subsequently acquired by an Act of the Legislature. I am unable to accept this contention. When the Legislature has deliberately made a certain provision retrospective, that is to say, legalised all the transfers which took place prior to a certain date, all those persons who were holding lands by virtue of those transfers must get complete title to them in the same way as if they had purchased them with the full consent of the landlords. In this view of the matter though the judgment of the learned Subordinate Jadge as it stands is untenable, his decree must be upheld.

The appeal is dismissed. As the situation has arisen on account of an Act coming into force during the pendency of the appeal, the parties will bear their own costs throughout. The learned Subordinate Judge had not allowed mesne profits to the plaintiffs. That order is also upheld. In respect of the mesne profits since the passing of the decree of the learned Subordinate Judge, with the consent of the learned advocate for the respondents, we order that in case the principal defendant gives up possession of the holding within six weeks from today, there will be no enquiry in respect of the mesne profits; otherwise the plaintiffs will be entitled to mesne profits from the date of the decree of the learned Subordinate Judge till the date of recovery of possession.

Rowland, J.—I agree.

W.D./A.L. *Appeal dismissed.*

1. K. C. Mukerjee v. Mt. Ram Ratan Kuer, A I R 1936 P C 49=160 I C 105=63 I A 47=15 Pat 268 (P C).

A. I. R. 1937 Patna 388

COURTNEY-TERRELL, C. J. AND JAMES, J.

Muhammad Waliul Haq and *others* — Plaintiffs—Appellants.

v.

Ludput Upadhya and *others*— Defendants—Respondents.

Appeal No. 1379 of 1933, Decided on 12th March 1937, from appellate decree of Dist. Judge, Patna, D/- 18th September 1933.

(a) Record-of-Rights — Entries in — Land forming part of zamindari and entered in Record-of-Rights as gair-mazrua-am is not under control of zamindar — Kund built on such land—Right of Brahmin custodians of it to collect offerings to exclusion of others recognized at permanent settlement

—Presumption is that zamindar has no control over kund—He has therefore no right of interference with kund.

Land forming part of a zamindari estate and entered in the Record-of-Rights as *gair-mazrua-am* or public waste land is not under the control of the zamindar. [P 390 C 1]

Where a pool or kund was built on such *gair-mazrua-am* land of a certain zamindari estate, and the right of its Brahmin custodians to collect the offerings to it to the exclusion of others was recognized at the permanent settlement :

Held : that the only presumption that could be drawn was that the zamindar had no control over the kund. The zamindar therefore had no right of interference with the kund. [P 390 C 1]

(b) Customary Right — Pool — Customary right of bath—Pool attached to Hindu temple and in custody of Brahmins—Mahomedans of village asserting general customary right of bathing in it—Evidence that certain distinguished Mahomedan bathed in it casually, held was insufficient to prove customary right of bathing by all Mahomedans.

An artificial pool forming part of the precincts of the Hindu temple, was always kept in repair by its Brahmin custodians and was enclosed completely by iron gates for more than 25 years. A customary right of bathing in it was claimed by certain Mahomedans on behalf of the Mahomedan community in general and evidence was adduced to show that certain distinguished Mahomedan bathed in the pool at times :

Held : that the casual bath of a distinguished Mahomedan could hardly be treated as representative bath and such kind of evidence was not sufficient to prove the existence of a general customary right of all Mahomedans to enter the precincts to bathe whenever they pleased. [P 391 C 1]

Sultan Ahmad, Khurshed Husnain, S. A. Khan, A. H .Fakhruddin, H. R. Kazimi, A. A. K. Warsi and *S. Naimul Haq* — for Appellants.

Tej Bahadur Sapru, K. P. Jayaswal, Murari Prasad, C. P. Sinha, Ramchandra Prasad, Ramnandan Prasad, R. K. L. Nandkeolyar and *Phulan Prasad Varma*—for Respondents.

James, J.—This is a second appeal from the decision of the District Judge of Patna affirming the decision of the Subordinate Judge. It appears from the findings of fact of the Courts below that from some of the springs at Rajgi the water has been led by artificial channels to artificially constructed tanks or pools (kunds) over a number of which certain families of Brahmans have for generations exercised supervision, and have collected the customary offerings from pilgrims who bathe at the pools. One of these pools is under the supervision of Mahomedans and is used by Mahomedans; while others are used by Hindus. The pool with which we are here concerned is entered in the survey map as plot 2349 and in the *gair-mazrua-am* khatian of the Record-of-Rights it is described as Saptadhara kund. A Hindu temple bearing plot 2348 opens on to the pool, and access to the pool has been guarded by iron gates for a time longer than 25 years before the institution of the suit. The Courts have found that this kund has been in actual possession of the Brahman custodians (Pandas) from ancient times. About 80 years ago one Sitaram, a kayestha of Baksanda, introduced some improvement in the Saptadhara kund and built the temple of the seven rishis which adjoins it. The Saptadhara kund is kept in repair and is cleaned by the Brahmans who receive the offerings of pilgrims and are the defendants in this suit. The suit was instituted by five Mahomedans, three of them residents of Rajgir village and two of other villages praying for a declaration that they have a right to bathe in the waters of the kund whenever they please. The Courts have found that the kund is in charge of its Brahman custodians and that no general right has been proved of Mahomedans or of any persons who are not Hindus to enter the sacred precincts for the purpose of bathing. The appeal would on the face of it appear to be concluded by the findings of fact of the Courts below, but Sir Sultan Ahmad argues that the law has been misunderstood and that in some respects the findings of fact are vitiated by misunderstanding of the effect of the evidence.

The entry in the Record-of-Rights is of *gair-mazrua-am* within an estate which was settled with the Nawabs of Hussainabad temporarily in 1781 and permanently eight years later. Sir Sultan Ahmad argues that since this pool is shown as lying within this zamindari, it should be presumed that the zamindar has complete right of control and that no such right of control can be claimed by the Brahman custodians of the pool, but the lower appellate Court has found that the rights of the Pandas were recognized at the time of the settlement so that although this pool with its adjoining temple may lie geographically within the zamindar's estate, it did not at any time strictly speaking form part of that estate. It appears from the rubkari of 1840 that this estate was originally granted in life mukarrari to Muhammad Yahia Khan ancestor of the

Nawabs of Hussainabad and that it was resumed in 1840 when a record was prepared under Regn. 7 of 1822. Re-settlement was not made permanently until 1861, but this is apparently the rubakari of the resumption proceedings. The rubakari describes first the Mahomedan dedications in the estate, and what part of the estate may have been set aside to meet the expenses of such institutions. It describes in the second place the sacred places of the Hindus and how far they were sources of profit to the zamindar. It is there stated that the Brahman families who are custodians of the kund have the right of receiving offerings, and that these rights are ancestral so that persons who are not members of the families are excluded from the privilege. The report states that dues levied at a fair which was held every three years at Rajgir were excluded from the patwari's papers, but there is nothing in it which indicates that by the settlement any right was conveyed to the zamindar of interfering with the kunds which were places of worship for Hindus. I consider that taking this rubakari as a whole, the learned District Judge was entitled to come to the conclusion that the permanent settlement with the zamindar conveyed to him no right of interference with the kund. It has been observed by the Courts below that although the Mahomedan zamindar may now say that these kunds form part of the zamindari in the strictest sense of the word, he is at the present time only proprietor of a share in the estate, and other co-sharers definitely say that they have no right to interfere with the kunds. The entry in the Record-of-Rights cannot be read as warranting any presumption that the zamindar more than any other person has a right of control over these lands. There are two terms of khatian for non-agricultural land or waste land. In one (*gair-mazrua-malik*), is enterd land, waste or uncultivated or utilised for building or non-agricultural purposes, which is under the control of the zamindar. In the other (*gair-mazrua-am* or public waste), is land of that kind not under the control of the zamindar, and the only presumption in that connection which can properly be drawn from the entry in the Record-of-Rights is that this pool is not under the control of the zamindar.

In the second place Sir Sultan Ahmad argues that it ought to have been presumed from the entry in the Record-of-Rights that the plaintiffs enjoyed the customary right which they claimed, that *gair-mazrua-am* means public waste, so that it should be presumed that all members of the public are equally entitled to enjoy it. In this khatian No. 483 we find that most of the entries are of Hindu temples and of their compounds or of Muhammadan mosques or sacred buildings and it is manifest that the entry of a plot in khatian No. 483 conveys no presumption that every member of the public irrespective of race or religion is entitled to enter the precincts of every plot described in the khatian. The adjoining temple is entered as plot 2348 while for plot 2349 the pool on which the temple opens out, the entry is Saptadhara kund. The learned District Judge has found that the Saptadhara kund is a place of special sanctity to the Hindus the kund of the seven Rishis, and as Sir Tej Bahadur Sapru on behalf of the respondents reasonably observes the framers of the Record-of-Rights though they plotted this appanage of the Hindu temple separately, would not have considered that any other description than that of Saptadhara kund should be necessay to indicate its sanctity. I do not consider that it can be held that any right of the plaintiffs to enter the precincts can be presumed from the entry in the Record-of-Rights.

We thus find that this is an artificial pool forming part of the precincts of the Hindu temple, which has always been kept in repair by its Brahman custodians; it has always, for the greater part, been enclosed, and has actually been enclosed completely by iron gates for twenty five years or more before the institution of the suit. A customary right of the public in general irrespective of caste or creed to enter the precincts for the purposes of bathing might possibly exist in such circumstances, but it is certainly not possible to say that in the present case the evidence adduced on behalf of the plaintiffs is such as to prove the existence of such a right. There is evidence on behalf of the plaintiffs to show that at different times particular Muhammadans have bathed in this pool as of right, which has not been believed on the whole by the Courts below, who in these matters are final judges of fact. Sir Sultam Ahmad lays special stress upon the evidence of certain Muhammadan gentlemen of posi-

tion who have at different times bathed in this pool whose evidence has been believed by the Courts below, though in one instance with certain reservations regarding the correctness of the witness's memory as to the particular pool in which he bathed. Sir Sultan suggests that if this evidence is believed, the existence of some kind of easement or customary right is proved, but as Sir Tej Bahadur Sapru points out this casual bath of a distinguished Muhammadan can hardly be treated as a representative bath, and this kind of evidence can certainly not be held to be sufficient to prove the existence of a general customary right of all Muhammadans to enter the precincts to bathe whenever they please. It may be possible that the Courts in India have sometimes insisted too strictly on proof of immemorial practice and invariability before they would treat the establishment of customary right as proved, but it cannot be held that in this case the Courts below have committed any error of law in finding that the customary right alleged has not been proved by the evidence adduced. I do not consider that it can be said that any case has been made out on behalf of the appellants which would warrant our interference under S. 100 of the Civil P. C. with the decision of the learned District Judge and I would dismiss this appeal with costs to the contesting respondents.

Courtney-Terrell, C. J. — I entirely agree.

K.B./A.L. *Appeal dismissed.*

A. I. R. 1937 Patna 391

WORT AND DHAVLE, JJ.

Secretary of State — Plaintiff — Appellant.

v.

Babu Rajendra Prasad and *others* — Defendants — Respondents.

Appeal No. 27 of 1933, Decided on 1st March 1937, from original decree of Addl. Sub-Judge, Palamau, D-/ 24th September 1932.

(a) Landlord and tenant—Relationship between two is a matter of contract — Rent — Non-agricultural land for building purposes — Court assessing fair and equitable rent payable by tenant — Court has no jurisdiction to do so.

The relationship of a landlord and a tenant is in the first instance a matter of contract, and by assessing a fair and equitable rent to be paid by the tenant to the landlord, in a suit which does not relate to agricultural land, but to land let out for building purposes, the Court purports to make a bargain of its own making, between the parties. The Court has no jurisdiction to impose such bargain on the parties ; *A I R 1927 Pat 319 Foll.*; *A I R 1919 P C 11, Ref.* [P 392 C 2]

(b) Landlord and tenant — Ejectment — Notice — Land let out by Government for building purposes—Rent enhanced from time to time and lease not shown to be heritable — Tenancy held was not of permanent nature —Transfers of part of such land sanctioned by Government — Government calling upon all plot-holders including one in dispute, for executing fresh leases at enhanced rate of rent — Suit for ejectment on default by holders of land in dispute — Notice found duly served on original lessee but not on his transferees — Tenancy, held was one from year to year and notice to transferees was essential before ejectment suit.

The mere circumstance that the tenant and his family have, for a very long time, been allowed to continue residing in the same place without any variation in the rate of rent is a circumstance which by itself is an insufficient foundation for holding that the tenant's right was permanent in its origin : *A I R 1929 Cal 37, Foll.* [P 396 C 2]

The land in dispute was let out by Government to the predecessors-in-title of the defendants for building purposes at a date years ago, at a certain rate of rent. At a settlement in 1894 the rent was enhanced. Subsequently the lessee sold a part of the land with the sanction of the Government and the remaining part of the land was put to sale in execution of a mortgage decree against the lessee and was purchased by defendants 3 to 5. In 1926 the Government called upon all the plot holders including the one in dispute to execute leases at enhanced rate of rent. On the failure of the holders of the plot in dispute, to execute the leases as called upon, the Government brought a suit for ejectment against the lessee and his transferees. It was found that due notice before the ejectment suit was served on the lessee but no such notice was served on the transferees :

Held : that inasmuch as the rent was varied from time to time and as it was not also shown that the land was treated by the landlord as heritable, the tenancy was not in the nature of a permanent tenancy. [P 394 C 1]

Held further : that as the tenancy was not governed by any provision in Indian law, by rule of justice, equity and good conscience, the tenancy was one from year to year and the transferees, viz., defendants 3 to 5 of the original lessee were entitled to a proper notice to quit before the ejectment suit was filed. Inasmuch as no such notice was served on them they were not liable to be ejected without such notice. [P 395 C 1]

(c) Landlord and tenant — Equitable estoppel — Landlord allowing tenant to erect permanent structures on land let out—In suit for ejectment tenant raising plea of equitable estoppel — Such plea cannot succeed unless tenant shows that conduct of owner

was such as to lead to inference of permanent tenancy by plain implication — Deputy Commissioner as Chairman of Municipality sanctioning erection of permanent structures on land let out by Government— He cannot be held to be agent of Government so as to create equitable estoppel debarring Government from pleading in ejectment suit that nature of tenancy is not permanent.

In order to raise equitable estoppel when a landlord allows the tenant to erect permanent buildings on land let out and then sues to eject the tenant, it is incumbent upon the lessee to show that the conduct of the owner, whether consisting in abstinence from interfering or in active intervention, was sufficient to justify the legal inference that they had by plain implication contracted that the right of tenancy under which the lessee originally obtained possession of the land should be changed into a perpetual right of occupation. There can also be no estoppel by acquiescence unless lessee shows that in spending money on the reconstruction of the house he was acting under an honest, though mistaken belief that he had a permanent right in the land and that the landlord knowing that he was acting under such belief, purposely abstained from interference with the view of claiming the building when erected.

[P 394 C 2; P 398 C 2]

Where however the Deputy Commissioner acting as a Chairman of the Municipality allows construction of permanent buildings on land let out by Government, and he as Sub-Judge, delivers possession of a part of such land to the auction-purchaser thereof in execution of a mortgage-decree against the lessee, it cannot be said that the Deputy Commissioner was acting as an agent of the landlord, the Government, in both the capacities, so as to raise equitable estoppel against Government and prevent Government from raising the plea that the tenancy is not of a permanent nature, in a suit for ejectment brought by Government : *21 All 496 (P C), Rel. on.*

[P 394 C 1]

Govt. Pleader — for Appellant.

D. P. Sinha, Rajkishore Prasad, Raghosaran Lal, Ishvarinandan Prasad and *G. P. Shahi* — for Respondents.

Wort, J.—This is one of a number of appeals by the Secretary of State for India in Council arising out of actions in ejectment and relating to building plots in the town of Daltonganj. There was an alternative claim in each case for settlement of a fair rent. This alternative claim has been granted in each case. In this action the claim for ejectment failed. The settlement of fair rent raises a question of jurisdiction and arises in these circumstances. In this case, the claim for ejectment failed and the Judge proceeded to settle a rent by way of enhancement of the rent already being paid. In other cases the claim for ejectment succeeded and the Judge proceeded to fix a rent on payment of which the defendants could remain in possession. In those cases where the action for ejectment succeeded, a fair rent was settled by the Court at the instance of the plaintiff, as it was stated that there was no intention to eject the defendants, and although it was desired to have the decision of the Court on the merits of that question, on payment of a fair rent the tenants would be allowed to remain in possession. There was no suggestion that the Court was exercising the jurisdiction to settle a fair and equitable rent or to enhance the rent under the Chota Nagpur Tenancy Act. Indeed, so far as enhancement was concerned, the Court proceeded to allow the plaintiff's claim for considerations which would not apply to the exercise of jurisdiction under that Act. Therefore in neither case could it be suggested that the Court was exercising a statutory jurisdiction in that regard. The relationship of landlord and tenant which existed is in the first instance a matter of contract, and, by assessing rent to be paid by the tenant, the Court purports to make a bargain between the parties—a jurisdiction which it does not possess. It is rather difficult to imagine how the Judge thought that he had jurisdiction in this matter as the question is an elementary one. If authority for the proposition that no such jurisdiction exists were needed it is to be found in 6 Pat 446,[1] where Sir Dawson Miller appears to have stated :

As this was not a suit relating to agricultural land governed by the Bengal Tenancy Act, the Court had no power to impose upon the parties a bargain not of their own making.

That matter is clear. I leave for consideration the question which arises in this connection in one other of the appeals which will be dealt with on the facts of that particular case. But so far as the question was one of making a bargain for the parties and not the interpretation of a contract or lease entered into by those parties, I hold that the claim for enhancement of rent or settlement of fair and equitable rent must fail in every case. I should have stated that part of this appeal relates to the enhancement of rent towards which the appeal is directed. The appellant contends that the rate of enhancement is not sufficient, but this question for the reasons which I have stated does not arise.

The land, the subject matter of this dispute, is a part of the khas mahal. It

1. Secretary of State v. Nistarini Annie Mitter, A I R 1927 Pat 319=104 I C 209=6 Pat 446.

formed part of a revenue-paying estate which was purchased by Government in default of payment of revenue about 120 years ago. There is no doubt that during the course of years the town of Daltonganj, which was in all probability in its origin a village, developed into a town of some importance and became the headquarters of the Division. This and some other facts were proved in the case for the purpose of establishing a matter with which we now have no concern, that is, the increasing value of the land. The land in dispute was let to one Badrinath for building purposes at a date of which there is no evidence. The defendants contend it was about 60 or 70 years ago; it measured .38 acre and was held at a rent of 13 annas 6 pies. In 1894, there commenced a settlement which was known as Mr. Sunder's settlement which was completed in 1896. The rent was enhanced under that settlement to Rs. 3. Subsequently Badrinath sold .21 acre leaving in hand .17, the area now in dispute. Government agreed to this transfer which was in 1908 and apportioned the rent for the balance at Rs. 1-5-0. The land appears to have been the subject matter of a mortgage by Badrinath and in 1913 in execution of a mortgage decree defendants 3 to 5 purchased the land but were not recognized by the landlord. It was contended therefore that in any event they were trespassers and liable to ejectment. That point, however, I will deal with, in a moment.

In 1926 there was a notification by Government calling upon the holders of building sites in Daltonganj including the holder of the plot in dispute to execute leases at an increased rent. This the defendants failed to do, and in September 1928 a notice calling upon the defendants to quit on 31st March 1929 was issued. The learned Judge in the Court below has held that the notice was served personally on defendant 1 but was not served on defendant 2 nor was it served on defendants 3 to 5. Against this finding there is no appeal. Defendants 3 to 5 after their purchase in 1913 proceeded either to demolish or alter the buildings then on the land and submitted plans for alteration to the Deputy Commissioner as Chairman of the District Board, which were sanctioned by him. The learned Judge in the Court below has held that the defendants had a permanent right in the land by reason of the fact that the defendants were allowed to build and to erect permanent structures to the knowledge of the landlord. He has held, however, that no occupancy rights existed in the defendants as the Chota Nagpur Tenancy Act did not apply. As regards the latter question, the facts are as follows :

It is admitted by both parties that the land was let out for building purposes. It was not pleaded in the written statement that rights existed under the Chota Nagpur Tenancy Act and the question appears to have been raised for the first time in the argument before the Judge in the Court below. The learned Judge has stated that it was not the contention of the parties that Badrinath was an agriculturist, nor is there any evidence to lead one to that conclusion. In those circumstances the Judge was undoubtedly right in coming to the conclusion that as the land was let out for building purposes no occupancy rights in the defendants existed. This is supported by the decision to which I have already referred in 6 Pat 446.[1] The Government pleader advances the argument that the learned Judge was wrong in coming to the conclusion that the defendants' right was a permanent one. The learned Judge, relying upon the decision of the Calcutta High Court in 15 C L J 220,[2] has come to the conclusion that the right was a permanent one. It appears that the Judge has based his conclusion on the presumption of a lost grant. By that I understand him to mean that the facts and circumstances of the case led to the inference that it was agreed by the landlord, when letting the land to Badrinath that he should have a permanent lease. It is impossible to lay down any definite rule from what facts such inference could be drawn but the case upon which the learned Judge relies does not support his conclusion. In that case the facts that were established were first, the original tenant and his successor had been in occupation of the land for over 60 years; secondly, that the rent had never been varied; thirdly, that the tenancy had been treated by the landlord as heritable; and fourthly, that the land had been let out for residential purposes. Even assuming that those four

2. Mohoram Chaprasi v. Telamuddin Khan, (1912) 15 C L J 220=13 I C 606=16 C W N 567.

facts were established, the inference would not be irresistible, but in the case before us two facts, namely, the second and the third, have not been made out. Rent, as we have seen in this case, has been varied from time to time. It was enhanced during Mr. Sunder's settlement, and the landlord in this case has treated it as liable to further enhancement by calling upon the defendants to execute leases at a higher rent. Had all the facts been established to which Mookerji, J. in that case referred, I do not agree that necessarily the inference of a permanent lease should be drawn, but in this case two at least of these four items are wanting as I have said.

The defendants have relied very strongly on what they have described as equitable estoppel. The facts upon which they rely to establish this proposition is that the landlord, the Government, stood by and allowed the person in possession to erect permanent buildings. They rely also upon the fact that the Deputy Commissioner, who was the Subordinate Judge, gave delivery of possession to defendants 3 to 5 on execution of a mortgage decree. They also rely upon the fact that the Deputy Commissioner, in the capacity of Chairman of the Municipality, approved of the building plans of defendants 3 to 5. In my opinion we must rule out the last two facts. The Deputy Commissioner as Subordinate Judge was not acting as the agent for the landlord even supposing that his action would have otherwise estopped the landlord nor was the Deputy Commissioner acting as the agent of the landlord in his capacity as the Chairman of the Municipality. No assistance therefore can be got from those two facts by the defendants.

We are therefore left with the fact that the tenant was allowed to erect buildings on the land to the knowledge of the landlord. I think the case in 26 I A 58,[3] is conclusive of this matter. In that case the landlord let out to five tenants six bighas of land for the term of the current settlement for the construction thereon of a saltpetre factory. There was an assignment by the landlords of their interests as also the interests of the tenants, and the tenants there relied upon the fact that after the completion of the saltpetre factory, for which the land was taken, the landlord saw that from time to time the defendants and their ancestors were erecting houses and spending large sums of money thereon without any objection or prohibition, which it was alleged induced the defendants and their ancestors to build. The Subordinate Judge in that case held that the saltpetre factory only went on for a few years and that since that date the land had been used for another purpose, namely, the building of shops, which the landlord did nothing to prohibit, and he applied the rule which he stated thus :

> If a man permits another to build upon the land, and with the knowledge that the building is being erected, stands by and does not prevent the other from doing so, then, no doubt, equity comes in, and by the rules of equity, which in this respect are the same as the rules of law, he cannot eject that other person.

The decision of the Subordinate Judge was confirmed by the Court of appeal, the High Court. Lord Watson describes the statement of the principle upon which the Subordinate Judge relied, a principle to be found in (1885) A W N 100,[4] as "loose and inadequate" and makes this observation :

> In order to raise the equitable estoppel which was enforced against the appellants by both the appellate Courts below, it was incumbent upon the respondents to show that the conduct of the owner, whether consisting in abstinence from interfering or in active intervention, was sufficient to justify the legal inference that they had by plain implication contracted that the right of tenancy under which the lessees originally obtained possession of the land should be changed into a perpetual right of occupation.

And Lord Waston held that :

> Their Lordships have had no difficulty in coming to the conclusion that the respondents have failed to discharge themselves of that onus.

Not only in this case, as I have stated, is there an absence of the facts from which an inference of a permanent tenancy could be drawn, but there is equally an absence of evidence to establish "by plain implication" that the landlord had contracted that the right of tenancy under which the lessees originally obtained possession should be changed into a perpetual right of occupation. In my judgment, the defendants' claim to a permanent tenancy fails. But there is another matter to be considered before this appeal can be disposed of. If the defendants' rights were not permanent, what were they ? In the first instance I have to note that the

3. Lala Beni Ram v. Kundun Lall, (1899) 21 All 496=26 I A 58=7 Sar 523 (P C).

4. Gopi v. Bisheshwar, (1885) A W N 100.

parties here contracted as landlord and tenant and it is not suggested that these lettings were by way of settlement of revenue and Mr. Sinha on behalf of Government admits that the lettings were governed by the ordinary law of landlord and tenant. There was a suggestion on the part of the plaintiff that these lands were let out for periods of fifteen and thirty years; but there is no evidence to establish the fact that that was the oral agreement between the parties. The case is not governed by the Chota Nagpur Tenancy Act as I have said, nor is it governed by the Transfer of Property Act. The Crown Grants Act (15 of 1895) provides :

> Nothing in the Transfer of Property Act, 1882, contained shall apply or be deemed ever to have applied to any grant or transfer of land or of any interest therein heretofore made or hereafter to be made by or on behalf of Her Majesty the Queen-Empress, her heirs or successors or on behalf of the Secretary of State for India in Council, to, or in favour of, any person whomsoever.

And it has been held in the decision to which I have already made two references that this Act applies to grants such as the one with which we are dealing. The matter therefore must be dealt with apart from the Transfer of Property Act. The defendants' predecessor went into possession without any agreement as to the renewal of the tenancy as there is a complete absence of evidence as to any contract with regard to that particular. By Common law, applied as the rule of justice, equity and good conscience, in the absence of any provision in Indian law in this regard, the tenants were tenants from year to year. We have noticed that the finding is that the notice was not served on defendant 2 and was not served on defendants 3 to 5. Defendants 3 to 5 were transferees, there being nothing in the law of India to prevent the original grantee from assigning his interest in the land, and defendants 3 to 5 were therefore entitled to notice before ejectment. The Judge in the Court below has noticed that the Government did not agree with the mutation of the defendants' names after they had purchased and has held that such mutation was not obligatory in this instance—a decision regarding the correctness of which there can be no doubt. The original grantee being entitled to assign as I have held, it was necessary to establish that notice had been served on defendants 3 to 5 which the landlord in this case has failed to do. In those circumstances, although the defendants had not a permanent interest the plaintiff is not entitled to eject them. Whilst therefore setting aside the decision of the Subordinate Judge as to the enhancement of rent, I would dismiss the plaintiff's appeal but without costs.

Dhavle, J.—This appeal arises out of a suit for ejectment from a non-agricultural holding in Daltonganj in the Palamau Government Khas Mahal. The case of the plaintiff, who is the appellant before us, was that the land "was in the lease of defendants 1 and 2 for residential purposes without a registered instrument" and carried an annual rent of Rs. 1-5-0 payable by the official year ending 31st March. In 1924 the plaintiff had a survey made of the town and fixed certain new rates for building sites in view of the growth of trade and rise in local values. A new lease with the relevant rate was offered to defendants 1 and 2, the recorded lessees of the plaintiff, and also to defendants 3 to 5 who had acquired the holding from defendants 1 and 2 and were in occupation of it without the permission of the Deputy Commissioner. As none of the defendants accepted the offer, the Deputy Commissioner gave them notice to quit, and on their failure to comply, this suit was filed for their ejectment, with a prayer in the alternative that a rent of Rs. 10-3-0 per annum in accordance with the rate of Rs. 60 per acre fixed by the plaintiff in 1924 be declared payable by defendants 3 to 5 "for a period of 30 years or till the next Settlement". Defendants 1 and 2 denied the plaintiff's case and said that defendants 3 to 5 had been unnecessarily impleaded, being trespassers; but they did not contest the suit. Defendants 3 to 5 pleaded a title to the holding in virtue of an auction-purchase by their father in execution of a decree against Badrinath, the grandfather of defendants 1 and 2. They denied the plaintiff's right to raise the rent, and said that the lease was permanent, heritable and transferable, with a fixed rent. They also said that the plaintiff's claim to eject the defendants was "barred by the principle of estoppel, waiver and acquiescence," since he had stood by and raised no objection to the construction of a substantial house on the site by their father at considerable expense with the permission of the Deputy Commissioner as Chairman of the Daltonganj Municipality.

The learned Subordinate Judge found that in the circumstances of the case there was a presumption of permanency as regards the tenancy in favour of the contesting defendants, and that the plaintiff was also barred from claiming ejectment by the principle of equitable estoppel. An issue had been framed as to the validity and legality of the notice that the plaintiff claimed to have served on the defendants; and though defendants 3 to 5, the contesting respondents before us, do not appear to have objected in their written statement that they had not been properly served with the notice, the learned Subordinate Judge found that no notice had been served upon them. He also found that no notice had been served upon defendant 2. But he negatived the claim of these defendants to hold at a fixed rent, without any enhancement, and found that a rent of Rs. 4-4-0, at the rate of Rs. 25 per acre, was fair and equitable. In the result he decreed the suit in part, disallowing the plaintiff's claim for ejectment and fixing the rent at Rs. 4-4-0 a year. It may be noticed incidentally that he did not deal with that part of the plaintiff's prayer in which the Court was asked to fix the rent, not without any term but "for a period of 30 years or till the next Settlement". The plaintiff appeals and contends that this was not a case where a permanent tenancy could be properly inferred, and that there was no equitable estoppel to prevent the plaintiff from obtaining ejectment.

In paras. 9 and 13 of their written statement, defendants 3 to 5 (the contesting respondents) pleaded that the land in suit had been originally settled with their predecessor-in-title, Badrinath, over 60 years ago, as a permanent lessee, for building purposes, at a fixed rent of Rs. 1-5-0 per annum. No evidence was however given to show when the original settlement with Badrinath was made. The earliest indication on record is afforded by Ex. 6, the khatian of Sunder's Survey and Settlement, 1894-95 to 1896-97, which shows that previously Badrinath had houses on three plots with an area of 0·38 acre, on a rent of Re. 0-13-6, and that this rent was raised to Rs. 3 in the proceedings of that Settlement. Ex. 2, the jamabandi register, shows that Mr. Sunder's settlement was to run for 15 years from 1st October 1896, and that during the currency of this Settlement Badrinath sold two of his plots, with an area of 0·21 acre, to one Dhanukdhari Lal who was recognized by the Khas Mahal as a new tenant on an enhanced rent of Rs. 3-2-0, Badrinath continuing as a tenant in respect of the balance of 0·17 acre on a rent of Rs. 1-5-0. It appears from the evidence of plaintiff's first witness, the mutation clerk of the Khas Mahal, that the transfer of 0·21 acre to Dhanukdhari Lal was effected in 1908. The learned Subordinate Judge has clearly misread Ex. 2 in taking it to mean that Badri's rent was Rs. 3-2-0 for 0.38 acre. He has arrived at his finding of permanency of the tenancy of 0·17 acre on the authority of such cases as 52 Cal 43,[5] 56 Cal 275[6] and 15 C L J 220.[3] Out of these cases the one that is most in the respondents' favour is *Mohoram Chaprasi's case*[2] where Mookerjee, J. held that a tenancy could be inferred to have been in its inception permanent, where its origin was unknown, the original tenant and his successor had been in occupation for over 60 years on a rent which was never varied, the tenancy was treated by the landlord as heritable and the land was let out for residential purposes. This view, which was carried still further by the same learned Judge in 32 C L J 85[7] was criticized in *Abdul Hakim's case*[5] and can hardly be accepted as sound having regard to the observations of Rankin, C. J. in 56 Cal 738[8] :

> The mere circumstance that the tenant and his family have for a very long time been allowed to continue residing in the same place without any variation in the rate of rent is a circumstance which by itself is an insufficient foundation for holding that the tenant's right was permanent in its origin.

In the present case, moreover, the original rent of Re. 0-13-6 for 0·38 acre was changed to Rs. 3 in Sunder's Settlement, and the transfer of 0·21 acre to Dhanukdhari was only recognized by the plaintiff on an enhanced rent of Rs. 3-2-0 instead of Rs. 1-11-0. That the proportionate rent for 0.17 acre, out of the total of Rs. 3 fixed by Mr. Sunder for 0.38 acre, has remained at Rs. 1-5-0

5. Abdul Hakim Khan v. Elahi Baksha Shah, A I R 1925 Cal 309=85 I C 103=52 Cal 43=29 C W N 138.
6. Pramathanath Das v. Champa Dasi, A I R 1929 Cal 473=118 I C 353=56 Cal 275.
7. Shoroshi v. Bhaglu Sah, A I R 1920 Cal 552=57 I C 877=32 C L J 85.
8. Kamal Kumar v. Nanda Lal, A I R 1929 Cal 37=116 I C 378=56 Cal 738=33 C W N 211.

since that settlement until the revision of 1924 plainly affords no reason whatsoever for presuming that the tenancy was permanent in character. For, that rent was fixed for a term of 15 years, though the fresh settlement or revision of rents in the case of old tenants or their heirs happened to be delayed till 1924. In arriving at the presumption of permanency, the learned Subordinate Judge also refers to the fact that the house built by the father of the contesting defendants on the land in suit is of a substantial character ; but it must not be overlooked that this house was built not by the recorded tenant, Badrinath, but by an execution purchaser to whom as defendant 3 himself states, recognition was refused by the landlord. Not having been built "long before any controversy arises", this house can lead to no inference that the tenancy was permanent. As to the non-recognition by the landlord, the learned Subordinate Judge cites 34 Cal 902[9] as an authority for the proposition that the non-recognition does not affect the rights of the respondents in any way. That may be, but the ruling in *Naba Kumari's case*[9] again, has no application to the facts of this case, for it is not pretended that there are here (as there were in that case) any receipts for rent in which the respondents are shown as the occupiers paying the rent of the holding on their own account. Rent was obviously paid, since the execution sale, in the name of the recorded tenant, and recognition by the landlord as one of the considerations leading to an inference of permanency or equitable estoppel is wholly wanting.

The tenancy of 0.17 acre on a rent of Rs. 1-5-0 is, strictly speaking, only established from 1908, but it has been urged by the learned advocate for the respondents that the arrangements of 1908 should not be regarded as creating a new tenancy since Badrinath had been holding this plot of 0.17 acre from before. Even if this be conceded, the tenancy of 0.17 acre on a rent of Rs. 1-5-0 per annum would only go back to Sunder's Settlement, and we know not only that before this Settlement the rent was much less, but also that the rent fixed by Mr. Sunder was only intended to remain in force for 15 years (*see* Ex. 2 and para. 351 of Sunder's Final Report). The learned advocate has laid stress on the recognition of Dhanukdhari, who purchased 0.21 acre from Badrinath, by the landlord ; but as I have already pointed out, this recognition was accompanied by an enhancement of the rent from Rs. 1-11-0 to Rs. 3-2-0. Mr. Sunder's settlement fixing a new rent of Rs. 3 for the whole holding for 15 years goes far by itself to negative the claim of a permanent tenancy. Even if it were possible to regard it as a solitary instance of unwilling submission by a permanent tenant entitled to hold on a fixed rent (as suggested by the learned advocate) the enhancement on the transfer of Dhanukdhari goes further to negative a permanent tenancy as an inference from a transfer as of right among other considerations. The learned advocate has also referred to the house built by Badrinath, a kutcha two-storied khapra house (as P. W. 1 describes it)—which was re-constructed by the execution purchaser. This house is not referred to by the Subordinate Judge, nor did the respondents rely on it in their written statement as they did in para. 15 on their father's house. Badri's house can be of but little assistance to the respondents in showing that his tenancy with its unknown origin was permanent. For as Rankin, C. J. said in *Kamal Kumari's case*[8] :

> The fact that a tenancy was for residential purposes in no way involves of itself that the tenant's right to the land was to be permanent as the land could be used for kutcha structures to be erected by the tenant,
>
> not structures such,
>
> as the tenant could not without imprudence raise upon the land in the absence of a permanent right nor such as give notice to the landlord that the tenant claims a permanent right.

It was also suggested on behalf of the respondents that an inference arises against the plaintiff's case of a tenancy from year to year from the fact that their house was constructed or reconstructed with the permission of the Deputy Commissioner. But this permission was only obtained under the Municipal Act, and it is obvious that as Chairman of the Daltonganj Municipality the Deputy Commissioner could not have refused permission merely because it was within his knowledge as an agent of the landlord that the land was not held on a permanent tenancy. Still less does it admit (assist ?) the respondents that their father had obtained delivery of possession from the Court of

9. Naba Kumari Debi v. Behari Lal Sen, (1907) 34 Cal 902=6 C L J 122=11 C W N 865 (P C).

the Deputy Commissioner Sub-Judge. The learned advocate for the respondents also relied on the circumstance that in Sunder's khatian Badrinath was shown as "dakhilkar (occupancy)". The khatian, however, does not carry any specific presumption of correctness such as attaches to Record-of-Rights under the Bengal or the Chota Nagpur Tenancy Act, and the entry regarding Badrinath's status is inconsistent with the respondent's case that the land had been originally settled with Badrinath for building purposes. An occupancy right in Chota Nagpur is given by law to certain tenants of agricultural land and entitles them to cultivate the land or to occupy it in proper ways, without any limit of time, subject to the payment of a rent which is liable to enhancement from time to time on certain specified grounds but not by contract. Such a right can only arise in agricultural land, and it is nobody's case that Badrinath was ever a raiyat of the land in suit in the sense in which suits for the ejectment of raiyats or tenants of agricultural land have continued from 1859 onwards to be excepted from the cognizance of the civil Courts in the Chota Nagpur Division. Mr. Sunder's classification of tenants purported to be in accordance with the principles of the Bengal Tenancy Act, although this Act had no application to Chota Nagpur (*see* para. 9 of the Government Resolution on and published with Sunder's Final Report). It is not distinguished between agricultural and non-agricultural holdings, as we see from the last page of his appendix I (Tappa Kote). His description of Badrinath as dakhilkar or occupancy raiyat was plainly erroneous on the common case of the parties before us, and it is not altogether without significance that the respondents did not raise any issue below regarding the jurisdiction of the civil Court to try a suit for the ejectment of the heirs or successors of the so-called dakhilkar. Every consideration on which the learned Judge below raised the presumption of permanency thus fails on an examination of the facts of this case.

It is not clear what the learned Subordinate Judge had in mind when he held that the suit was barred by the principle of equitable estoppel. The learned advocate for the respondents has suggested that estoppel arises because the defendants' house was constructed at least with the knowledge of the plaintiff. But that knowledge, such as it was, does not estop the plaintiff from denying that these defendants had any permanent right to the land; in asking for ejectment he is not relying on any facts which were unknown to the defendants and of which it was his duty to inform them. It is not the defendants' case that they were not aware of their actual rights but were misled by any representation made by the plaintiff; nor was the plaintiff under any obligation in these circumstances to warn them of their precarious right. If they built, they did so at their own risk notwithstanding the knowledge of the Deputy Commissioner that they (or rather their father) intended to build. There could be no estoppel by acquiescence unless these defendants showed that in spending money on the reconstruction of the house their father was acting under an honest, though mistaken, belief that he had a permanent right in the land and that the landlord knowing that he was acting under such belief, purposely abstained from interference with the view of claiming the building when erected. But this was not even alleged by them. It is therefore impossible to say that the conduct of the plaintiff as landlord in abstaining from interfering with the reconstruction of the house justifies the legal inference that he had, by plain implication, contracted that the right of tenancy under which Badrinath had originally obtained possession of the land should be changed into a permanent right. We have thus neither the estoppel by representation that was found in 4 Pat 707,[10] nor the estoppel by acquiescence referred to in 1 H L 129,[11] from which an implied contract of permanency could be inferred : *see* 21 All 496.[3] In my opinion the learned Subordinate Judge was in error not only (as I have already shown) in drawing an inference or making a presumption of permanency of the tenancy but also in holding that there was any equitable estoppel.

In spite of his findings on these two points, the learned Subordinate Judge proceeded to assess a fair and equitable rent for the holding, apparently under the impression that R. 28 (8) of the Govern-

10. A. H. Forbes v. L. E. Ralli, A I R 1935 P C 146=87 IC 318=52 I A 178=4 Pat 707 (PC).

11. Ramsden v. Dyson, (1866) 1 H L 129=12 Jur (N S) 506=14 W R 926.

ment Estates Manual, which speaks of regular civil suits for ejectment with an alternative prayer for enhancement, gave the Court jurisdiction to assess rent in such cases. But as was pointed out in 6 Pat 446,[1] the Court has no power to impose upon the parties a bargain not of their own making in a suit which does not relate to agricultural land governed by the (Bengal or) Chota Nagpur Tenancy Act :

> Once it is settled that the original bargain was for a permanent tenancy at a fixed rent, all question of enhancement is necessarily gone unless such proceeding is authorized by statute,

as was said by Lord Dunedin in 47 Cal 1.[12] As a matter of fact the Government pleader at first complained of the assessment made by the lower Court as arbitrarily low, but he finally conceded that the Court had no jurisdiction to make a bargain for the parties at all, nor was the contrary urged by the learned advocate for the respondents in view of what was said in the case in 6 Pat 446.[1] Though the appellant is right in his contention that the lower Court erroneously held the tenancy to be permanent, he is still not entitled to ejectment in this suit. It is a tenancy from year to year that we are dealing with in this case, and the landlord can only terminate such a tenancy by serving a proper notice to quit. The Subordinate Judge has shown that no notice was served upon defendant 2, one of the recognized tenants, but that a notice had been left with his minor brother, defendant 1, nor upon defendants 3 to 5, as to whom the case made in the plaint was that these defendants were not entitled to any notice because they were not recorded as lessees of the holding but that notice had been served on them to avoid legal objections. The Subordinate Judge's finding regarding non-service has not been assailed, and the mere circumstance that these defendants are not recorded as lessees is of little assistance to the landlord. For, if the tenancy be transferable, non-recognition by the landlord would not affect the rights of the transferees; and if it be assumed that the tenancy was non-transferable the contesting defendants have been in possession of the holding to the exclusion of the recorded tenants, from 1913 onwards, and as they have done so to the knowledge of the plaintiff, the claim to eject them without notice on the footing that they are trespassers could presumably be met by adverse possession of a tenancy interest for over 12 years. This aspect of the matter was however not gone into below, doubtless because the holding was non-agricultural; and nothing has been said before us to suggest that even in 1913 such holdings were non-transferable.

It follows that though the appellant has succeeded in his contention as regards the nature of the tenancy, none of the three prayers made in the plaint can be allowed. The appeal therefore fails except in the matter of the assessment made by the lower Court which is without jurisdiction and must be set aside. The suit should now stand dismissed. In the circumstances I would make no order about costs, the course properly adopted by the lower Court.

K.B./A.L. *Order accordingly.*

12. Mt. Afzalunnissa v. Abdul Karim, A I R 1919 P C 11=50 I C 749=47 Cal 1=46 I A 131 (P C).

A. I. R. 1937 Patna 399

WORT AND DHAVLE, JJ.

Secretary of State — Plaintiff — Appellant.

v.

Sarat Chandra Sen Gupta — Defendant — Respondent.

Appeal No. 28 of 1933, Decided on 1st March 1937, from original decree of Subordinate Judge, Palamau, D/- 24th September 1932.

(a) Estoppel—Equitable — Plot let out by Government for building purposes without fixing duration of term—Government advancing loan for building by mortgage of plot—Held there was no implied representation founding estoppel or legal inference that tenancy became perpetual.

If a Court of equity is to enforce a title to land against the person who at law is the owner thereof the title must nevertheless be based either upon contract, express or implied, or upon some statement of fact grounding as estoppel.

[P 406 C 1]

A certain plot was settled and leased out by Government for building purposes. The lease was apparently for no fixed term. There was no legal usage or custom by which persons acquiring homestead land had a permanent right therein. The lessee obtained a loan from the Government for the purpose of building on the land and executed mortgage of the land:

Held: that the mortgage advance was neither an implied representation founding an estoppel nor a circumstance sufficient to justify the legal inference that Government had by plain implication contracted that right of tenancy should

become a perpetual right of occupation: *A I R 1931 P C 79, Ref.*; *21 All 496, Foll.* [P 406 C 1]

(b) Occupancy rights—Plot of land in respect of which no occupancy rights were created purchased by purchaser and amalgamated with other plots leased by Government for non-agricultural purposes—Held no occupancy rights were created in favour of purchaser.

Tenancy Acts apply to agricultural lands and not to non-agricultural lands. [P 402 C 2]

Where therefore a person purchased a plot of land in respect of which no occupancy rights were created in favour of the seller at the time of sale and amalgamated that plot with other plots which were let out to him by the Government for non-agricultural purposes:

Held: occupancy rights were not created in favour of the purchaser. [P 402 C 2]

(c) Lease—Period of lease—Land let out by Government for building without mention of duration of term—Tenancy is at will—It becomes one from year to year on payment of rent.

Where certain property was let out by Government for building purposes without any mention of or agreement about, the duration of the term:

Held: that the tenancy was at will which became converted by payment of rent into a tenancy from year to year. [P 406 C 1, 2]

Government Pleader — for Appellant.

S. M. Mullick, A. B. Mukherjee and *K. N. Banerjee*—for Respondent.

Wort, J.—This appeal relates to a plot of building land in Daltonganj held by the defendant from the plaintiff at a rent of Rs. 26-2. The Judge in the Court below has granted a decree to the plaintiff for ejectment, but has proceeded to order that the defendant should execute a fresh lease at an annual rent of Rs. 38-2-6 within two months in default of which the plaintiff was to have possession. I have already dealt with the question of jurisdiction of the Judge to make a bargain between the parties in *First Appeal No. 27 of 1933*,[1] and I propose to make no further observation in this case with regard to that matter excepting to repeat that the Judge had no jurisdiction to make such an order. The only question that remains therefore is whether the plaintiff was entitled to eject the defendant.

By way of preliminary objection Mr. Sushil Madhab Mullick, who appears on behalf of the defendant contended that the appeal was incompetent. It is said that it appears from the decision of the Court below that, even succeeding on the question of ejectment the plaintiff was not desirous of ejecting the defendant so long as he paid a fair rent to be fixed by the Court; and it is said that by letter the defendant's father agreed to execute a lease at the rent so fixed. This is tantamount (so it is contended) to a compromise of the action in which event the appeal does not lie. From a perusal of the judgment, however, it is quite clear that not only the Court but the plaintiff and the defendant were under the impression that the Court had jurisdiction to settle rent for the parties. In this connection it appears that the Judge in trying these cases had in mind R. 28, Cl. (8), of the Bihar & Orissa Government Estates Manual of Instructions to Government Officers, with regard to suits of this kind in which they are ordered, in dealing with khas mahal properties, to claim ejectment, and, in the alternative, the settlement of a fair rent. This is wholly misleading and has misled the Judge in the Court below as he appears to be of the opinion that this is binding on the Court. The parties and the Court, as I have said, were under the impression that the Court had jurisdiction and the matter is referred to in these terms:

It has been suggested by both the parties that a fair rent may be fixed by the Court and an opportunity be given to the defendant by way of equitable relief against forfeiture to take a lease from the plaintiff with a stipulation to pay the said rent.

There appears to be a confusion of thought in this matter. There was no question here of forfeiting a lease; it was a question of the term having expired by a notice to quit in which event there could be no question of a relief against forfeiture. It is under this misapprehension that the Court has acted, and in my view it was not a question of the compromise of the action but the exercise of an assumed jurisdiction. In my judgment there is no substance in the contention that the appeal is not competent as the plaintiff is entitled to appeal if in fact the Judge purported to exercise jurisdiction in giving the alternative form of relief.

The facts of the case were these. By an order of 9th December 1901, the Deputy Commissioner gave possession to the defendant of a block of land known as plots 608 and 601 at a rent to be fixed. In addition the defendant purchased plot 590 adjoining the land under settlement by Government. This was amalgamated with the other plots, and a rent of Rs. 26-2-0 was fixed by Government for the whole. The purchase

1. Secy. of State v. Rajendra Prasad, *reported in* A I R 1937 Pat 391.

to which I have made reference was from one Lal Mohammad Khan in the year 1902. A notice was issued on the defendant in 1926 to execute a lease by 20th January 1927 at an enhanced rate. This the defendant failed to do. Thereupon Government served a notice dated September 1928, calling upon the defendant to quit on 31st March of the following year.

An issue was raised as to whether S. 139, Chota Nagpur Tenancy Act applied. The defendant contended that as a portion of the disputed land was occupancy land, the Court of the Deputy Commissioner, and not the civil Court, had jurisdiction in this case and that, in addition, the defendant had occupancy rights by reason of S. 78 of the Act. The Judge in the Court below has held against this contention and also held that the Crown Grants Act (15 of 1895) did not apply, and has held that the Transfer of Property Act applied to the case. The Judge in this case has also held contrary to the defendant's contention that the Deputy Commissioner settling this land did not induce the defendant to take possession on the footing that the lease was a permanent one. The argument of the defendant in the Court below was put in a somewhat different form, namely, that the Deputy Commissioner induced the defendant to take settlement of the land and never suggested that the settlement should be a temporary one. The Judge has come to a conclusion against the defendant on the footing that there was nothing to show that the Deputy Commissioner had given the defendant to understand that the lease was permanent. He has rightly held in my judgment that as the origin of the tenancy was known there could be no inference that there was a permanent tenancy. The position of the defendant is that as no term was fixed, the defendant obtained such a tenancy as regards its term as the law implied in the case.

Reliance, both in the Court below and in this Court, was placed also upon the rule of equitable estoppel and the case in 52 I A 178[2] was quoted. The facts of that case are entirely different. In that case there was a definite representation that the lease which had been obtained by Forbes was of a permanent character and it was in those circumstances that their Lordships of the Judicial Committee of the Privy Council held that the landlord was estopped. In this case apart from the fact that the defendant was allowed to use the land for the purpose for which it was let out, there could be no suggestion that the necessary facts in order to establish an estoppel were proved, and, as I have already pointed out, there was no room for any inference contrary to what we know the origin to have been. Nor was it established as the defendant contended that there was some local usage or custom by which persons acquiring homestead land had a permanent right therein. The defendant further relied upon the fact that he obtained a loan from Government to the extent of Rs. 2,000 for the purpose of building on this land. That in itself adds nothing to the terms of the original grant, that the land was for the purpose of building, and from that fact it cannot be held to be established that there was any representation by Government in granting the loan as a result of which the defendant's conduct was influenced. It appears that the defendant in the Court below relied upon the decision in 58 I A 91.[3] But this case is against the defendant. That was a case in which the tenant went into possession of the land on the understanding that he was to have a permanent lease. He went into possession in 1913 and expended large sums of money on the land by way of building. Ultimately the plaintiff brought an action based on a notice to quit, alleging that the defendant to be a mere monthly tenant. The appellate Court relying on 18 Ves 328[4] and 1 H L 129[5] held that the landlord was estopped. The High Court also relied upon the decision in 21 Ch D 9[6] in holding that it was part performance of an oral agreement.

Their Lordships of the Judicial Committee of the Privy Council held both these pleas to be unfounded and doubted whether the English equitable doctrine of part performance affecting the provision of an English statute could by analogy be applied to such a statute as the Transfer of Property Act. I mention that part of

2. A. H. Forbes v. Ralli, A I R 1925 P C 146=87 I C 318=52 I A 178=4 Pat 707 (P C).
3. G. H. C. Ariff v. Jadunath Majumdar, A I R 1931 P C 79=131 I C 762=58 I A 91=58 Cal 1235 (P C).
4. Gregory v. Mighell, (1811) 18 Ves 328=11 R R 207.
5. Ramsden v. Dyson, (1866) 1 H L 129=12 Jur (N S) 506=14 W R 926.
6. Walsh v. Lonsdale, (1883) 21 Ch D 9=52 L J Ch 2=46 L T 858=31 W R 109.

their decision by reason of the argument which has been advanced that the decision in *Ariff's case*[3] depended upon those considerations and not so much on the question of the application of the doctrine of equitable estoppel. But their Lordships' decision was clearly in two parts: first as regards the doctrine of part performance, and secondly the question of equitable estoppel. As regards the latter, their Lordships made this observation :

> This is no case of money being expended by the respondent in any mistaken belief as to his legal rights, or of the appellant knowing of the existence of any such mistaken belief, or encouraging the respondent by abstaining from asserting a right inconsistent with the acts of the respondent (landlord).

Their Lordships then proceeded to note the facts of the case and observed that having gone into possession upon a verbal agreement for the grant of a perpetual lease he could have sued for, and obtained, a registered instrument to enjoy the property in perpetuity. But the time for such an action had elapsed. In this case also it cannot be said that the defendant was under any mistaken belief as to his legal rights. He had a lease apparently for no fixed term and a lease for the purposes of building. The mere fact that the land was to be used by agreement between the parties for the purpose of building does not in itself give any permanent right in the land; and as I have said there could be no suggestion that there is any representation either by word or by act which would have led the defendant to have supposed his rights to be any other than those stated in the agreement. In those circumstances we have to see what was the position in law of the defendant. The case is not governed by the Transfer of Property Act as the Crown Grants Act of 1895 applies, *see* 6 Pat 446,[7] otherwise by S. 107, the interest which the tenant would have would be a tenancy from month to month. We must in those circumstances apply the rule of the Common law as the rule of justice, equity and good conscience. The position of the defendant therefore would be that of a tenant from year to year.

The other contention of the defendant was that he was governed by the Chota Nagpur Tenancy Act and had occupancy rights. In this case the defendant raised this point in his written statement and an issue was framed in these terms : "Has the civil Court jurisdiction and is the suit barred by S. 139-A, Chota Nagpur Tenancy Act?" That is a broad issue, the question arising thereunder being whether the Court of the Subordinate Judge or the Court of the Deputy Commissioner had jurisdiction. The contention of the defendant was that Lal Mohammad Khan, from whom the defendant purchased a part of the land on 23rd February 1902 was recorded as a non-occupancy raiyat having been in possession as such for six years, that the defendant having been in possession for more than six years, occupancy rights had accrued. That however in my judgment does not lead to the conclusion that the defendant acquired occupancy rights on that part of the land which was admittedly let to the defendant for the purposes of building. As we have seen the two blocks of land were amalgamated after the purchase in February of 1902 and settled with the defendant on a rent of Rs. 26-2-0. There is abundant authority for the proposition that the Tenancy Acts apply to agricultural lands and not to non-agricultural lands : *see* the cases in 11 P L T 107[8] and 42 C L J 197.[9] In those circumstances the tenancy being from year to year, the question was whether the notice expiring on 31st March 1929 was a valid notice. It does not clearly appear at what time the rent, Rs. 26-2-0, was fixed for the amalgamated holding. The fixing of the rent and the agreement by the defendant to pay that rent implied from the fact that he did pay it, would constitute a new letting. Possibly it was in those circumstances that the defendant's contention in the Court below as to the validity of the notice was confined to the question whether the notice was issued by the proper authority, and no question arose as to the expiration of the notice on 31st March 1929 as a notice expiring on the anniversary of the commencement of a tenancy. As no question arises in this Court as to the validity by reason of the authority issuing it, the notice must be held to be valid. For the reasons which I have already stated the decision of the learned Judge in the Court below assessing a rent of Rs. 38-2-6

7. Secy. of State v. Nistarini Anne Mitter, A I R 1927 Pat 319=104 I C 209=6 Pat 446.

8. Bishnath Singh v. Mt. Bibi Ayesha, A I R 1930 Pat 224=120 I C 477=11 P L T 107.

9. Purusottam Mahesri v. Panchanan Mazumdar, A I R 1926 Cal 373=90 I C 805=42 C L J 197.

must be set aside and the parties must be left to make their own bargain in the matter. In those circumstances the judgment of the Court below granting the plaintiff's prayer for ejectment will stand. The appeal has in substance succeeded, but there will be no costs.

Dhavle, J.—This appeal arises out of a suit for ejectment from land let for house building and gardening in the town of Daltonganj in the Palamau Government Khas Mahal. The plaintiff's case was that the land was leased to the defendant for non-agricultural purposes, without any registered instrument, and carried an annual rent of Rs. 26-2-0 payable by the official year ending the 31st of March. In 1924 the plaintiff had a survey made of the town and fixed certain new rates for various classes of land in view of the growth of trade and rise in local values. A new lease with the relevant rate was offered to the defendant. But as the defendant did not accept the offer he was served with a notice to quit, and on his failure to comply, this suit was filed for his ejectment, with a prayer in the alternative that a rent of Rs. 83-11-0 per year for 2.44 acres in accordance with the rates fixed by the plaintiff be declared payable by the defendant "for a period of 30 years or till next settlement." The defendant denied that he was a tenant from year to year as alleged by the plaintiff, and claimed a permanent tenancy on various grounds. He also assailed the new rates of rent fixed by the plaintiff, and denied the jurisdiction of the civil Court to try the suit on the ground that the land was homestead land governed by the Chota Nagpur Tenancy Act. There were other defences taken, which it is not material to state. The lower Court found that the tenancy was governed by the Transfer of Property Act and that the civil Court had jurisdiction to try the suit. It held that the defendant had not acquired any permanent right to the land, and that the plaintiff was, therefore, entitled to eject him. As regards the plaintiff's alternative prayer for enhancement the learned Subordinate Judge said:

> It has been suggested by both parties that a fair rent may be fixed by the Court, and an opportunity be given to the defendant by way of equitable relief against forfeiture to take a lease from the plaintiff with a stipulation to pay the said rent. The learned pleader for the plaintiff has conceded that the plaintiff has no intention to turn out tenants who would be ready and willing to pay the rent to be fixed by the Court. I therefore deem it necessary to assess rent in respect of the disputed holding on the materials placed by the parties in this suit.

The plaintiff had fixed a rate of Rs. 60 an acre for ·35 acre of land and of Rs. 30 an acre for 2·09 acres of another class of land, and the Subordinate Judge allowed instead a rate of Rs. 25 an acre for the ·35 acre and Rs. 15 an acre for 1·96 acres only, which a Commissioner appointed in the case had found to be in the possession of the defendant. This gave a total rent of Rs. 38-2-6 and the Subordinate Judge decreed that the defendant do take a fresh lease of the disputed land on this rent within two months, with ejectment in default. The plaintiff appeals, and contends that the lower Court has misappreciated his position and wrongly decreed ejectment only in the event of the defendant failing to take a lease on the rent fixed by the Court. A ground was also taken in the memorandum of appeal that even assuming that the plaintiff's pleader had conceded the plaintiff's case on the point of ejectment (i. e. ejectment by reason of the termination of the tenancy), the lower Court should have ordered the defendant to pay at the rate of Rs. 83-11-0 a year for a period of 30 years or till next settlement. Mr. Sushil Madhab Mullick for the defendant-respondent urged at the outset that the plaintiff is not entitled in appeal to ask that the lower Court should have passed an unconditional decree for ejectment since this point was given up below. He argued that the relief asked for, in the plaint consisted of two independent alternatives, viz. (1) ejectment and (2) rent of Rs. 83-11-0 per annum. But it is obvious that on the plaint as framed no question of fixing a new rent could arise unless it was held that the plaintiff was not entitled to ejectment as on the termination of a terminable tenancy. The Government pleader says that even now, as in the similar case in 6 Pat 446,[7] the plaintiff has no intention of turning out the defendant if he should agree to take a fresh lease upon the terms proposed by the appellant and he points out how this is very different from saying that the plaintiff gives up the claim to ejectment and leaves the rent to be fixed by the Court.

We were informed, after enquiry, that there was no talk below between the parties of a compromise at all. It is also

clear that the plaintiff's pleader below could not really have given up the claim to ejectment, since the lower Court has recorded an elaborate finding on the non-permanent character of the defendant's tenancy and his consequent liability to ejectment, which would have been quite unnecessary if the point had been given up. The learned Subordinate Judge must therefore have misunderstood the plaintiff's position, and we overruled the contention advanced by Mr. Mullick by way of preliminary objection. Mr. Mullick also said that the respondent had put in no cross-objection on the question of ejectment because this claim had been given up by the plaintiff in the lower Court. This however plainly confuses a cross-objection with an appeal. The misunderstanding such as it was, and the decree passed by the lower Court, may have prevented the respondent from appealing as regards ejectment irrespective of a fresh agreement, but on the appellant's memorandum of appeal, it was clearly open to the respondent, if he so chose, to take up that point by way of cross-objection.

This, however, was not the only confusion in the case. As was observed by Dawson-Miller, C. J. in 6 Pat 446,[7] already referred to, the Court had no power to impose upon the parties a bargain not of their own making in a suit relating to land which was not agricultural land governed by (the Bengal or) the Chota Nagpur Tenancy Act. In the present case both parties apparently proceeded on the footing that the Court below had jurisdiction to fix a fair and equitable rent by way of relief against forfeiture (as if there could be any "forfeiture" to speak of when a terminable tenancy is put an end to on proper notice). Mr. Mullick did not, however, argue that the lower Court had any jurisdiction to fix a rent, and the Government pleader conceded that there was no such jurisdiction, even though the plaint itself contained the alternative prayer for what the rule in accordance with which the suit was brought, R. 28 (8) of the Government Estates Manual, calls enhancement of the old rent. It cannot be seriously contended that the misunderstanding of the parties and the lower Court about jurisdiction to enhance the rent or assess a new rent by way of relief against the supposed forfeiture sufficed to turn the Court into an arbitrator. If it did, no appeal would lie at all. In these circumstances we held that there was no question of enhancement of assessment of a fair rent for our decision, and as the finding as regards the permanency of the tenancy was against the respondent, we allowed Mr. Mullick to argue the point, even though he had neither appealed nor put in a cross-objection.

The facts upon which this point turns are (1) that the respondent, who was then posted at Daltonganj as the senior Deputy Magistrate, received in December 1901 a notice or parwana from the Deputy Commissioner of the district, stating that certain plots had been settled with him since 1901-1902, that he may build a house thereon and that the rent of the land shall be fixed after the measurement of the land; (2) that in February 1902 the defendant purchased an adjoining plot from one Lal Muhammad Khan, who had been recorded in Sunder's settlement as a "non-occupancy (raiyat) for six years"; (3) that the defendant proceeded to erect a pucca building on the land including a portion of the plot purchased from Lal Muhammad, and (4) that in July 1902 he mortgaged the land together with the structures then being erected thereon to Government as security for a house-building advance of Rs. 2,000 which was to be repaid by the deduction of monthly instalments from his salary. It does not appear when exactly the land was measured, but it was measured as one holding and a sum of Rupees 26-2-0 a year was fixed as rent. No document, such as a patta or kabuliat, was however executed throwing any light on the duration of the term intended. The settlement was for non-agricultural purposes, and there is no dispute before us that the lower Court erroneously overruled the defence contention that the case was governed not by the Transfer of Property Act but by the Crown Grants Act (Act 15 of 1895). That point is concluded by the express ruling in *Nistarini's case*[7] already referred to. It was stated in para. 12 of the written statement of the defendant that settlements of land in Daltonganj made by the plaintiff for house building are by local usage permanent, heritable and transferable.

The learned Subordinate Judge held that this plea was without any foundation, and Mr. Mullick has not been able to assail this finding. But Mr. Mullick has urged that the consent of the landlord to the erection of the building (which was

the very purpose of the settlement) should be taken to supply the absence of any term agreed to between the parties. Mr. Mullick did not advance this contention as a matter of law but urged that it was the proper inference of fact in the circumstances of the case, and in support of such an inference he relied on 1 I C 802,[10] 32 Cal 648,[11] 2 Pat 452[12] and 55 Cal 355.[13] The learned Subordinate Judge referred to 52 Cal 43[14] for the "principles of law governing a case like the present one," though in an earlier part of his judgment he had expressly adverted to the fact that in the present case the origin of the tenancy of the defendant is known. But whether the origin be known or unknown, the question whether a tenancy is permanent or precarious is (except where nothing more is required than the construction of a document) "a legal inference from facts and not itself a question of fact," an observation of the Judicial Committee in 8 Lah 573[15] which was considered by Rankin, C. J. in 56 Cal 738.[16] The learned Chief Justice pointed out that now

> we cannot confine ourselves to saying (as was said by Garth, C..J. in 8 Cal 960[17]) that 'under these circumstances we think that the Courts below were at liberty to presume, if they thought fit, that the grant itself was of a permanent character.'

The question in such cases is whether the legal inference from the facts is that the tenancy is permanent or precarious, the burden of proof being on the tenant.

From this point of view the cases relied on by Mr. Mullick must be treated as decided on their own particular facts. It cannot be said as a matter of law that a tenancy must be permanent because it was created for building purposes. This is obvious from the fact that non-permanent building leases are not uncommon. In 27 Cal 570[18] a case where the kabuliat specified no term, Banerjee, J. found that :

> Upon the authorities a permanent tenancy may . . . . . be inferred from the length of possession by the tenant and his predecessors, from the fact of the tenure having been made the subject of transfer to the knowledge of the landlord, and from the fact of pucca buildings having been erected on the land with the knowledge of the landlord.

This was referred to in 32 Cal 648[11] one of the cases cited by Mr. Mullick which in its turn was followed by Jwala Prasad, J. in 2 Pat 452,[12] a case of a lease for the purpose of gola business and building houses with a provision for building pucca structures with the permission of the landlord. The learned Judge held that "the inference is not unreasonable that the lease in question was meant to be of a permanent character and not from year to year;" but the decision of the case was apparently rested on the "firmer ground" of an estoppel which was read into the permission granted by the landlord. It will be seen from Rankin, C. J.'s observations in *Kamal Kumar's case*[16] that the question now would be not whether such an inference is "not unreasonable" but whether it is a necessary inference. Even if the contrary were, however, to be held, the defendant in this case was not a stranger to the landlord. As the senior Deputy Magistrate, he could hardly have been altogether ignorant of the Government Estates Manual when he applied for a lease of Khas Mahal land. As the learned Subordinate Judge has pointed out, the Deputy Commissioner had no authority to grant a permanent lease, and it is impossible to accept the suggestion of the defendant that he was given to understand that the lease would be permanent. The land was let to him without a term, and though this was for building purposes an inference of permanency is contra-indicated by the known circumstance of the transaction. Failing an inference of permanency Mr. Mullick has urged the plea of equitable estoppel. He has referred to 4 Pat 707[2] but that was a case of estoppel founded on a definite representation by the landlord that the tenancy was permanent. Mr. Mullick has asked us to infer a similar representation from the house-building advance made by the plaintiff on the security of the premises. But the advance merely helped the expressly

10. Duraisawmy Chettiar v. Kuppusawmi Padayachi, (1909) 1 I C 802=5 M L T 89.
11. Promada Nath Roy v. Srigobind Chowdhry, (1905) 32 Cal 648=9 C W N 463.
12. Forbes v. Hanuman Bhagat, A I R 1924 Pat 88=77 I C 32=2 Pat 452=4 P L T 414.
13. Monmatha Nath v. Rajeswar Rai, A I R 1928 Cal 315=107 I C 81=32 C W N 184=55 Cal 355.
14. Abdul Hakim v. Elahi Baksha, A I R 1925 Cal 309=85 I C 103=52 Cal 43=29 C W N 138.
15. Dhanna Mal v. Moti Sagar, A I R 1927 P C 102=101 I C 355=54 I A 178=8 Lah 573 (P C).
16. Kamal Kumar v. Nand Lal Dube, A I R 1929 Cal 37=116 I C 378=56 Cal 738=33 C W N 211.
17. Gungadhur Shikdar v. Ayimuddin Shah, (1882) 8 Cal 960.
18. Ismail Khan Mohamed v. Jaigun Bibi, (1900) 27 Cal 570=4 C W N 210.

stated purpose of the tenancy, and cannot be taken to point to a permanency in view of the fact that it was to be repaid by deductions from the defendant's salary in a not very long period familiar to those who have had to work on the Civil Account Code. Mr. Mullick has also referred to *Ariff's case*.[3] But it was pointed out in that very case as regards equitable estoppel that :

> If a Court of equity is to enforce a title to land against the person who at law is the owner thereof the title must nevertheless be based either upon contract, express or implied, or upon some statement of fact grounding an estoppel.

Lord Russell of Killowen again expressed the same view shortly afterwards in 61 M L J 958[19] as follows :

> Whether there can be any estoppel which is equitable as distinct from legal and whether equitable estoppel is an accurate phrase, their Lordships do not pause to enquire. The foundation upon which reposes the right of equity to intervene is either contract or the existence of some fact which the legal owner is estopped from denying.

The mortgage advance is neither an implied representation founding an estoppel nor a circumstance sufficient to justify the legal inference that the plaintiff had by plain implication contracted that the right of tenancy should be or become a perpetual right of occupation: 21 All 496.[20] The only other point raised by Mr. Mullick was that the defendant had an occupancy right in the plot purchased by him from Lal Muhammad and partly built over. But no occupancy right had accrued to Lal Muhammad himself by the time of his sale to the defendant, and the plaintiff's settlement with the defendant was for non-agricultural purposes. The defendant also admits that he did not use the land for agricultural purposes, nor is it pretended that he was a raiyat so as to make S. 78, Chota Nagpur Tenancy Act, applicable to his tenancy of the homestead. His tenancy of the plot was neither agricultural nor such as at any time to support an occupancy right. The suit was therefore not excepted from the cognizance of the civil Court.

The view of the lower Court that the tenancy was not permanent is, accordingly, right. There was a letting without any mention of or agreement about the duration of the term, and this meant a tenancy-at-will, which became converted by payment of rent into a tenancy from year to year. This tenancy has been terminated by a proper notice to quit, and the plaintiff was entitled to ejectment in accordance with the first and second prayers of the plaint. I would allow the appeal and in lieu of the relief given by the lower Court decree the suit as indicated above. As to costs, I would make no order in view of the circumstance that the appellant himself contributed so largely to the confusion regarding ejectment and the jurisdiction of the Court to assess a fair and equitable rent.

S.C./D.S. *Order accordingly.*

19. Canadian Pacific Ry. Co. v. The King, A I R 1932 P C 108=138 I C 292=61 M L J 958 (P C).

20. Beni Ram v. Kundan Lal, (1899) 21 All 496 =26 I A 58=7 Sar 523 (P C).

A. I. R. 1937 Patna 406

VARMA, J.

Sulaiman Shah and *others*—

Petitioners.

v.

Emperor — Opposite Party.

Criminal Revn. No. 617 of 1936, Decided on 18th December 1936, from order of Offg. Addl. Sess. Judge, Muzaffarpur, D/- 30th September 1936.

Penal Code (1860), S. 429—Young calf branded as bull at shradh of complainant's deceased father and fed and kept at complainant's house even thereafter—Killing of such bull held was offence under S. 429 as it did not cease to be property of complainant.

A young calf was branded as bull at the shradh of the complainant's deceased father and it used to be fed and kept at the complainant's own place even thereafter :

Held : that the killing of such a bull was an offence under S. 429, Penal Code, as the bull had not ceased to be the property of the complainant : *17 Cal 852* ; *8 All 51* and *9 All 348*, *Disting.*; *1 Weir 500* and *11 Mad 145*, *Rel. on.*

[P 407 C 2]

Yasin Yunus for *Azizullah* and *Mohammad Hasan Jan*—for Petitioners.

Braj Kishore Prasad for *Jaleshwar Prasad*—for Opposite Party.

Order. — The eight petitioners before me have been convicted under S. 429, read with S. 34, Penal Code and were originally sentenced to suffer one year's rigorous imprisonment each. On appeal before the Additional Sessions Judge of Muzaffarpur, the sentence of the petitioners was reduced from one year to six months.

The case for the prosecution is that on 24th May 1936, a bull was killed at

Mauza Koili. This bull was branded as a bull on the occasion of the shradh of Nantun Jha's father Mauje Jha of Koili. Both the Courts below have come to the conclusion that the petitioners before me took part in the slaughtering of the bull. Mr. Yasin Yunus, appearing on behalf of the petitioners, relying upon some reported cases, has urged that as the bull was not the property of any person, its killing could not amount to mischief and, therefore, the petitioners were entitled to an acquittal. He has referred to the case in 17 Cal 852,[1] in which it was held that a bull dedicated and set at large at the shradh of a Hindu in accordance with religious usage is not an 'object' within the meaning of S. 295. In that case it was further held that the bull did not come within the description of moveable property mentioned in Ss. 373 and 403 or 'property' within the meaning of S. 425, Penal Code, and could not be the subject therefore, of theft, criminal misappropriation or mischief.

The next case referred to is 8 All 51.[2] That was a case under S. 411, Penal Code, where it was held that the bull which was set at large by some Hindus according to Hindu usage at the time of performing funeral ceremonies could not be said to be 'property' within the meaning of the Penal Code. The same view was expressed in a subsequent decision of the Allahabad High Court in 9 All 348,[3] but a different note has been struck in a decision of the Madras High Court in 11 Mad 145,[4] where their Lordships of the Madras High Court held that a bull dedicated to an idol and allowed to roam at large is not *fera bestia* and, therefore, *res nullius*, but, *prima facie*, the trustee of the temple has the rights and liabilities attaching to its ownership. Their Lordships observed as follows :

> If, on the evidence, it appeared that the animal was turned loose after dedication to the temple and that it was actually or inferentially accepted as so dedicated on behalf of the temple, then though the animal was allowed to be at large, free from all control, it would, *prima facie*, be the property of the temple.

There is another case, the case in 1 Weir 500,[5] which is very much similar to the case in hand in view of the findings arrived at by the Courts below. There, discussing a similar case, their Lordships observed :

> Before finding that it ceased to be private property, it was necessary to see whether the funeral ceremony referred to was followed by an abandonment of all control and property over the beast. It may be that the subsequent acts of the owner amount only to a reservation of the property for the purpose of putting the animal to pious or charitable uses only, or they may amount to a dedication to a temple or a section of the public so as to vest the property in the latter. In none of these cases, it would be correct to say that the bull belonged to no one.

In this case the trial Court came to a finding in these terms :

> From the overwhelming evidence that has been adduced on behalf of the prosecution, it is clear that a 2—2½ months young calf was branded as bull at the shradh of the complainant's deceased father, the late Mauje Jha, that it used to be fed and kept at his (complainant's) own place even thereafter and it was killed by the accused because it happened to enter into and graze the accused's kharaur, etc.

The lower appellate Court also came to a similar finding in the following terms :

> I think that on account of its young age the bull in question had not been set at large to roam anywhere it liked, and had not been abandoned by the complainant perhaps like some other full-grown bulls of the village but was being taken care of and fed by him and regarded as his property after Mauje's shradh till the date of occurrence.

On these findings, with which I have no reason to interfere, it is clear that the bull was not the type of animal contemplated by the cases reported in 17 Cal 852,[1] 8 All 51[2] and 9 All 348.[3] It had not ceased to be the property of the complainant. In our own Court I have come across a decision by a Single Judge delivered just a few weeks ago in Criminal Revision No. 577 of 1936, in which Madan, J., held that even after a bull is branded at a funeral ceremony, but the owner does not abandon control of it, it cannot be treated as *res nullius*.

On these authorities, and concurring with the findings of the Courts below, I have no hesitation in holding that the petitioners are guilty of the offence for which they have been convicted. I would, therefore, confirm their conviction. The next question is the question of sentence. I think in a case like this the ends of justice will be met if I reduce the sentence

1. Romesh Chuder Sannyal v. Hiru Mondal, (1890) 17 Cal 852.
2. Queen-Empress v. Bandhu, (1886) 8 All 51= 1885 A W N 326.
3. Queen-Empress v. Nihal, (1887) 9 All 348= 1887 A W N 73.
4. Queen-Empress v. Nalla, (1888) 11 Mad 145.
5. Ghanta Veeranna v. Pasupati Narsiah, (1889) 1 Weir 500.

of the petitioners to three months' rigorous imprisonment. With this modification the application is rejected.

W.D./A.L. *Sentence reduced.*

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* A. I. R. 1937 Patna 408

COURTNEY-TERRELL, C. J. AND JAMES, J.

Rashik Lal Sahu and *another* — Appellants.

v.

Babu Surpat Singh and *another* — Respondents.

Letters Patent Appeal No. 12 of 1936, Decided on 3rd February 1937, from decision of Wort, J., D/- 24th February 1936, reported in *A I R 1936 Pat 315*.

(a) Precedents — Interpretation by High Court of certain Privy Council decision — Same interpretation should be followed until dissented from by larger Bench.

Where a decision of the Privy Council has been interpreted by the High Court, it is desirable that the interpretation placed by the Court upon that Privy Council decision should be followed unless a larger Bench should dissent from that interpretation. [P 409 C 2]

*** (b) Record of Rights — Presumption in favour of entry—Entry that land was held rent free—Presumption is not rebutted even though landlord shows that land fell within his proprietary rights :** *A I R 1936 Pat 315= 162 I C 999, Reversed.*

Even though the landlord succeeds in showing that the land in question falls within his proprietary rights the presumption given by the Record of Rights to the entry that the land was held rent free should not be taken as rebutted : *A I R 1937 Pat 96, Dissent.*; *A I R 1923 Pat 340, Foll.*; *A I R 1936 Pat 315=162 I C 999*, **Reversed.** [P 409 C 2]

D. L. Nandkeolyar — for Appellants.

J. C. Sinha — for Respondents.

Courtney-Terrell, C. J.—This Letters Patent appeal is brought by the defendant-appellant against a decision of Wort, J. sitting singly and arises out of a suit by the landlord for a declaration that an entry in the Record of Rights to the effect that the land held by the defendant is held rent free is erroneous and for assessment of a fair rent. The suit was dismissed by the trial Court and by the first appellate Court, but these decisions were reversed by Wort, J. who held that the landlord plaintiff was entitled to succeed.

The substantial point for our consideration is the effect to be given to the entry in the Record of Rights that the land is held rent free. Some difficulty has been felt by the Courts by reason of a decision of their Lordships of the Privy Council in 2 Pat 38[1] and that decision has been interpreted and discussed in subsequent decisions of this Court. The first decision of importance was given in 11 P L T 444.[2] The decision of the Privy Council had given rise to the belief that it laid down the proposition that the presumption of the correctness of the entry in the Record of Rights was rebutted if the landlord could show that the land in respect of which the suit was brought fell within the ambit of his 'zamindari'. Now the word 'zamindari' has been somewhat loosely used. It may be used in the strict sense to denote the land in respect of which the landlord has a proprietary right and in respect of which he is assessed to revenue. It may also be used in a wider and looser sense to mean the land over which he has proprietary rights as to part of which he is assessed to revenue and as to the remainder of which he is not assessed to revenue but may have the duty of collecting the cess, and in this wider sense it may be that the 'zamindari' includes both land in respect of which the landlord receives rent and which is assessed to revenue and land in respect of which no rent is paid or in respect of which the tenant is not liable to pay rent. I think that some of the subsequent confusion has been due to the fact that the term has been used, sometimes in the one sense and sometimes in the other.

In the Privy Council decision, as was pointed out by Das, J. in 11 P L T 444,[2] their Lordships, when the decision is examined, were dealing with a case in which it was shown by evidence that there was no rent free land within the landlord's zamindari and that the land in suit was within the zamindari; and as a matter of evidence in that case their Lordships took the view that as a matter of fact the presumption was rebutted. It is entirely a mistake to imagine that that decision laid down the broad proposition that if it could be shown that the land in suit was part of the landlord's proprietary right, the presumption which the Courts

1. Jagdeo Narain Singh v. Baldeo Singh, A I R 1922 P C 272=71 I C 984=49 I A 399=2 Pat 38 (P C).
2. Stonewigg v. Kameshwar Narayan Singh, A I R 1923 Pat 340=71 I C 1022=11 P L T 444.

are bound under the Bengal Tenancy Act to attach to the entry in the record has been rebutted. Indeed if such a broad proposition had been intended by their Lordships of the Privy Council it would have been in contravention of the express terms of the Bengal Tenancy Act. By S. 102, para. (j) it is the duty of the officer to make an entry in the record as to whether the land is claimed to be held rent free and whether or not rent is actually paid and if not paid whether or not the occupant is entitled to hold the land without payment of rent, and if so entitled, under what authority. The entries including entries of such matters as are prescribed by para. (j) are given presumptive force by the Act itself and the proposition in the wider and erroneous sense which was attempted (had their Lordships laid down any such proposition) would have meant that as between a landlord and tenant that the entries in the Record of Rights relating to these matters have no presumptive force whatever.

The view of Das and Kulwant Sahay, JJ. in the case reported in 11 P L T 444[2] was followed and assented to by the judgment of a Bench of which I was a member together with Chatterji, J., also reported in 11 P L T 468.[3] The same view of the judgment of the Privy Council was taken by Mohamad Noor and Madan, JJ. in so recent a case as in 17 P L T 824[4] which was decided subsequently to the decision of Wort, J. from which this appeal is now presented. The learned Judge of this Court has made reference to the decision of a Bench consisting of himself and Agarwala, J. in 17 P L T 819[5] and in that case the Court did not follow the decisions of this Court reported in 11 P L T 468[3] notwithstanding that those decisions were cited to the Court. Now in the decision given by the learned Judge to which I have just referred it would seem that a point of principle in the matter of judicial decisions was not given its proper weight. The decision of the Privy Council had been interpreted in the two cases reported in 11 P L T 444[2] and 11 P L T 468[3] and it was in the circumstances therefore desirable that the interpretation placed by the Court upon that Privy Council decision should be followed unless a larger Bench should dissent from that interpretation. The learned Judges there, like Wort, J. in the particular case before us, seem to have reverted to and followed the contention that the decision of the Privy Council was to be given to have laid down the principle that when once the landlord had succeeded in showing that the land in question fell within his proprietary rights the presumption given by the Record of Rights to the entry that the land was held rent free should be taken as rebutted. In view of the decisions in 11 P L T 444[2] and 11 P L T 468[3] that opinion as to the meaning of the decision of the Privy Council was not open to a Bench of two Judges sitting in this Court. The plaintiffs in this case did attempt to prove by the evidence of a patwari that the land in respect of which the suit was brought was in fact assessed to rent, but this evidence was not believed and in the circumstances, therefore, the entry in the Record of Rights should have prevailed and the defendant should have been held to have held his land rent free and the plaintiff's suit should accordingly have failed. For these reasons I would allow the appeal set aside the judgment of the learned Judge of this Court and restore the judgments of the trial Court and the first appellate Court with costs throughout.

James, J.—I agree.

B.D./D.S. *Appeal allowed.*

3. Jodha Sahu v. Tirbena Sahu, A I R 1929 Pat 748=123 I C 386=11 P L T 468.
4. Surpat Singh v. Bhupendra Narayan Singh, A I R 1937 Pat 165=16 Pat 105=17 P L T 824.
5. Kameshwar Singh Bahadur v. Shaikh Sakhawat Ali, A I R 1937 Pat 96=167 I C 238=17 P L T 819.

A. I. R. 1937 Patna 409

WORT, J.

Mt. Rukmini Kuer—Petitioner.

v.

Balmik Prasad and *another* —

Opposite Parties.

Civil Revn. No. 650 of 1936, Decided on 25th February 1937, from order of Dist. Judge, Patna, D/- 6th May 1936.

Civil P. C. (1908), O. 21, R. 89—Deficit of 4 annas in favour of auction-parchaser in challan of deposit—Judgment-debtor mistakenly depositing deficit in name of decree-holder—Court disallowing application to set aside sale on ground of such mistake—Application held should be allowed.

In an application to set aside a sale under O. 21, R. 89 of Civil P. C., the judgment-debtor made a

double mistake in the challan of deposit. When the deposit was first made there was a deficit of 4 annas in favour of the auction-purchaser and when the deficit was deposited the judgment-debtor made the mistake of depositing it in favour of the decree-holder. The Court disallowed the application on the ground of mistake in challan :

Held : that it could not be said that the judgment-debtor had not complied with the strict letter of the law on the principle of *de minimis non curat lex.* It was therefore proper under the circumstances to allow the application to set aside the sale. [P 410 C 1]

B. P. Sinha — for Petitioner.

R. K. Prasad — for Opposite Parties.

Order.—If I were to confirm the decision of the Court below in this case, it would in my judgment be reducing the law to an absurdity. There is no doubt that the full amount was deposited, although there was a mistake in chalan to the extent of 4 annas, a double mistake in fact, because the 4 annas was not deposited in the first instance, that is to say, when the deposit was first made there was a deficit in favour of the auction-purchaser of 4 annas, and when the deficit was deposited on the 14th April the judgment-debtor made the mistake of depositing it in favour of the decree-holder. I do not know what the exact system is in the Court below with regard to these matters, but I can only gather it from the reported decisions in so far as they throw any light upon the matter. But I propose to give no countenance to the idea that the Court, either on the order of the Judge or other person in authority, could not have altered the chalan for the purpose of putting matters in order. For this Court to hold that the judgment-debtor in this case had not in substance complied with the strict letter of the law would, in my judgment, be ignoring the well-known principle of *de minimis non curat lex.* In my judgment the Judge was quite irregular in this case, although perhaps his decision is understandable by reason of the authorities of this Court in not holding that the judgment-debtor was entitled to have the sale set aside. The rule is made absolute, but there will be no costs.

K.B./A.L. *Rule made absolute.*

A. I. R. 1937 Patna 410

WORT AND JAMES, JJ.

Liquidator, Bagha Co-operative Society — Plaintiff — Appellant.

v.

Debi Mangal Prasad Sinha and *others* — Defendants — Respondents.

Appeal No. 1070 of 1933, Decided on 25th September 1936, from appellate decree of Sub-Judge, Muzaffarpur, D/- 8th June 1933.

(a) Principal debtor and surety—Person holding himself responsible for payment of debt due to creditor from another, in letter under his signature to creditor—Such person becomes principal debtor and not surety.

Where a person states in a letter written by him to the creditor under his signature that he shall be responsible for the payment of the debt due to such creditor from another person, the person writing the letter stands in the position of a principal debtor and not of a surety. [P 411 C 2]

(b) Limitation Act (1908), S. 20—Payment and appropriation towards interest—Deposit by debtor with creditor society of amount towards debt due from him—No specification by him whether it should be credited towards principal or interest—Appropriation by society towards interest in account books—Subsequently letter by debtor to society stating about deposit—Debtor's consent held should be assumed to such appropriation by creditor—Payment held was towards interest as such within meaning of S. 20 (3).

Under S. 20, Limitation Act, if the creditor is to rely upon a payment of interest it must be a payment of interest as such, but as regards a payment towards principal no such specification is necessary. [P 413 C 1]

A debtor deposited a certain amount with the creditor society without specifying whether it was to be appropriated towards interest or principal. The creditor society appropriated the deposit towards interest in its account books. Shortly after the debtor wrote to the society about the deposit made by him. In a suit by the society for the recovery of the loan, relying on the payment as one made under S. 20 (3), Limitation Act, the debtor contended that the payment not being one made towards interest as such could not save limitation and the suit was therefore barred :

Held : that the debtor had the first option to state whether the deposit was to be appropriated towards payment of interest or principal and inasmuch as he did not exercise the option, and the creditor appropriated the amount towards interest, the debtor must be presumed to have consented to such appropriation and the payment was one made on account of interest and could be held to have been paid as such within the meaning of S. 20, Limitation Act : *A I R 1935 All 946, Dissent.* [P 411 C 2 ; P 412 C 1]

B. N. Mitter and *S. N. Banarji* — for Appellant.

N. K. Prasad II — for Respondents.

Wort, J.—This appeal is against the decision of the Subordinate Judge in an action in which the Bagha Co-operative Society claimed a certain sum of money—a loan taken by one Munshi Muna Pal. The Judge in the Court below held that the action was barred by limitation. I must say that when the case was first opened, it seemed impossible to support the contention of Mr. Mitter appearing on behalf of the plaintiff-appellant that the letter of 3rd February 1928, upon which he relies, gave a fresh start to limitation, and I am bound to add that I find some difficulty in coming to a conclusion in the matter. The question in the case was whether by the letter of 3rd February 1928 a fresh start to limitation was given under S. 20, Limitation Act. The facts which it is necessary to state are very few. Although Munshi Muna Lal actually borrowed the money from the Bagha Co-operative Society, it has been found by the Court below that it was taken by Munshi Muna Lal on behalf of defendant 1, in other words, defendant 1 was the debtor.

Before dealing with the main point in the case I propose to refer to two arguments addressed to us by the learned advocate for the respondents, who were defendants in the Court below. The first is as regards limitation and the second is with regard to the nature of the liability of defendant 1. So far as limitation is concerned, it was contended that this Court ought to hold, supporting the judgment of the Court below, that the action was in any event barred by limitation, that is to say, that the action was already barred when the letter of 8th September 1927 upon which this claim rests, was written. There is certainly nothing on the face of the record to entitle this Court to come to any such conclusion, and indeed it was never suggested in either of the Courts below that the action was so barred. The only question was whether the period of limitation between 8th September 1927 and the date upon which this action was brought was such as to bar the action; and, as I have already indicated, the only way the plaintiff could get out of that case was to show that by the letter of 3rd February 1928 a fresh start to limitation had been given. As regards the other question, the nature of the liability of defendant 1 it was contended by the learned advocate appearing on behalf of the defendant-respondents that the Court below had no right to come to the conclusion that defendant 1 was the debtor, that is to say, that it was on his behalf that the money had been advanced. But, as I have already said, the basis of the claim was the letter of 8th September 1927 which is to the effect:

> In obedience to your letter dated 8th September 1927 I beg to state that I hold responsible myself regarding the payment of the dues against Munshi Muna Lal, a member of the Bagha Co-operative Society, by 15th January 1928.

The letter is then signed by defendant 1. It is rather difficult to ascertain from the plaint exactly what the case of the plaintiff is: whether it is a case of defendant 1 being a surety, whether defendant 1 was to be looked upon as a principal debtor, or whether Munshi Muna Lal was to be looked upon as the principal debtor. But one matter is perfectly clear and that is that the letter of 8th September 1927 does not put defendant 1 who wrote the letter in the position of a surety; he becomes by that letter on its proper construction the principal debtor whatever the position may have been prior to the date upon which the letter was written. In my judgment, therefore, that point cannot avail the respondents. The only other question, the main question in the case, is whether the payment has been made and acknowledged within the meaning of S. 20, Limitation Act. The letter of 3rd February 1928 is a letter signed by Debi Mangal Prasad Sinha and its relevant portion is to this effect:

> I would like to bring to your kind notice that on 30th January 1928 I had been to Bettiah for paying respect to you and depositing money on behalf of Munshi Muna Lal, but to my great misfortune I could not see you. The money has been deposited.

Now, certain payments had been made towards this debt on behalf of Munshi Muna Lal, and the one with which we are concerned is a payment of Rs. 394 odd entered in the books of the Society as paid on account of interest. That is to say, it appears that a payment was made to the Co-operative Society, the creditor, which appropriated it towards interest, and it must be assumed that the debtor consented to that appropriation. Being the debtor he had the first option; he could have appropriated the amount towards principal or he could have appropriated it towards interest according to his own wish. But as I have said the creditor having appropriated it and the debtor having consented I suppose it must be assumed that the

amount was paid on account of interest, and it might be held to be paid as such within the meaning of S. 20, Lim. Act. That this payment of Rs. 394 odd was made, there can be no doubt and the amount was paid on account of this debt which in the first instance had been incurred by Munshi Muna Lal. Now the question is whether the statement in the letter of 3rd February 1928 that 'the money was deposited on 30th January 1928' can in the circumstances of the case be held to be an acknowledgment of payment within the third sub-clause of S. 20 of the Act. The learned Judge in the Court below did not address his mind to this question as it was not raised. He held merely that the action was barred by limitation as the period of three years had elapsed from 8th September 1927. Now, as this point arises in the case, there are two courses open to this Court, first to remand the case to the learned Judge in the Court below to determine this question as a question of fact and secondly to investigate the matter for itself under the powers given to it by S. 103, Civil P. C. It is the latter course that we propose to take.

Looking at the evidence a number of facts have in my judgment clearly proved first, that a payment was made on 30th January 1928 of Rs. 394 odd. I think also that it would not in any way be straining the evidence to hold that this was the payment made on 30th January 1928 and placed against interest in the manner which I have already indicated. It is also proved by the evidence of the plaintiff that the account was recorded in the name of Munshi Muna Lal as to do otherwise would be contrary to the rules of the Society. We then come to the letter of 3rd February 1928 itself. The letter clearly admits a payment. It was contended by the learned advocate for the respondents that the word used was 'deposited.' But I think it would be taking a very strange view of the letter if we hold that when the writer says 'money was deposited' he did not mean that he had paid the money. He admits having paid the sum on 30th January 1928. There can be no doubt whatever on the evidence taken as a whole of his having paid the amount against the account of Munshi Muna Lal. Taking the evidence as a whole there can be no doubt in my judgment that the payment referred to by the letter of 3rd February 1928 was this payment of Rs. 394 odd. There was one point taken by the learned advocate for the respondents and it was this : that the letter of 3rd February 1928 does not admit a payment by the debtor as such, but admits a payment on behalf of Munshi Muna Lal. To give effect to that argument would in my judgment be placing words in S. 20, Lim. Act, which are not there. All that is required by the section is an acknowledgment of the payment by the debtor.

We are not dealing here with the question of agency, otherwise certain very difficult questions would have arisen. As I have said, all that is required is an acknowledgment of the payment by the debtor, and in this case the person who wrote the letter of 3rd February 1928 has been held to be the debtor. I do not think there can be any doubt in this case that in the discussion which took place in the evidence the payment which is referred to in the letter of 3rd February 1928 was the payment which the plaintiff had proved, and in my opinion it would be taking a somewhat grotesque view of the evidence to hold otherwise. I have already stated in the course of my observation that from one point of view it might be taken that the payment of Rs. 394 odd referred to in the letter of 3rd February 1928 was the payment of interest as such within the meaning of S. 20, Lim. Act. I do not propose to come to any definite conclusion on that although I have the gravest possible doubts whether that could be said to be the case having regard to the plain construction of S. 20. When it speaks of an acknowledgment of the payment of interest, and acknowledgment of payment of interest as such, I am of the opinion (although perhaps it is unnecessary to decide the point definitely in this case) that the writing which is the acknowledgment of the payment of interest must also contain the description of the payment as a payment of interest. But it is unnecessary as I have observed to decide that question having regard to the view that I take of S. 20 as a whole. In this connexion I must refer to the Full Bench decision of the Allahabad High Court in 58 All 261.[1] This case is relied upon by

1. Udeypal Singh v. Lakshmi Chand, A I R 1935 All 946=159 I C 387=1935 A L J 1029=58 All 261 (F B).

the learned advocate for the respondent to support his contention that the letter of 3rd February 1928 does not give a further period of limitation as it is not an acknowledgment within the meaning of S. 20, Lim. Act, because there is no payment within that section. The learned Chief Justice of the Allahabad High Court construing this section came to this conclusion at p. 276 of the Report :

I have therefore come to the conclusion that where money is paid by a debtor without specifying whether the payment is towards interest or towards principal, leaving it to the option of the creditor to appropriate it as he likes, and the creditor appropriates it towards interest, there is neither a payment of interest as such nor a part payment of the principal within the meaning of S. 20, but there is a mere unspecified payment of money, which has subsequently by the act of the creditor become a payment of interest.

Thom, J., with one other of the learned Judges of the Court took an opposite view, but the majority concurring in the view taken by the Chief Justice, that view prevailed. But with great respect to the learned Judges the effect of the opinion there expressed would be to place words in S. 20, Lim. Act, which do not appear. The learned Chief Justice points out that where money is paid and there is no appropriation, or to put it more accurately, no specification whether payment towards interest or towards principal, it cannot be payment within the meaning of S. 20 of the Act. Now, it is quite clear that under S. 20, Lim. Act, if the creditor is to rely upon a payment of interest it must be a payment of interest as such, but as regards a payment towards principal no such specification is necessary. Now the effect of the opinion expressed by the majority of the Judges of the Allahabad High Court would make it necessary, both in the case of payment towards interest and in the case of payment towards principal, for the payer to specify towards which items they were made. In my view, with great respect, the opinion expressed is a view that I cannot possibly take, upon what seems to me, to be the plain construction of S. 20 of the Act. Having regard to the view I take of the letter of 3rd February 1928, connected as it is with the payment of Rs. 394 odd, I am of the opinion that the action is not barred by limitation, and therefore the decision of the learned Judge in the Court below is wrong. The appeal is therefore allowed, the judgment of the learned Subordinate Judge is reversed and the judgment of the trial Court restored with costs throughout.

James, J.—I agree.

K.B./A.L. *Appeal allowed.*

A. I. R. 1937 Patna 413

ROWLAND, J.

Ram Kishun Singh and *others* —
Petitioners.

v.

Faujdar Gop and *others* —
Opposite Parties.

Criminal Revn. No. 21 of 1937, Decided on 19th February 1937, from order of Sub-Divisional Magistrate, Jahanabad, D/- 8th December 1936.

Criminal P. C. (1898), S. 145 — Landlord taking out writs for delivery of possession against tenants in execution of rent decrees in respect of various holdings — Dispute arising, action under S. 145 taken—Magistrate issuing only one proceeding common to all holdings — Only landlord appearing and filing written statement of his claim—Magistrate held should have issued separate proceedings in respect of each holding — He should have first ascertained what holding was claimed by each tenant.

A landlord in execution of his rent decrees in respect of various holdings consisting of many plots took out writs of delivery of possession. The tenants resisted. Police lodged information with Magistrate calling for action under S. 145, Criminal P. C. The Magistrate, while proceeding, instead of dealing with each holding or tenant separately, issued one common proceeding in respect of all the holdings. The landlord alone appeared and put in his written statement of his claim. The Magistrate without proceeding ex parte and hearing evidence on the side of the landlord or without granting time to the tenants to file their written statements went into evidence without first ascertaining which of the tenants were claiming what lands, and decided the proceeding as if the entire lands had been claimed by the whole body of the tenants jointly. On revision :

Held : setting aside the order, that the Magistrate should have dealt with the case of each holding separately and should have given the tenants opportunity of producing evidence to show which of the holdings was claimed by each one.

[P 414 C 1,2]

Baldeo Sahay and *G. P. Singh* —
for Petitioners.

S. M. Gupta — for Opposite Parties.

Order.—This is an application to revise an order under S. 145, Criminal P. C., made by the Sub-Divisional Magistrate of Jehanabad which the Sessions Judge of Gaya refused to refer to the High Court. The petitioner before me is the landlord

of the village in which the disputed lands are situated. The lands appear to be not one compact block but a number of separate blocks entered in twenty-one khatas of the Record of Rights and containing a considerable number of plots of land. These lands at one time were in possession of tenants as ordinary raiyati lands, there having been sixteen tenancies concerned. In respect of each tenancy the landlord had obtained a rent decree and taken out execution and purchased the holdings. Writs of delivery of possession were also taken out, some in 1922, some in 1923, some in 1924, some in 1925, some in 1933 and one in 1935. On a report by the Sub-Inspector that there was dispute between the proprietor and the raiyats of the village regarding these lands the Sub-Divisional Magistrate drew up a proceeding under S. 145, Criminal P.C. It is to be noted that the Sub-Divisional Magistrate did not draw up one proceeding in respect of each holding but a single proceeding covering the whole number of khatas comprising the several holdings dealt with. The proceeding called on the parties in the usual form to attend the Court of the Magistrate in person or by pleader and to put in written statement of their respective claims. The petitioner landlord put in a written statement of his claim but not one of the tenants put in any written statement claiming any part of the disputed land. That being so, it was open to the Magistrate to proceed ex parte and hear evidence on the side of the landlord or he might grant time to the tenants to file their written statements, but he did neither of those things. He went into evidence without first ascertaining which of the tenants were claiming what lands, and he decided the proceeding as if the entire lands in suit had been claimed by the whole body of the tenants jointly. There was no such claim before him. The result includes the absurdities of passing an order declaring possession of Gobind Gop who was dead before the proceeding was drawn and declaring the possession of Aklu who before the police disclaimed any interest in the disputed land and made no appearance in Court.

The order of the Magistrate must be set aside. He will call upon the members of the first party to put in their written statements showing what lands each of them claims. He will then give the parties an opportunity of adducing their evidence and he should come to a finding regarding possession if not of each individual plot at least regarding each holding.

B.D./D.S. *Order accordingly.*

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* A. I. R. 1937 Patna 414

FAZL ALI, J.

Narain Pandey and *others*—Defendants — Appellants.

v.

Surajbhan Lal and *others* — Plaintiffs — Respondents.

Appeal No. 459 of 1933, Decided on 26th November 1936, from appellate decree of Sub-Judge, Gaya, D/- 14th February 1933.

(a) Pleadings — Non-joinder of parties — Objector should specifically state persons who ought to have been joined.

Where a defendant objects to the maintainability of a suit on the ground of non-joinder of necessary parties, he should specifically state who are the persons who ought to have been impleaded but are not so impleaded. [P 415 C 2]

*** (b) Civil P. C. (1908), O. 34, R. 1 — Rule of joining all persons interested in redemption is rule of procedure—In suit for redemption some of persons interested in redemption not joined—Court should decide if it can adjudicate upon rights of parties actually present — If so, then non-joinder of persons interested does not affect suit.**

The rule laid down in O. 34, R. 1. Civil P. C., that all the persons interested in the right of redemption shall be joined as parties is merely a rule of procedure which has been enacted with the object of avoiding multiplicity of suits. Where therefore in a suit for redemption some of the proprietors who were also interested in the equity of redemption have not been made parties, the point is whether the presence of these persons is essential to enable the Court to adjudicate upon the rights and interests of those actually before it. If the rights of the parties actually before it can be determined in the suit leaving the rights and interests of others unaffected, there is no reason why, even if other parties might properly have been added, the Court should not determine the matters in controversy between the parties actually present : *A I R 1922 Pat 651* and *A I R 1921 P C 125, Rel. on* ; *A I R 1916 Pat 310* and *A I R 1933 Cal 621, Ref.* [P 416 C 2]

N. K. Prasad II — for Appellants.

Mahabir Prasad and *A. N. Lal* — for Respondents.

Judgment.—This appeal arises out of a suit brought by the plaintiffs for the redemption of a mortgage. The suit was dismissed by the Court of first instance but decreed on appeal. The case of the plaintiffs was that sometime in the year 1876 certain proprietors of village Bara

had orally mortgaged 35.26 acres to the ancestors of the principal defendants for a sum of Rs. 291. The defence was that there was no such mortgage and that the principal defendants were in possession of the property in absolute right. The main questions which were debated in the Courts below were (1) whether in fact there was a mortgage and (2) whether the suit of the plaintiffs was instituted within the period of limitation. On the first point both the Courts are agreed that the disputed land had in fact been mortgaged to the ancestors of the principal defendants. The Courts below, however, differed as to the date of the mortgage and consequently on the question of limitation. The trial Court held that the mortgage transaction had taken place more than sixty years before the institution of the suit (that is to say long before 1876) and so the suit was barred by limitation. The lower appellate Court has accepted the case of the plaintiffs in its entirety.

The only argument which was addressed to me on the question of limitation was that the lower appellate Court had not given due effect to an admission made by the plaintiffs before the survey authority and that it had overlooked certain statements made in Exs. D and D 1 which were judgments pronounced in certain criminal proceedings in the year 1880. These documents have been referred to by the learned Subordinate Judge and I do not think that any question can legitimately arise on the basis of these documents. As to the decision of the revenue officers (Ex. 10) stress was laid on the fact that the statement in that judgment to the effect that "the mortgage deed is said to have been executed over a century ago" should have been treated by the lower appellate Court as an admission by the plaintiffs or their predecessors-in-interest. This contention, however, does not appear to me to be sound. In the first place there was no record before the learned Subordinate Judge of the actual statement which might have been made by the plaintiffs or their predecessors-in-interest before the Settlement Officer; and in the second place even in this order (Ex. 10) the Settlement Officer does not clearly say that it was stated before him by the plaintiffs or their predecessors-in-interest that the mortgage deed had been executed over a century ago. Besides the learned Subordinate Judge has considered these documents and the construction placed by him not being an unreasonable one, no point arises in second appeal. It appears to me therefore that the decision of the learned Subordinate Judge so far as it relates to the date of the mortgage cannot be disturbed.

The next contention which is put forward on behalf of the appellant is that certain persons who ought to have been joined as defendants have not been so joined. It is stated in the plaint that all the persons who according to the plaintiffs were interested in the property as the successors in interest of the original mortgagors were impleaded. The defendants in their written statement stated among other things as follows: "This suit is not tenable without impleading all the proprietors of the mouza by the plaintiffs." This statement is obviously vague and it was contended on behalf of the respondents that it was based upon a misapprehension of paras. 1 and 9 of the plaint. In my opinion the defendants should have specifically stated who were the persons who ought to have been impleaded as defendants but have not been impleaded. Notwithstanding the vagueness in their statement an issue was raised in the case as to whether the suit was bad for defect of parties. Neither of the Courts below unfortunately investigated the question as to whether there had been any omission on the part of the plaintiffs to implead any persons who were necessary parties. The Court of first instance assumed that some of the proprietors had not been made parties and dealt with the legal aspect of the question as follows:

> The question of non-joinder is governed by the provisions of O. 1, R. 9, which provides that no suit shall be defeated by reason of non-joinder of parties. O. 34, R. 1, which deals with mortgage and joinder of parties is subject to O. 1, R. 9. Thus we find that though the suit may be bad for defect of parties but the defect is not fatal to the suit.

The learned Subordinate Judge appears to have approached the matter in a slightly different way and the respondents' reading of his judgment is that in his view all the persons who were interested in the mortgage had been made parties. The actual passage in which the learned Subordinate Judge dealt with the matter runs as follows:

It was urged by the respondents that the suit is bad for non-joinder of parties. The defendants' allegation was that all the maliks of the tauzi in which the lands in suit are situate should be made parties. This is a redemption suit brought under O. 34, Civil P. C., and so it will be governed by R. 1, O. 34, Civil P. C. Under that rule only those persons who have the right of redemption or interested in the mortgage money should be made parties. The other maliks of the touzi have neither of those rights. Hence the suit is not bad for non-joinder of parties.

It appears to me that this passage does support the view taken by the respondents that what the learned Subordinate Judge meant to say was that in fact there was no defect of parties. If this is correct there is obviously an end of the matter, but as the learned advocate for the appellant still maintains that a few of the persons who were interested in the matter have not been impleaded it becomes necessary to deal with the legal aspect of the question. In one of the earlier decisions of this Court it was laid down clearly that R. 9, O. 1, Civil P. C., is subordinate to R. 1, O. 34 : *see* 1 P L J 468,[1] and in view of this decision the learned advocate for the appellant contends that the non-joinder of some of the proprietors is fatal to the decree passed in this suit. He also cited the decision in 37 C W N 478[2] where it was laid down that O. 34, R. 1 controls O. 1, R. 9 and not vice versa. Both these cases, however, were cases in which some of the mortgagees having not been made parties it was held that in those cases the suit was liable to be dismissed in its entirety. The matter, however, has been dealt with very fully by a Division Bench of this Court consisting of Sir Dawson Miller and Mullick, J. in 2 Pat 175.[3] In the course of his judgment the learned Chief Justice has given strong reasons to show that the proposition that O. 1, R. 9 is subordinate to O. 34, R. 1 was not correct. This view is supported by a reference to O. 34, R. 1 which provides that :

Subject to the provisions of this Code all persons having an interest either in the mortgage security or in the right of redemption shall be joined as parties in any suit relating to the mortgage.

It is unnecessary for me to deal with this matter at length because I respectfully agree with the conclusions arrived at by the learned Chief Justice in that case which are set out in the following passage:

It seems to me that the combined effect of these rules, in so far as the mortgages are concerned, is that all persons whose rights and interests may be adjudicated upon and determined in the suit ought to be added as parties but that failure to add one or more such persons should not have the effect of defeating the suit if the Court, in their absence, can deal with the matter in controversy so far as regards the rights and interests of the parties actually before it. Whether the Court can do so or not must depend upon whether the presence of those not added is essential to enable the Court to adjudicate on the rights and interests of those actually before it. It is a fundamental rule of procedure that the Court cannot, by its decree, affect the rights of those who are not parties to the suit. If, therefore, no decree can be passed without affecting the rights of absent parties, the suit cannot proceed in their absence and should be dismissed. If, however, the rights of the parties actually before it can be determined in the suit leaving the rights and interests of others unaffected, I can see no reason why, even if other parties might properly have been added, the Court should not determine the matters in controversy between the parties actually present.

Now it is settled beyond controversy that any one of the co-mortgagors can redeem the mortgage and it was pointed out clearly by the Privy Council in 48 Cal 22[4] that:

It is not the law in India any more than in England that any one of the several mortgagors cannot redeem more than his own share unless the owners of other shares consent or make no objection subject to the proper-safeguarding of the rights which these owners might possess.

Thus the rule laid down in O. 34, R. 1 that all the persons interested in the right of redemption shall be joined as parties is merely a rule of procedure which has been enacted with the object of avoiding multiplicity of suits. Assuming therefore that some of the proprietors who were also interested in the equity of redemption have not been made parties, the point which is to be decided here is whether the presence of these persons is essential to enable the Court to adjudicate upon the rights and interests of those actually before it. The most important question which arose in this case was whether the mortgaged property could be redeemed or not ; and, if one of the co-mortgagors is entitled to redeem it, I do not think that on the facts of this particular case, the

1. Girwar Narain Mahton v. Mt. Makbulunissa, A I R 1916 Pat 310=36 I C 542=1 P L J 468.
2. Govinda Chandra Ghose v. Jamaluddin Mondal, A I R 1933 Cal 621=146 I C 259=60 Cal 777=37 C W N 478.
3. Sital Prasad Ray v. Asho Singh, A I R 1922 Pat 651=69 I C 677=2 Pat 175=4 P L T 698.
4. Yadalli Beg v. Tukaram, A I R 1921 P C 125 =57 I C 535=48 Cal 22=47 I A 207=16 N L R 154 (P C).

omission to implead some of the proprietors (assuming that there was in fact such an omission) can affect the decree passed by the Courts below. However that may be, the defendants, if they were really serious about the plea of non-joinder, should have pointed out to the courts below who were the persons who ought to have been joined to enable them to decide how their absence would affect the decision in the suit. As matters however stand at present, the defendants have failed to substantiate their objection. In these circumstances, I do not think it necessary either to remand the case or to interfere with the decree passed by the Court below. I would therefore dismiss this appeal with costs. Leave to appeal under the Letters Patent is refused.

B.D./D.S. *Appeal dismissed.*

A. I. R. 1937 Patna 417

COURTNEY-TERRELL, C. J. AND JAMES, J.

Pratap Mandal — Plaintiff — Appellant.

v.

Surpat Sinha and *others* — Defendants — Respondents.

Letters Patent Appeal No. 22 of 1936, Decided on 8th March 1937, from decision of Wort, J., D/- 12th October 1936, reported in *A I R 1937 Pat 48.*

Bengal Tenancy Act (8 of 1885), Ss. 104-H and 50—Proceedings under S. 104-H—Party can claim benefit of presumption under S. 50 although final publication has taken place : *A I R 1937 Pat 48=166 I C 955, Reversed.*

In proceedings under S. 104-H, Ben. Ten. Act, a party can claim the benefit of the presumption under S. 50 although final publication has taken place because it cannot be held that the particulars mentioned in S. 115 have been completely recorded so long as any dispute remains pending which would immediately affect the record which is being prepared : *37 Cal 30 (F B), Foll.; A I R 1921 Pat 435* and *A I R 1925 Pat 181, Rel. on; A I R 1937 Pat 48=166 I C 955,* Reversed.

[P 417 C 2]

Mahabir Prasad and *D. L. Nandkeolyar* — for Appellant.

J. C. Sinha — for Respondents.

James, J.—This appeal arises out of a suit under S. 104-H, Ben. Ten. Act, wherein the plaintiff prayed for a declaration that he was a permanent tenure-holder holding at a fixed rent of Rs. 41-12-0. In the Record of Rights the status of the plaintiff was recorded as that of a permanent tenant holding at a rent which was not fixed (*istemrari lekhin mukarrari nahin*).

The lower appellate Court has found that rent for this tenure has been paid at an unvarying rate for 60 years before the suit, and that there has been no change in the area actually occupied by the tenant. Applying the presumption mentioned in S. 50, Ben. Ten. Act, he found that the plaintiff was tenure-holder at a fixed rent and decreed the suit. A second appeal was preferred which was heard by a Single Judge of this Court who held that the provisions of S. 115, Ben. Ten. Act, barred the application of the presumption mentioned in S. 50 of the Act after the Record of Rights had been finally published under S. 103-A. He therefore reversed the decree of the Subordinate Judge; but he gave leave to the plaintiff to appeal from his decision under Cl. 10, Letters Patent. The question for decision is merely whether in a suit under S. 104-H, Ben. Ten. Act, a party can claim the benefit of the presumption mentioned in S. 50 of the Act. In 37 Cal 30[1] a Full Bench of the Calcutta High Court held that in proceedings under S. 105, Ben. Ten. Act, a party could claim the benefit of the presumption under S. 50 although final publication had taken place because it could not be held that the particulars mentioned in S. 115 had been completely recorded so long as any dispute remained pending which would immediately affect the record which was being prepared. That decision has been accepted in this Court in 2 P L T 642[2] and in 6 P L T 221,[3] though the decisions in those cases were not actually based upon the rule laid down by the Calcutta High Court. No instance has been cited before us in which a Bench of this Court has dissented from the view of the Calcutta High Court with regard to the applicability of the presumption under S. 50 in suits framed under Ch. 10, Ben. Ten. Act, whether they are suits under S. 106 or under S. 104-H of the Act. Under S. 104-J of the Act, the presumption of correctness attaching to the record of rent settled under S. 104 is expressly made subject to the provisions of S. 104-H; and under sub-s. (9), S. 104-H,

1. Pirthichand Lal Chowdhry v. Basarat Ali, (1910) 37 Cal 30=3 I C 449=10 C L J 343=13 C W N 1149 (F B).
2. Gobind Lal v. Ramsaran Lal, A I R 1921 Pat 435=68 I C 433=2 P L T 642.
3. Ramsaran Mahton v. Aradut Hussain, A I R 1925 Pat 181=80 I C 926=6 P L T 221.

the Court which passes final orders in a suit under this section is required to notify the same to the Collector of the District. If it cannot be held that the particulars mentioned in S. 102 (b), Ben. Ten. Act, have been recorded so long as any suit is pending under Ch. 10 of the Act which might lead to amendment of the record under S. 107, it would also appear no finality has been given to a record prepared under Ss. 103 and 104 of the Act so long as a suit under S. 104-H remains undecided. I therefore consider that the reasoning which formed the basis of the decision in *Pirthichand Lal Chowdhry's case*[1] must apply with equal force to suits under S. 104-H, Ben. Ten. Act.

It is suggested on behalf of the respondents that this question was left open by the Calcutta High Court, because it was remarked that it was not necessary in the case before the Court to decide whether the presumption under S. 50 of the Act could be applied to suits of the nature of those mentioned in S. 111; but S. 111 merely prohibits for a certain period the institution of particular suits while the Record of Rights is under preparation. Prima facie it would appear that the provisions of S. 115 would apply to suits of that nature instituted after the bar provided by S. 111 has been removed, but it would not follow from this that the presumption would not apply to suits for which Ch. 10, Ben. Ten. Act, expressly provides, such as those under S. 104-H, which are equivalent to applications under S. 105 and suits under S. 106, when settlement of land revenue is being made or rents are being settled under S. 112 of the Act. In the present case the learned Subordinate Judge has found that the plaintiff proved payment of rent at an unvarying rate for 60 years before the suit and he has not accepted the evidence by which the defendant sought to rebut the presumption which followed on this proof by the plaintiff of uniform payment. The Subordinate Judge therefore rightly decreed the plaintiff's suit unless some other grounds were made out for holding that the rent payable was something other than the rent which had been paid during that period. It is suggested on behalf of the respondent that there has been a large increase of area because the plaintiff says that he acquired 244 bighas and the area of the tenure has now been found to be 209 acres. It appears from the judgment of the learned Subordinate Judge that these two areas do not exactly correspond though it is not clear whether the area now held is in excess or something less. The plaintiff stated that the area which he held was 244 bighas and the learned Subordinate Judge thought that he had stated the area by guess, but he finds that it has not been proved that there has been any variation in the area held by the plaintiff, and in view of the manner in which the defendant conducted his defence he could hardly prove that rent was originally fixed at a rate of so much an acre. The learned Subordinate Judge was therefore right in holding that the defendants were not entitled to claim that additional rent should be assessed under S. 52 (i) (a) of the Act.

The result is that I would allow this appeal, set aside the decree of this Court and restore that of the Subordinate Judge decreeing the plaintiff's suit with costs throughout. A copy of this judgment should be sent to the Collector of Purnea under S. 104-H (9), Ben. Ten. Act.

Courtney-Terrell, C. J. — I entirely agree.

S.C./D.S. *Appeal allowed.*

A. I. R. 1937 Patna 418

AGARWALA AND MADAN, JJ.

Shiv Saran Rai — Plaintiff — Appellant.

v.

Sukhdeo Rai and *others* — Defendants — Respondents.

Appeal No. 685 of 1933, Decided on 12th March 1937, from appellate decree of Dist. Judge, Shahabad, D/- 22nd April 1933.

(a) Pleadings—Admission — Court of fact should not dissect admission in parts but should take whole of it into consideration.

It is not open to the Court of fact to dissect an admission in parts arising out of pleadings but the Court should take the whole of it into consideration. [P 421 C 2]

(b) Bengal Tenancy Act (8 of 1885), Sch. 3, Art. 3—Applicability—Suit for possession—Statement by plaintiff in plaint that he was dispossessed by defendant third persons claiming land—No allegation that defendant landlord instigated such persons in his dispossession—No evidence by plaintiff to prove landlord responsible for his dispossession—Landlord also denying any dispute with plaintiff—Suit is governed not by Art. 3 of Act, but by general law of limitation.

Where in a suit for possession of a holding the plaintiff stated in the plaint that he was dispossessed by the defendant third persons claiming land and he did not allege that the defendant landlord instigated or assisted such third persons in his dispossession and no evidence was adduced by him to show that the landlord was responsible for his dispossession but on the contrary the landlord denied that there was any dispute with the plaintiff :

Held : that the suit was governed by the general law of limitation and not by the special period of limitation prescribed by Art. 3, Ben. Ten. Act : *A I R 1933 Cal 923, Rel. on; Case law referred.* [P 421 C 2]

(c) Possession — Plaintiff dispossessed by defendants—Suit for possession by plaintiff within limitation period—Plaintiff is entitled to recover possession unless defendants prove better title.

If the defendants dispossess the plaintiff within the period of limitation prescribed for a suit for possession, the latter is entitled to recover possession unless the defendants establish a better title : *A I R 1929 Pat 601, Rel. on.* [P 422 C 1]

B. P. Sinha, R. S. Chatterji and *Bajrang Sahai* — for Appellant.

Manohar Lal, D. N. Varma and *Harians Kumar* — for Respondents.

Agarwala, J.— The dispute in this appeal relates to the properties of one Nathuni Rai, a descendant of the eldest branch of the family of Bhup Rai. The plaintiff and defendants, except defendants third party, are descendants of other branches of the family of Bhup Rai. Nathuni Rai had property in two villages, Madhubani and Jagarnath Sarai. In the latter village his property consisted of two holdings, khata No. 178 and khata No. 185. Defendants third party were the landlords of the former holding. In the plaint in the present suit it is alleged that one Paras Nath was the landlord of khata No. 185. After the death of Nathuni Rai, the present defendants 1 and 6, belonging, respectively to the third and fifth branches of Bhup Rai's family, and Aman Rai, father of defendant 7 of the second branch of the same family, instituted a suit in 1922 against the father and uncles of the present plaintiff, who belonged to the fourth branch of Bhup Rai's family, alleging that the second, third, fourth and fifth branches of the family had each inherited one-fourth of Nathuni Rai's property. That suit was decided in favour of the father and uncles of the present plaintiff, it being held that they were the nearest surviving heirs of Nathuni at the time of his death. Despite this decision the dispute between the parties continued with the result that proceedings under S. 144, Criminal P. C., were initiated and resulted in an order against the contesting defendants in this suit prohibiting them from interfering with the present plaintiff's possession of the two holdings in Jagarnath Sarai. This was in March 1926. At the end of the same year the present plaintiff again complained that his possession was being interfered with and he asked for proceedings under S. 107 to be taken against the persons complained against. His request was refused.

Consequently, on 27th August 1927, he filed the plaint in the present suit alleging that as a result of the refusal to initiate proceedings under S. 107 he had been dispossessed on 5th Pus, 1334 Fasli, corresponding to 24th December 1926. Defendants 1 to 4 in the suit were the descendants of the third branch of Bhup Rai's family; defendant 5 was a descendant of the fourth branch; defendant 6, a descendant of the fifth branch, and defendants 7 to 9 of the second branch. The landlords of khata No. 178 were also impleaded as defendants third party. Defendant 5 filed a written statement admitting the plaintiff's claim. Defendants 6 to 9 did not enter appearance. The third party defendants, the landlords, filed a written statement objecting that they had been unnecessarily impleaded in this suit and denying that they had any dispute with the plaintiff. The plaintiff's claim was contested by defendants 1 to 4 alone. They alleged that Nathuni Rai was a congenital idiot and, therefore, that he had not succeeded to any property, but that on the death of his father Pirthi Pal the latter's property had been divided by family arrangement between the second, third, fourth and fifth of Bhup Rai's family. This was a repetition of the claim in the former suit, and it was again negatived. The suit was decreed and an appeal by the contesting defendants failed. Thereafter defendant 7, against whom the suit had been decreed ex parte, applied for a re-hearing. His application succeeded, with the result that the suit has been re-tried as between plaintiff and defendant 7.

In his written statement defendant 7 did not take the same line of defence as had been taken by the other contesting defendants. He alleged, on the other hand, that on the death of Nathuni Rai the latter's properties were inherited by

one Sheotahal of the second branch of Bhup Rai's family who was alleged to be the nearest agnate of Nathuni at the time of the latter's death. He also alleged that plaintiff's father had pre-deceased Nathuni and that Sheotahal, after succeeding to Nathuni's properties, had made an oral gift of them to himself. Defendant 7 claimed to have been in adverse possession of the disputed properties for more than 12 years and also pleaded that the plaintiff's suit was barred by limitation. The plaintiff filed a genealogy of the family with his plaint in which the sons of Bhup Rai were shown as follows : Dihal, the ancestor of Nathuni Rai, Sarab, the ancestor of Sheotahal and defendants 7 to 9, Udwant, the ancestor of defendants 1 to 4, Mana, the ancestor of defendant 5 and the plaintiff, Sadan Rai, the ancestor of defendant 6, and Ramji Rai who was stated to be the adoptive father of Mahipat Rai, the father of Sheotahal. Defendant 7 denied that Dihal and Sarab were sons of Bhup Rai or that Ramji Rai had adopted Mahipat.

He alleged that Dihal and Sarab were the sons of Prayag Rai, who was said to be a son of Bhup Rai, and that the plaintiff's father and uncles had pre-deceased Nathuni Rai. If these allegations of the defendants were correct then Sheotahal was the nearest male agnate of Nathuni on the latter's death. Accordingly, the questions whether Dihal and Sarab were the sons of Bhup Rai, whether Sheotahal survived Nathuni, whether the plaintiff's father and uncles pre-deceased Nathuni and whether Sheotahal's father was adopted by Ramji Rai were material issues in the case. A further material question was whether the sons of Mana were Ranjit, Mitrajit and Sampat, the grandfather of the plaintiff, as alleged by the latter, or whether third son of Mana was Indrajit as alleged by defendant 7, according to whom Sampat was the son of Indrajit.

In view of the decision of the first suit, that is to say the suit of 1922, to which the father of defendant 7 was a party, and in which it had been held that the plaintiff's father and uncles were the nearest male agnates of Nathuni Rai at the time of his death, defendant 7 would *prima facie* have no title to the properties of Nathuni Rai unless the latter predeceased Sheotahal leaving him as the nearest agnate and Sheotahal made a gift of the properties to him. The first Court, after an elaborate survey of the evidence, held that the defendants' evidence was entirely false, that Sheotahal pre-deceased Nathuni, that the statement of Sheotahal's widow that Sheotahal had succeeded to the properties and gifted them to Nathuni Rai was unreliable, that plaintiff's father and uncles were the nearest male agnates of Nathuni at the time of the latter's death and that plaintiff was in possession of the disputed lands until 1334 Fasli. The suit was accordingly decreed. In appeal by defendant 7 it was held that the genealogy annexed to the plaint was correct, that Sheotahal survived Nathuni and gifted the disputed property to defendant 7, that plaintiff's father and uncles did not survive Nathuni and that in any case the plaintiff's suit was barred by limitation. The last question, which is the only issue adequately discussed in the judgment of the appellate Court, was contested on the basis of the suit being governed by Art. 3, Sch. 3, Ben. Ten. Act. The appellate Court held that plaintiff had failed to prove that he had been in possession of the disputed land within two years of the suit. In second appeal by the plaintiff it is contended that Art. 3, Sch. 3, Ben. Ten. Act, does not apply to the case and that the suit is governed by the 12 years' period of limitation prescribed by the general law.

We have been referred to a large number of cases of this Court and of the Calcutta High Court as to the scope of Art. 3, Sch. 3, Ben. Ten. Act. There is a conflict of decisions as to whether the Article applies when the plaintiff has been dispossessed by the landlord, not *qua* landlord but in some other capacity. In 54 Cal 450[1] it was held that the Article is not confined to cases of dispossession by the landlord as such. In 9 Pat 788,[2] on the other hand, it was held that dispossession by the landlord as auction-purchaser of the holding does not attract the provisions of the Article. In 9 C W N 54[3] it was held that the Article does not apply where the dispossession was not effected by the landlord even though it is alleged that the landlord has set up the person who actually dispossessed the tenant. The

1. Satish Chandra v. Hasemali, A I R 1927 Cal 488=103 IC 124=54 Cal 450=31 CWN 634.
2. Gajadhar Rai v. Ram Charan Gope, A I R 1930 Pat 256=125 I C 565=9 Pat 788=11 P L T 197 (F B).
3. Rakhit v. Puddo Bauri, (1905) 9 C W N 54.

decision in 10 Pat 264[4] was that where the landlord has settled the land with a person who has already dispossessed the tenant, Art. 3 does not apply, but on the other hand, dispossession of a tenant by a person armed with a settlement from the landlord does attract the operation of the Article: 158 I C 21=A I R 1935 Pat 372.[5] The Article does apply of course where the tenant is actually dispossessed by the landlord or by his servants 24 Cal 40[6] or by a person set up by the landlord : 9 C W N 54.[3] But where the landlord had no hand in the dispossession it has been held that the Article does not apply: 57 C L J 549,[7] 64 I C 858.[8] In the present case it is contended by defendant 7 that the plaintiff alleged that the defendants including defendants third party, the landlords of khata No. 178, had conspired to dispossess him and it was therefore argued that Art. 3 applied. In the first place, it is to be noticed that this contention cannot apply to khata No. 185 which, in para. 4 of the plaint, is said to be in the milkiat of Parasnath, although para. 6 is as follows :

> With regard to the properties bearing khatas Nos. 178 and 185 in mauza Sarai Jagarnath of which the defendants third party are the proprietors.

The lower appellate Court has come to no finding whether khata No. 185 is in the milkiat of Parasnath or in the milkiat of defendants third party. Further despite the general allegations of conspiracy the plaintiff's substantial grievance was that he had been dispossessed by persons who claimed the properties of Nathuni Rai. He led no evidence to prove that the landlords were in any way responsible for the dispossession. The allegation of a conspiracy was apparently based on the fact that the landlords had granted receipts to the other defendants. But the landlords themselves in their written statement disclaimed any dispute with the plaintiff and said they had merely granted receipts to the persons who had had their names recorded in their sherista after the death of Prithi Lal and his son Nathuni Rai. The lower appellate Court's finding that the defendants dispossessed the plaintiff more than two years prior to the suit and that the suit was therefore barred by Art. 3 is based almost entirely on an allegation in the plaint that the defendants dispossessed him on 5th Pus 1334, which was within two years of the suit. If this allegation is to be construed as an admission that the landlords were responsible for the dispossession it cannot be divided into parts and must be read only as an admission that the dispossession was on 5th Pus 1334. It was not open to the Court of fact to dissect the admission and treat it as an admission that the plaintiff had been dispossessed by the landlords at some prior time. The appellate Court has omitted to consider the evidence referred to by the trial Court in coming to its conclusion on the question of the plaintiff's possession.

In my opinion the plaintiff's case substantially was that he had been dispossessed by the persons claiming the land and not that the landlords had instigated or assisted in the dispossession of the plaintiff. It follows therefore that the special period of limitation prescribed by Art. 3, Sch. 3, Ben. Ten. Act, does not apply to the case. On all the other issues of fact the judgment of the lower appellate Court is entirely inadequate. The documentary and circumstantial evidence in the case with regard to these issues have been completely neglected and their bearing on the oral evidence not discussed. I refrain however from expressing any opinion on this evidence. The decree of the lower appellate Court must therefore be set aside and the case remanded to be disposed of according to law.

It was contended on behalf of the respondent that even if the alleged oral gift of Sheotahal to defendant 7 be not established the latter was entitled to succeed as to half of the disputed property in the event of it being held that Sheotahal survived Nathuni. To succeed in this contention however the respondent must rely on the title of his father and this was decided in favour of the plaintiff in the suit of 1922. The principle of the decision in 59 I A 247,[9] applies and precludes the respondent's contention.

4. Ramdhari Rai v. Gorakh Rai, A I R 1931 Pat 236=133 I C 34=12 P L T 570=10 Pat 264.
5. Har Dayal Bhagat v. Nathuni Bhagwat, A I R 1935 Pat 372=158 I C 21.
6. Bheka v. Nakchhed, (1897) 24 Cal 40.
7. Hridaya Nath Roy v. Prabodh Chandra Khan, A I R 1933 Cal 923=147 I C 747=37 C W N 1148=57 C L J 549=60 Cal 1171.
8. Gobinda Chandra Gope v. Akhil Chandra Das, (1921) 64 I C 858.
9. Maung Sein Done v. Ma Pan Nyun, A I R 1932 P C 161=137 I C 328=59 I A 247=10 Rang 322 (P C).

Lastly, it was argued that the plaintiff being admittedly out of possession at the date of suit is not entitled to succeed unless he establishes his title and that if Sheotahal survived Nathuni, his widow and not the plaintiff is entitled to the property. Answer to that is that if the defendants dispossessed the plaintiff within the period of limitation prescribed for a suit for possession the latter is entitled to recover possession unless the defendants establish a better title : 11 P L T 34.[10]

Madan, J.—I agree.

K.B./A.L. *Case remanded.*

10. Ranjit Singh v. Jhori Singh, A I R 1929 Pat 601=119 I C 906=11 P L T 34=8 Pat 351.

A. I. R. 1937 Patna 422

MOHAMAD NOOR, J.

Chandra Mohan Singh and *others* — Appellants.

v.

Butu Mian and *others* — Respondents.

Appeal No. 734 of 1934, Decided on 7th January 1937, from appellate decree of Dist. Judge, Manbhum, D/- 7th March 1934.

(a) Ejectment—Suit for—Though plaintiff must prove possession within 12 years of suit, nature of proof varies according to nature and circumstances of suit land—Land incapable of continuous user — Presumption is, title follows possession.

Though in a suit for ejectment the plaintiff must prove his possession within 12 years of the suit, the nature of proof will vary according to the nature and circumstances of the land in suit. If the land is of such a nature that it can hardly only be occasionally occupied then it will be impossible for the plaintiff to prove continuous possession over it and in such a case the presumption of title following possession is available to the plaintiff : *A I R 1921 Pat 237* and *A I R 1924 Pat 629*, *Rel. on.* [P 423 C 1]

(b) Chota Nagpur Tenancy Act (6 of 1908), S. 64 — No occupancy right can be acquired under another occupancy raiyat—Trespass upon occupancy holding and making korkar therein—No application for ejectment within two years of commencement of korkar — Still he does not acquire occupancy right—It can be acquired only by lapse of 12 years under general law (*Obiter*).

Obiter.—There cannot be the acquisition of an occupancy right under another occupancy raiyat. [P 423 C 2]

A right of occupancy under a landlord is a right subordinate to him, but if such a right is acquired against a man who himself is an occupancy raiyat the right so acquired is the complete annihilation of right of the raiyat) and that can only be acquired after 12 years under the general law. [P 424 C 2]

So if a man trespasses upon the holding of an occupancy raiyat and makes korkar therein, he acquires no occupancy right even if no application for ejectment is made within two years of the commencement of the korkar : *A I R 1917 Pat 243* and *A I R 1928 Pat 87*, *Disting.*; *A I R 1936 Pat 39* and *Appeal No. 89 of 1925*, *Dissent.* [P 423 C 2]

N. N. Roy — for Appellants.

S. C. Mazumdar — for Respondents.

Judgment.—This second appeal arises out of a suit instituted by the plaintiff-respondents for recovery of three plots of land in village Kasitaur in the district of Manbhum. Plaintiffs' case was that they took settlement of these lands under an unregistered hukumnama from the predecessor of the defendant-landlords some time in the year 1860. They complained that defendant 1, the landlord, dispossessed them and settled the lands with the defendants 2 and 3. On these allegations they sought recovery of possession of the lands. The point for determination was firstly whether the hukumnama relied upon by the plaintiffs was genuine and valid, secondly whether it related to the land in suit, and thirdly whether the plaintiffs' suit was barred by limitation. The trial Court held that hukumnama was genuine and that two of the plots, viz. 186 and 188, were covered by it. Regarding the third plot, it came to the conclusion that its identity with the lands of the hukumnama was not established. It therefore decreed the suit in respect of the two plots mentioned above and dismissed it in respect of the third. The plaintiffs remained satisfied with this decree, but the defendants preferred an appeal to the District Judge who upheld the decree of the trial Court and dismissed the appeal. The defendants have preferred this second appeal.

Three points have been urged before me on behalf of the appellants. One is that the finding about the genuineness of the hukumnama is based upon inadmissible documents. The learned District Judge has stated in his judgment that the hukumnama was found to be genuine in some previous suits whose judgments were filed in this case. The learned advocate contended that those judgments not being *inter partes* were not admissible to prove the genuineness of the hukumnama. What in fact has happened is this. The defendants contended that the hukumnama was fabricated for the purpose of the suit. The learned District Judge has held that

it was not so as it was produced in Courts in several cases previously. On the whole, in my opinion, the plain meaning of the judgment of the learned District Judge is that the hukumnama saw the light of day many years before the controversy arose. There is other evidence relied upon by him for holding that the hukumnama is genuine and there is no substance in this part of the argument of the learned advocate.

The second point urged was that, as the learned District Judge was unable to find possession of the plaintiffs over the land in suit within 12 years of its institution, he on the authority of the Full Bench decision of this Court in 6 P L J 478[1] ought to have dismissed the suit. But according to the finding of the learned District Judge the lands are incapable of continuous user. In fact the finding is that they are sometimes cultivated and sometimes not. Therefore he has applied the presumption that possession must follow title. The case reported in 6 P L J 478[1] was explained by Sir Dawson Miller, C. J. himself in a later case in 3 Pat 258[2] where his Lordship clearly held that though in a suit for ejectment the plaintiff must prove his possession within 12 years of the suit, the nature of proof will vary according to the nature and circumstances of the land in suit. If the land is of such a nature that it can hardly only be occasionally occupied then it will be impossible for the plaintiff to prove continuous possession over it and in such a case the presumption of title following possession is available to the plaintiff. I therefore overrule this contention also of the learned advocate.

The third contention of the learned advocate was that defendants 2 and 3 after taking settlement from defendant 1 made korkar in plot 186 and an application for ejectment not having been made by the plaintiffs before the Deputy Commissioner within two years of the commencement of the korkar the defendants acquired occupancy right and were not liable to be ejected. The learned advocate relied upon a decision of Dhavle, J. sitting singly in A I R 1936 Pat 39.[3] In my opinion at any rate in this case, under the express provision of law, the claim of korkar right in the land in suit is not available to the defendants. The decisions relied upon by the learned advocate is based upon three Single Judge decisions of this Court. The first one is of Atkinson, J. in 38 I C 478.[4] It is not clear from the judgment whether the plaintiffs who sought to eject the defendants were not of a status under whom an occupancy right can be acquired. In other words it is not clear whether the plaintiffs of that suit who had acquired title from Government were not tenure-holders who can have an occupancy raiyat under them. In the present case we are dealing with a claim of korkar against an occupancy raiyat who cannot have another occupancy raiyat under him.

The next case relied upon by Dhavle, J. is 105 I C 58[5] in which Allanson, J., held that a man who was the Nundari Khutkatidar of a village acquired occupancy right by korkar upon the Mundari Khutkati land of another village. In this case also the man against whom the right of occupancy was held to have accrued to the maker of the korkar was a Mundari Khutkatidar who under the law holds a position of tenure-holder also, and the man who was held to have acquired that right was also a Mundari. A Mundari can acquire an occupancy right under a Mundari Khutkatidar. Under S. 240 (4) (b) a Mundari Khutkatidar can give a lease of uncultivated land to a Mundari to enable him to cultivate it as a raiyat. Allanson, J. himself based his decision on the fact that the plaintiff of that suit was the malik Mundari Khutkatidar of the village. Therefore the right was acquired on a land which on the face of the judgment was not encumbered by any occupancy right of another raiyat.

None of the two cases referred to above support the proposition that if a man trespasses upon the holding of an occupancy raiyat and makes korkar therein, he acquires an occupancy if no application for ejectment is made within two years of the commencement of the korkar. The third case referred to by Dhavle, J., is an unreported decision of Ross, J., in appeal from Appellate Decree No. 89 of 1925 (decided on 14th February 1928).

1. Shiva Parsad v. Hira, A I R 1921 Pat 237=62 IC 1=6 Pat L J 478=2 P L T 487 (F B).
2. Ram Nath Sarangi v. Gobardhan Pandey, A I R 1924 Pat 629=81 I C 669=6 P L T 185=3 Pat 258.
3. Doman Mian v. Gunaram Mahata, A I R 1936 Pat 39=159 I C 350.
4. Raham Ali v. Chintamon Kumar, A I R 1917 Pat 243=38 I C 478.
5. Lal Sahi Palian v. Deba Munda, A I R 1928 Pat 87=105 I C 58.

It is a very short judgment and the question does not seem to me to have been discussed. Ross, J. was of opinion that the case was concluded by the decision in 38 I C 478[4] already referred to. But as I have pointed out, that case was not one in which occupancy right was claimed by korkar under another occupancy raiyat. The learned Judge has observed that the acquisition of occupancy right is not confined to a tenant, as the word used in S. 64 of the Act is "cultivator". It was not placed before his Lordship that acquisition of an occupancy right against another occupancy raiyat will completely destroy the right of the latter and will not make the former a raiyat under him. With profoundest respect to the learned Judge I beg to differ from the views taken by him. I shall later give my reason for holding that there cannot be the acquisition of an occupancy right under another occupancy raiyat.

Now I have already said that Dhavle, J. relied upon three decisions of the learned Judges sitting singly. Two of them were not the cases in which the right of occupancy was claimed against an occupancy raiyat. The learned Judge has referred to the observation of Allanson, J. to the effect that a tenant also may be a landlord as defined in S. 3 (14), Chota Nagpur Tenancy Act. This is so and a landlord against whom a korkar right may be acquired may be of a status lower than the proprietor: But as a tenant under him holds a much lower status than he holds under his superior landlord, it necessarily follows as a logical conclusion that he should be in a position of having such a raiyat under him. But a raiyat under a raiyat is an under-raiyat and he has no protected interest under the Chota Nagpur Tenancy Act. Rather, transfer of any kind by a raiyat except that specified is prohibited by S. 46 of the Act. Lease is expressly prohibited. It is obvious that if a raiyat cannot grant lease for korkar he cannot give a raiyati right by silence for two years. An occupancy right can be acquired by korkar under S. 64, Chota Nagpur Tenancy Act, if the landlord of the land does not take necessary steps for ejecting the maker of the korkar within the period prescribed by law. But if the landlord is not of a status who can give his consent for creation of an occupancy right, his implied consent cannot create a right which he could not create by express consent. If a man trespasses upon the holding of an occupancy raiyat he cannot acquire an occupancy right under him as there cannot be an occupancy raiyat under another occupancy raiyat. Acquisition of occupancy right by korkar is analogous to its acquisition by adverse possession.

If a man begins korkar and the landlord of the land does not take steps to eject him for two years he shall be deemed to have given his consent. The same is the case in adverse possession. If a man goes and begins to cultivate a land claiming himself to be raiyat and if the landlord allows him to do this for the statutory period the man acquires an occupancy right because by prescription he acquires what he could acquire if he had held the land under a settlement for the required period. Atkinson, J. in the judgment above referred to has dealt with this aspect of the case. But when the man prescribes a right which is of the same character as the right of one against whom he prescribes he does not acquire a limited right of tenancy but a complete right and such a case is outside the scope of the provision of korkar in the Chota Nagpur Tenancy Act. A right of occupancy under a landlord is a right subordinate to him, but if such a right is acquired against a man who himself is an occupancy raiyat the right so acquired is the complete annihilation of right of the raiyat and that can only be acquired after twelve years under the general law. I therefore respectfully disagree with the views of Dhavle, J. But strictly speaking the question does not arise and I therefore do not think it necessary to refer this case to a Division Bench. In this particular case the land in question was not an altogether uncultivated land. It used to be cultivated from time to time and the defendants have converted it into paddy land. In that case the express provision of law (S. 66, Chota Nagpur Tenancy Act), precludes the accrual of occupancy right by korkar. That section runs thus:

> Nothing in S. 64 shall authorize any cultivator to convert into korkar any orchard or cultivated or homestead land in the direct possession of another person.

If the defendants have made korkar in the face of the legal prohibition they cannot claim the protection of law. The Court having found in this case that land was in possession of the plaintiffs till they

were dispossessed from it and that it was a cultivated land, the conversion of it into paddy land was not authorized and therefore no right accrued to the defendants. In my opinion the appeal fails and it is dismissed with costs. I certify that this is a fit case for Letters Patent appeal.

V.B.B./A.L. *Appeal dismissed.*

A. I. R. 1937 Patna 425

FAZL ALI AND MADAN, JJ.

Tribeni Prasad Singh and *others* —
Plaintiffs — Appellants.

v.

Jainarain Singh and *others* —
Defendants — Respondents.

Appeal No. 625 of 1934, Decided on 5th February 1937, from appellate decree of Dist. Judge, Bhagalpur, D/- 16th April 1934.

(a) Hindu Law—Joint family—Manager—Contract by manager can be specifically enforced even though some members were minors when it was entered into.

A contract entered into by a manager of a Hindu joint family can be specifically enforced even though some of the members were minors at the time when the contract was entered into. The manager of a Hindu joint family is not an agent of the other members of the family and when he contracts in his capacity as a karta, the contract is made not by minors but by a person who has power under the Hindu law to make a contract on behalf of the joint family: *A I R 1917 Pat 478 (F B), Foll.* ; *A I R 1930 Cal 457, Dissent.*

[P 426 C 1]

(b) Specific Performance—Suit for—Plaintiff attempting to put construction upon contract which he knew to be wrong—Plaintiff held acted dishonestly and was not entitled to relief.

Equity will not help a dishonest suitor who demands what he is not entitled to. [P 427 C 1]

So where in a suit for specific performance of a contract the plaintiff attempted to put a construction upon the contract which he knew to be wrong :

Held : that the plaintiff acted dishonestly and was not therefore entitled to equitable relief : *Molloy* v. *Egan, 7 Ir Eq Rep 590, Rel. on.*

[P 427 C 1]

K. P. Jayaswal and *Bindeshwar Prasad* — for Appellants.

Khurshaid Hasnain, R. K. Jha and *K. N. Lal* — for Respondents.

Fazl Ali, J.—This is an appeal by the plaintiffs in a suit for specific performance of a contract. The Courts below have awarded a small damage to the plaintiffs against defendant 1 but have refused to grant a decree for specific performance and so the plaintiffs have preferred this second appeal.

The plaintiffs impleaded in this suit four sets of defendants of which the defendants first party consist of defendant 1, the father, defendant 2, his major son and defendants 3 to 5, his minor sons. Defendants 2nd, 3rd and 4th parties are co-sharers of defendants first party and some of them have purchased portions of the property which is the subject matter of this suit. The case of the plaintiffs is that on 6th February 1928 defendant 1 as karta of his family executed an agreement contracting to sell to the plaintiffs 10 gandas odd zamindari interest in mauza Sukhpur Solhni in the district of Bhagalpur for a sum of Rs. 3,000. In this contract reference has also been made to certain lands which are said to appertain to the said zamindari interest and which are described in these words :

22 bighas khudkasht batai nisf and gairmasrua khas recorded in the khatian of executant No. 1 and one third share in the lands recorded in the name of executant No. 1 and one Jogendra Narain Singh.

As to these lands it is stated that they had before the date of the contract been settled with a third party at a rental of Rs. 71 per year and the plaintiffs were entitled only to receive the above rent from the settlement holder. It is necessary to mention this fact because (1) it has been found by both the Courts below that in spite of this recital the lands in question were actually in possession of the defendants first party and this fact was fully known to the plaintiffs at the time when they entered into the present contract and (2) because it appears that subsequent to the contract there was an agreement between defendant 1 and his other co-sharers, namely defendants 2nd, 3rd and 4th parties by which the position *inter se* of all these persons in respect of khud kasht lands was defined and it was made clear that the survey entries in respect of some of those lands were not correct. It has been argued in this Court on behalf of the appellants that this agreement was a collusive one and was intended to prejudice their claim for specific performance but the trial Court has found that the agreement had been executed in good faith and that in fact the survey entries are not correct in certain particulars.

The first question which was raised in this Court was whether a contract affecting lands which were in possession of a Hindu joint family consisting of certain minor members could be enforced against

them. This question has been answered in the negative by the Calcutta High Court in 34 C W N 272[1] and the view put forward in that case is supported by a reference to the well known decision of the Privy Council in 39 I A 1.[2] A Full Bench of this Court, however, in 2 P L J 513[3] has taken a contrary view and has held that a contract entered into by a manager of a joint Hindu family can be specifically enforced even though some of the members were minors at the time when the contract was entered into. It was pointed out in that case that the manager of a Hindu joint family is not an agent of the other members of the family and that when he contracts in his capacity as a karta, the contract is made not by minors but by a person who has power under the Hindu law to make a contract on behalf of the joint family. This decision has been followed in other High Courts and as at present advised I am not prepared to dissent from it. As to whether the contract in question was beneficial to the minor defendants and justified by legal necessity or not, the first Court held against the plaintiffs answering the question in the negative, but the lower appellate Court has reversed its findings and we must, therefore, for the purpose of this appeal assume that the contract, as it was entered into, was for the benefit of the minors. Thus the only point which requires consideration is the point upon which the suit has been dismissed by the learned District Judge on appeal.

The learned Judge has held (1) that both the contracting parties were aware that 22 bighas of khud kasht lands were in the possession of the defendants first party and it was fully understood by them that these lands would continue to be in possession of the defendants first party and the plaintiffs would be entitled to receive an annual rent of Rs. 71 ; (2) that in consideration of this fact the price of the property to be sold was fixed at Rs. 3,000 though its proper value was at least Rs. 5,000 and (3) that the plaintiffs were not entitled to a decree for specific performance because in their plaint they dishonestly asserted that they were entitled to the khas possession of 22 bighas of khud kasht lands. The view taken by the learned District Judge was that in making this demand the plaintiffs had tried to take advantage of the false recital in the contract that the property at the time of the contract was in possession of certain tenants and on this point he has expressed himself as follows :

> Now specific performance is an equitable remedy and the Court has discretion in such cases though that discretion must be exercised in a judicial manner. It is one of the principles of equity that he who seeks equity must do equity, or it has sometimes been expressed 'he who seeks equity must come with clean hands'. In the present case it is clear that the plaintiffs have not throughout been willing to carry out the terms of the agreement (Ex. 1) as they were really intended by the parties; but have instead attempted by suit to punish the defendants first party for the failure of defendant 1 to carry out his agreement by claiming in their suit those 22 bighas of land to which they had not, and knew they had not any legal or equitable claim.

It is contended on behalf of the appellants that the District Judge was wrong in refusing to pass a decree for specific performance in favour of the plaintiffs on the ground stated in the above passage and that the utmost that he should have done was to compensate the defendants by making a suitable order as to costs. It was also pointed out on their behalf that though the plaintiffs did state in their plaint that they were entitled to khas possession of 22 bighas, yet when the matter came up before the District Judge on appeal, they expressed their willingness to allow the defendants first party to remain in possession of those lands on payment of an annual rent of Rs. 71 as provided in the contract. This argument appears to be plausible at the first sight, but on a careful consideration of all the facts of the case I have come to the conclusion that the view taken by the learned District Judge is correct in law. The plaintiffs came to Court with a definite case that they were entitled to khas possession of the 22 bighas of land as will appear from para. 10 of the plaint which runs as follows :

> That the defendants first party being in khas possession of the said kamat lands, the clause in the agreement dated 6th February 1928 regarding the kamat land cannot be binding on the plaintiffs and the plaintiffs are entitled to khas possession of the said kamat lands.

This claim was persisted in by the plaintiffs so long as the case was before the trial Court and the trial Court took

1. Nripendra Chandra v. Ekherali Joardar, A I R 1930 Cal 457=127 I C 66=57 Cal 268 =34 C W N 272.
2. Mir Sarwarjan v. Fakhruddin Mohammad Choudhury, (1912) 39 Cal 232=13 I C 331= 39 I A 1 (P C).
3. Hari Charan Kuar v. Kaula Rai, A I R 1917 Pat 478=40 I C 142=2 Pat L J 513 (F B).

some pains to point out that they were trying to enforce a contract which was not beneficial to the minors and was also different from the contract which had been entered into by the parties. When the plaintiffs appealed to the District Judge they still claimed in the memorandum of appeal that they were entitled to khas possession of the 22 bighas of land, but when it was found that the court-fee paid by them on the memorandum of appeal was insufficient, they filed a petition withdrawing their claim for khas possession. The learned Judge has noted in his judgment that he asked the pleader for the plaintiffs what justification they had for attempting to obtain khas possession of the 22 bighas of land, if, as he has already urged, the price to be paid was fixed on the basis that the plaintiffs would be excluded from khas possession of those lands and to this the only reply of the pleader for the plaintiffs was that when defendant 1 failed to carry out the agreement, the plaintiffs probably thought it advisable to claim as much as possible. These facts make it clear that the plaintiffs did attempt to put a construction upon the contract which was known by them to be wrong and in doing so they acted dishonestly. Now S. 22 clearly states that the jurisdiction to decree specific performance is discretionary and the Court is not bound to grant such a relief merely because it is lawful to do so. It is true that it also states that the discretion of the Court is not arbitrary but sound and reasonable, but in my opinion the reasons given by the learned District Judge for not granting a decree for specific performance were far from arbitrary and were based upon the well known principle that equity will not help a dishonest suitor who demands what he is not entitled to. This principle was stated very clearly by the Lord Chancellor in 7 Ir Eq Rep 590[4] in these words:

> Here the evidence shows the real nature of the contract; and the question is, whether I can give the aid of this Court to a plaintiff making such a case as this. The plaintiff now says, "I am content to admit that the real contract was not as I stated it, but as it is proved" . . . I never will execute a contract for a plaintiff one way, when with his eyes open he insists in his bill on a different construction against good faith. If he attempts to perpetrate a fraud and fails, I shall take care that he fails altogether, and does not obtain the aid of the Court at all. A Court of equity is not to let parties speculate whether they can commit a fraud and then if they fail, seek what they are really entitled to. I am perfectly justified in dismissing the bill on that ground, although I should have had no difficulty in giving the plaintiff a decree according to the real meaning of the contract, if he had asked for it directly, properly and fairly.

There also appears to me, apart from the ground upon which the suit has been dismissed by the learned District Judge, the following other grounds for holding that a decree for specific performance should not be granted in this case: (1) Ex. 1 purports to be a contract by defendant 1 as well as by defendant 2 and defendant 1 is described therein as the guardian of his minor sons. The trial Court had after a full discussion of the evidence adduced in the case held that although in fact defendant 1 was the karta of the family, yet at the time when he signed the contract he purported to act merely as the guardian of his minor sons and not as representing the whole family and for this reason defendant 2 was also joined as a party to the agreement. It appears that defendant 2 neither signed the contract nor was present at the time of its registration. The plaintiffs now want to enforce the contract on the ground that defendant 1 purported to register the contract as a karta and that he was in fact a karta. The learned Judge seems to have accepted this contention but he has made no attempt to meet the arguments which were advanced by the trial Court to show that although it was open to defendant 1 to execute the contract as a karta, yet as he had elected not to do so, the plaintiff could not now turn round and say that he should be deemed to have executed it as a karta. However that may be, the fact remains that one of the parties to the written contract who was to have executed it, did not execute it and the reasons for his not executing it are not clearly before us; (2) it has been found by the trial Court (and the finding of the Court has not been disturbed in appeal) that the survey entries with regard to khudkasht lands are not correct in certain respects and there is thus a conflict between the contract relied upon by the piaintiffs and the agreement subsequently entered into between defendants first party and his co-sharers. Moreover as the learned trial Court has pointed out no particulars have been given in the contract of the 22 bighas of khudkasht lands and the identity of those lands is by no

4. Molloy v. Egan, (1845) 7 Ir Eq Rep 590.

means clear. In such circumstances a decree for specific performance of the contract would only lead to confusion and also involve the minors in further litigation. I would in these circumstances dismiss the plaintiffs' appeal but having regard to the fact that defendant 1 did not contest the suit I would direct that the costs incurred by the plaintiffs throughout should be paid by him (defendant 1). There will be no order for costs between the plaintiffs and the respondents who have appeared in this Court, but the decree for costs obtained by the latter in the trial Court will stand.

Madan, J.—I agree.

S.C./D.S. *Appeal dismissed.*

A. I. R. 1937 Patna 428

WORT, J.

Bank of Behar Ltd. — Plaintiff — Appellant.

v.

Madhusudan Lal and *another* — Defendants 1 and 2—Respondents.

Appeal No. 65 of 1935, Decided on 16th March 1937, from appellate decree of Sub-Judge, 3rd Court, Gaya, D/- 18th September 1934.

(a) Negotiable Instruments Act (1881), S. 28 — No indication on face of pro-note that any person other than person executing it is real debtor — Person executing it is liable under pro-note.

The person liable is the person whose name appears on the face of the bill and no other person can be held liable unless it is clearly indicated on the face of the instrument that the agent is acting in his behalf. [P 429 C 1]

Where there is no indication on the face of a pro-note that any person other than the person executing it, is a real debtor, the person executing the pro-note is liable under the pro-note : *A I R 1918 P C 146, Rel. on.* [P 429 C 1]

(b) Pleadings — Failure to deny — Allegations in written statement not specifically denied by plaintiff cannot be held to be proved—Rule applicable in case of allegations in plaint does not apply to averments in written statements.

What holds good as regards the allegations in the plaint does not hold good as regards the averments in the written statement. The allegations, therefore, made by the defendant in his written statement cannot be held to be proved merely by the absence of their specific denial by the plaintiff. [P 429 C 2]

(c) Appeal—Competency—Party aggrieved—Plaintiff asking relief against two defendants —Court granting against one only—As plaintiff has grievance, appeal from decision is competent.

Where the plaintiff asks for a decree against both the defendants and the Court grants a decree against only one of them, the plaintiff has a grievance against the decision and so an appeal therefrom is competent. [P 429 C 2]

(d) Promissory note—Liability under—Suit on pro-note—Promisor contending inducement of execution of pro-note by consideration of sufficiency of security given to promisee by real debtor for loan—Promisor not contending inducement to execute pro-note by allegation by promisee regarding security —Promisor cannot deny liability under pro-note as he is principal debtor and not surety —Though promisor may have right against real debtor he had none against promisee.

In a suit on a pro-note the promisor contended that he was induced to execute the pro-note because he thought that there was sufficient security given to the promisee by the real debtor for the loan. The promisor did not contend that he was induced to execute the pro-note by any allegation made by the promisee regarding the security :

Held : that the promisor could not deny his liability under the pro-note as the promisor was a principal debtor and not a surety. If the promisor had got any right, it was against the real debtor and not against the promisee. [P 430 C 1]

Netai Chandra Ghosh—for Appellant.

Raj Kishore Prasad—for Respondents.

Judgment.—This is a very clear case and in my judgment quite hopeless from the point of view of the defendant-respondents. The plaintiff, the Behar Bank, sued two parties, defendant 1 and defendant 2. Defendant 1 executed a promissory note for Rs. 1,690 which it is now said was executed for a loan made to defendant 2. It may very well be that the loan was for defendant 2, but in the circumstances of the case, as will be seen, that question is quite immaterial. The Judge in the Court below has given judgment against defendant 2 on the footing that the loan was advanced to him and he has said that the decision of their Lordships of the Judicial Committee of the Privy Council in 46 Cal 663[1]

is applicable to cases where the creditor advances money under the belief that the executant of the document is the real debtor or in cases where he is led to believe like that.

That is a completely erroneous statement of the law. Under the ordinary law of contract if an agent acts on behalf of the principal, the principal being disclosed, the creditor is entitled to sue the principal : S. 230, Contract Act, would apply. But that is not this case. The law under the Negotiable Instruments Act is an exception and S. 28, Negotible Instruments Act,

1. Sadasuk Janki Das v. Sir Kishen Pershad, A I R 1918 P C 146=50 I C 216=46 I A 33 =46 Cal 663 (P C).

1881, applies, that is to say, the person liable is the person whose name appears on the face of the bill and no other person can be held liable unless it is clearly indicated on the face of the instrument that the agent is acting in his behalf. This statement is supported by a large number of decisions on the Bills of Exchange Act, 1882 in England and at Common law, and in India specially by the case reported in 46 Cal 663[1] to which I have already referred. The promissory note here admittedly was executed by defendant 1 and there is no suggestion by either party that there was any indication on the face of the bill that defendant 2 was the real debtor. The only way to get out of that was for the plaintiff, if he desired, to make defendant 2 liable or to have sued the defendant on the loan and not on the promissory note. That raises the first question which is argued before me.

It is contended by the learned advocate appearing on behalf of the respondents that the action was on the debt and not on the promissory note. It is true that it was for the balance due on the promissory note, to say the least of it. But I think it is abundantly clear, when the pleadings are looked into, that the action was on the bill or promissory note. Para. 1 of the plaint alleges that the defendant executed the promissory note in lieu of the said loan : Para. 7 gives the date of the promissory note as the date of the cause of action ; and para. 7 of the written statement avers that defendant 2 requested this defendant to execute a promissory note and assured this defendant that as the ornaments were valued at much more than Rs. 1,800 there was no risk in this defendant executing the promissory note. If the plaint had been a plaint in an action on the debt, and if the defendant had understood that to be, the written statement would be quite different from what it was. The defendant would have ignored the promissory note and stated that he was acting in the matter of the loan on behalf of the defendant and that the plaintiff knew that to be the case. There is no suggestion in the written statement which would entitle (if the matter was dealt with strictly as it ought to be) the defendant to raise the question of the exception under S. 28, Negotiable Instruments Act, that is to say, inducement by the plaintiff to sign the bill on the footing that he (defendant 1) would not be liable. There is no such suggestion in the written statement whatever. It is not surprising, therefore, that no cross-examination of the plaintiff's only witness was directed to that point, nor was any evidence given by the defendant himself. His only suggestion was that there was some sort of understanding between him and defendant 2. When those facts are stated there could be no way out of giving judgment against defendant 1. To put it shortly defendant 1, was liable on the face of the promissory note ; it was an action on the promissory note ; it was not an action on the debt ; and lastly the defendant neither alleged nor did he prove those facts which would entitle him to take advantage of the exception under S. 28.

I have listened to an extraordinary argument to the effect that as the defendant alleged it and as the plaintiff did not deny, it must be taken to be proved. What holds good as regards the allegations in the plaint does not hold good as regards the averments in the written statement, and indeed as I have already pointed out the defendant made no attempt to prove any inducement. The next point was that the appeal was incompetent as judgment had been given against defendant 2. The case of the plaintiff was that defendant 1 was liable and I suppose he had reason for making him liable. The Court was asked to make both or either of them liable. As the plaintiff has got a grievance the appeal to the lower appellate Court and to this Court is quite competent. Lastly it is suggested that the matter should go back for the determination of the question of ornaments. Ordinarily speaking, defendant 1 has got no rights with regard to these ornaments whatever. He was not in the position of a surety. A surety, if security is given for the principal debtor's debt, has certain rights if the security is in any way affected. If there was any fraud on the part of defendant 2, the plaintiff may have (I do not say that he has, nor do I wish it to be understood that he has) some grievance ; but certainly the defendant has got no action or right against the Bank. The question whether the matter should go back depends very largely upon the evidence of the defendant himself. He makes no grievance in his evidence as to the handing back of the ornaments, for they have

been handed back to defendant 2. He says in his evidence that the ornaments were worth at least Rs. 3,000 : gold was dear in 1931. 'Defendant 2' says the witness 'told me that the ornaments were worth Rs. 2,500. I believed what he said. At that time I had no idea that I might be deceived'. He then says :

> On 7th July 1931, I did not ask defendant 2 or Haridas to show me ornaments that were pledged in March 1927. I kept no list of the ornaments or their weights. I have no recollection of their weights ..... As the ornaments were sold for much lesser price, I infer that they must have been changed.

There are several passages to the effect that the witness knew nothing about the ornaments at all. He had gone entirely on the statement or alleged statement made by defendant 1, and in the circumstances it would be waste of public time to allow the case to go back for a decision whether by collusion (by that I understand the argument to mean fraud of the Bank and defendant 2) defendant 1 has been in some way cheated. If he has got any rights he has got against defendant 2, but certainly not against the Bank. Defendant 1 (respondent) is the principal debtor and not a surety. I would add one thing further which makes the matter as a point of law beyond any doubt. The allegation of defendant 1 was that he was induced either actively by defendant 2 or by his own consideration of the matter to execute this hand-note because he thought that there was sufficient security. There is no suggestion that the Bank made any allegation about the security which they held, and it would be impossible, therefore, even if the learned Judge held to the contrary, to hold that as a matter of law the defendant was entitled to set up this defence to an action on the promissory note which I have held this to be. I have already pointed out and I repeat that this is to my mind a very clear case indeed and the judgment of the Court below must be set aside and there must be a decree against defendant 1 with interest *pendente lite* and costs throughout. Leave to appeal is refused.

W.D./A.L. *Order accordingly.*

A. I. R. 1937 Patna 430

COURTNEY-TERRELL, C. J.
AND JAMES, J.

Jagdeo Narain Singh and *others* — Appellants.

v.

Tula Singh and *others* — Respondents.

Letters Patent Appeals Nos. 79 to 86 of 1935, Decided on 5th February 1937, from decision of Wort, J., D/- 1st November 1935, reported in *A I R 1936 Pat 54*.

Bengal Tenancy Act (8 of 1885), S. 30-A— Suit for enhancement of rent—No prevailing rate found in village—Suit must fail.

In a suit for the enhancement of rent claimed under S. 30-A, Bengal Tenancy Act, if no prevailing rate is to be found in the village, the claim in suit must fail : *A I R 1916 Pat 120, Ref.* [P 431 C 2]

S. N. Ray and *A. H. Fakhruddin* — for Appellants.

B. N. Mitter, *K. Sahai* and *Raj Kishore Prasad* — for Respondents.

James, J.—These are appeals under Cl. 10 of the Letters Patent from the decision of a Judge of this Court sitting singly, dismissing a batch of second appeals from decree in suits for enhancement of rent. The plaintiff claimed enhancement under sub-ss. (a) and (b) of S. 30, Bengal Tenancy Act. The Courts below found that it had not been demonstrated that any prevailing rate existed in the village and therefore dismissed the plaintiff's claim under S. 30-A. Under S. 30-B the enhancement admissible on a strict application of the provisions of S. 32 of the Act would have been at 0-3-9 in the rupee, but applying the provisions of S. 35 the Courts below found that enhancement at a higher rate than that of one anna in the rupee would not be fair and equitable. The learned Judge of this Court has accepted the finding that there is no prevailing rate in the village, and he has also accepted the finding that enhancement at the higher rate than one anna would not be fair and equitable; but permission has been given to appeal under Cl. 10 of the Letters Patent because the learned Judge considered that the Courts below were mistaken in supposing that the decision in 2 P L J 124,[1] had been overruled by subsequent decisions of this Court. Mr. Sivanandan Ray on behalf of the plaintiff-appellant suggests that on

1. Brij Behari Singh v. Sheo Sankar Jha, A I R 1916 Pat 120=39 I C 85=2 P L J 124.

the application of the decision in 2 P L J 124,[1] the prevailing rate should be determined in accordance with the principles laid down in S. 31-A, Bengal Tenancy Act. So far as the Courts below have agreed in finding that no prevailing rate existed in the village, they have proceeded exactly in accordance with the instructions which were given in *Brij Behari Singh's case*[1] wherein by reference to the decision of Mitter J. in 9 W R 83,[2] the late Sir B. K. Mullick made it clear that the prevailing rate must be understood to mean, not the average rate, nor the rate at which more than half of the land of the village was held, but the actual prevailing rate of rent at which all the villagers or the great majority of them held their land. In the case to which Sir B. K. Mullick referred, the learned Judge had cited as an example a village in which over ninety per cent. of the raiyats might hold at a certain determined rate and pointed out that if so large a proportion of the land of the village were held at a certain rate it might be reasonably assumed to be the prevailing rate of the village.

It need not be doubted that if in the present case ninety per cent. of the raiyats had held their land at a certain definite rate, that would have been properly regarded as the prevailing rate; unless there were some special circumstance such as recent commutation of rent on a large scale to make it impossible thus to treat the rate. Mr. Sivanandan Ray has drawn our attention to the report of the commissioner from which it is obvious that nothing of the kind is to be found in this village, as the learned Judge of this Court has remarked, and the finding that there is no prevailing rate must be affirmed. But if the principles laid down in *Brij Behari Singh's case*[1] are to be applied, and there is no prevailing rate in the village, then the holdings in suit would have to be assessed at the lowest rate paid for land of similar description with similar advantages in the village. This fact has frequently escaped notice when the decision of Mullick, J. has come under consideration, although attention was drawn to it by Wort, J. in 14 P L T 645.[3] On the strict application of the rule in *Brij Behari Singh's case*,[1] the plaintiff's claim under S. 30-A would thus necessarily fail since all the defendants are already paying at rates higher than the lowest rate paid for lands of similar description in the village. In later decisions wherein the decision in *Brij Behari Singh's case*,[1] has been discussed, it has been held that if no prevailing rate is to be found in the village the claim under S. 30-A, Bengal Tenancy Act must fail. This, in our judgment, is the more correct view. The same result would ordinarily ensue from the application of the rule in *Brij Behari Singh's case*[1]; but it is difficult to understand how, if no prevailing rate is found in the village, the provisions of S. 30-A can be applied to assess the land at the lowest rate paid for lands of similar description in the village.

It is manifest that the provisions of S. 31-A must not be applied except in that small area in the Monghyr district to which the provisions of that section have been extended. It is difficult to conceive in what circumstance the decision in *Brij Behari Singh's case*[1] could be held to justify the application of the principles laid down in S. 31-A, because these are not to be applied if the lowest rates paid for land of similar description can be ascertained; and it is clear that if the lowest rate cannot be ascertained the procedure prescribed by S. 31-A cannot be adopted. The decision has been misunderstood as implying that the provisions of S. 31-A are to be followed in a suit for enhancement when the prevailing rate cannot be ascertained; but on a proper reading of the judgment this conclusion certainly cannot be drawn from it. It therefore appears to matter little for practical purposes whether the Courts below were right or wrong in assuming that the decision in *Brij Behari Singh's case*,[1] so far as it referred to S. 31-A, Bengal Tenancy Act had been overruled, since on a proper reading of the judgment that direction could never come into practical application at all. Mr. Sivanandan Ray further argues that since the rents paid by the defendants in these cases are low, the full enhancement on a strict reading of S. 32, Bengal Tenancy Act ought to have been allowed. Mr. Ray pointed out that in 11 Pat 654,[4] a Special Bench of this Court did actually allow enhance-

2. Shadoo v. Ramanoograha, (1868) 9 W R 83.
3. Kameshwar Singh v. Soney Misser, A I R 1933 Pat 529=148 I C 1199=14 P L T 645.
4. Nathuni v. Ramsaran, A I R 1932 Pat 225=139 I C 191=11 Pat 654=13 P L T 377 (S B).

ment on the ground that the rent which had been paid by the defendants in that case was exceptionally low. The general effect of that decision has apparently been properly appreciated by the learned Munsif, which was this; that the provisions of S. 35, Bengal Tenancy Act should be read as saving an officer who is applying the provisions of S. 32 from the anomalous position in which he might otherwise find himself, of being obliged to take as a basis for future payments comparatively recent conditions which he may know have already ceased to exist. In the present case the learned Munsif pointed out from the evidence which he had before him under S. 39, Bengal Tenancy Act that if the later decennial period had been extended by one year, the rate of enhancement admissible would fall by more than half; while if it were extended by two years, up to 1932, the rate admissible would fall to one anna. In the circumstances he came to the conclusion that it would not be fair and equitable to allow enhancement at the rate of more than one anna in the rupee; and it cannot be said that the discretion which he is required by law to exercise in this matter has been unfairly exercised. This finding that enhancement at one anna in the rupee would be fair and equitable was also accepted by the learned Judge of this Court and we do not find any ground for interference with his decision. I would dismiss these appeals with costs. There will be one consolidated hearing fee of Rs. 64 which will be equally divided among the eight sets of respondents.

Courtney-Terrell, C. J.—I agree.

S.C./D.S. *Appeals dismissed.*

A. I. R. 1937 Patna 432

WORT, J.

Shyam Lal — Appellant.

v.

Raghunath Marwari — Respondent.

Appeal No. 972 of 1934, Decided on 16th March 1937.

Contract Act (1872), S. 60—Absence of express stipulation to appropriate—Court must see whether parties intended to appropriate payment to particular debt.

Where there is an absence of express stipulation to appropriate the payment to a certain debt, the Court has got a further duty to see whether there was any intention of the parties to appropriate it to a particular debt. [P 433 C 2]

Syed Ali Khan and *Sambhu Barmeshwar Prasad* — for Appellant.

S. C. Mazumdar — for Respondent.

Judgment.—This is an appeal by the plaintiff in an action for the redemption of certain ornaments to secure a debt owed by the plaintiff to the defendant. The Judge of the trial Court decided that Rs. 300 had been paid towards the debt and that Rs. 150 which the plaintiff alleged had been paid had not been paid. As regards the latter point the appellate Court expresses no opinion and I am not in a position now to know whether the point was argued or not. I do not propose to encourage litigants to argue these questions in this Court when this Court has no materials upon which to decide whether as a matter of fact the point was argued or not. It may very well be in this case that the finding of the first Court (the criminal Court's decision was not evidence) and the finding of the trial Court in this action were so clear that the parties did not think it wise or necessary to go into this matter. I therefore leave that point.

The other question was to which debt of the plaintiff the sum of Rs. 300 admittedly paid was to be appropriated. It is quite clear that there was no express appropriation by the plaintiff and I think it is equally clear from the finding of the lower appellate Court that in the books of the plaintiff at any rate the payment was appropriated to some debt other than that secured by the deposit of the ornaments. The learned advocate who appears on behalf of the plaintiff-appellant contends that the learned Judge has misapplied S. 61, Contract Act. It appears that the Court has appropriated in the absence of appropriation by the parties. The contention is that S. 60 applied and the Judge not only had to come to the conclusion whether there had been express appropriation or not but had to consider whether there were any circumstances from which it could be inferred that it was intended by the debtor to appropriate the payment to a particular item. I think that is sufficiently answered by the statement of the Judge. It is impossible to say that the Judge was not aware of the

sections of the Act because he points out that his attention was invited to Ss. 59, 60 and 61 and then adds:

> There is nothing to show that at the time of the payment of Rs. 300 the appellant stipulated that it should be placed for the redemption of the pledged ornaments in preference to any other dues.

The contention of the advocate is that the Judge was directing himself to a question of express stipulation whereas the section indicates that there may be evidence of intention other than express stipulation. The words are these:

> Where the debtor has omitted to intimate and there are no other circumstances indicating to which debt the payment is to be applied, the creditor may apply it at his discretion to any lawful debt actually due and payable.

I have read the section from which it is quite clear that although the stipulation may put the matter beyond doubt, the Court has got a further duty to see whether there was any intention of the parties to appropriate it to a particular debt. Rather there are instances indicating to which debt the payment is to be applied and from some points of view there is a slight variation of the Common law. At Common law an appropriation may be held to have taken place although the proof of an express appropriation might be wanting. But in any event it would be necessary at Common law to prove the actual appropriation whereas the section rather indicates something short of that. It is contended here that the fact that the plaintiff demanded back the ornaments at the time of the payment of Rs. 300 is the circumstance from which it might be inferred that the plaintiff was appropriating the Rs. 300 to a particular debt. That is quite possible; and whether there are any other circumstances in the case I am quite unaware although the learned advocate has not pointed out any to me at the moment.

I think in all the circumstances of the case the matter must go back for the determination of these questions. At first I felt that the Judge was stating quite clearly that there were no such circumstances. But the words actually used by the learned Judge are "there is nothing to show that the appellant stipulated" from which I gather he means that there was no express intimation by the defendant. As regards the Rs. 150, whether that has been paid or not has not been decided by the Judge. It is contended by Mr. Mazumdar that the point was not argued. As the matter has to go back on the other point the Judge in the Court below will consider the question whether this point as to the payment of Rs. 150 was argued by the appellant before him. If it was not, the matter will not be further considered; if it was, the Judge will come to a finding on that question. The case will be remanded to be heard on these two points and the costs of this appeal will abide the result of the hearing in the Court below.

K.B./A.L. *Case remanded.*

A. I. R. 1937 Patna 433

SPECIAL BENCH

COURTNEY-TERRELL, C. J., MOHAMAD NOOR AND VARMA, JJ.

In the matter of *G., an advocate.*

Misc. Judicial Case No. 1 of 1937, Decided on 20th April 1937.

(a) Legal Practitioner — Misconduct — Senior advocate not accustomed to withdraw client's money in Court—Practice of such advocate to advise client to engage junior advocate for such work — Clerk of senior advocate approaching junior advocate with vakalatnama for withdrawing client's money —Junior advocate crossing endorsement on vakalatnama and signing it with word "accepted", in good faith—There is no imputation on junior advocate's professional honour.

A senior advocate was not accustomed to withdraw his client's money in deposit in the Court. In such cases such advocate usually advised his clients to get the services of a junior advocate for that purpose. The clerk of the senior advocate approached a certain junior advocate with a vakalatnama on behalf of the former's client authorizing him to withdraw the client's money. The junior advocate accepted the vakalatnama being aware of the general unwillingness of the senior advocate to perform such kind of work. The junior advocate acting in good faith crossed out the endorsement on the vakalatnama and signed his name on it with the word "accepted":

Held: that there was not the slightest imputation on the professional honour of the junior advocate. The fact that the senior advocate was unwilling to perform the kind of duty mentioned and the circumstance that the junior advocate was approached by a person who was up to that time at least a clerk in the employ of the senior advocate and trusted by him, deprived his mind of all cause for suspicion. [P 434 C 2]

(b) Legal Practitioner—Duty of advocate while withdrawing money or accepting serious responsibility of such kind on behalf of client stated.

Advocates when having to withdraw money or to accept serious responsibility of the kind from and on behalf of client should, even if there be no apparent circumstances to justify a suspicion, do

everything in their power to verify the form of the vakalatnama and furthermore they should not accept a vakalatnama unless they have satisfied themselves of the bona fides of the person who offers it to them. [P 434 C 2]

B. N. Mitter—for Bar Council.

Govt. Pleader—for the Crown.

Judgment.—In this matter we have to consider the conduct of an advocate of this Court and the report thereon by a tribunal appointed under the Bar Councils Act. The facts are simple. Another advocate whom I will designate as *X* was in charge of a certain first appeal pending in this Court on behalf of the appellants. The appeal was eventually disposed of and a sum of money remained due to the advocate *X* from his clients and a sum of money was lying to the credit of the appellants as surplus printing cost in the High Court. The advocate *X* had a clerk who up to that time seems to have given satisfaction to his employer. There is a rule governing the practice of the office. When money is to be withdrawn standing to the credit of a client, the advocate has to go down personally to acknowledge the receipt of the money. This practice is sometimes inconvenient for advocates of leading practice, with the result that a junior advocate whose time is not so precious is instructed to take out the money. In this particular case the advocate *X* was not accustomed to receive money in the office and the practice I have described seems to have been usually followed by him of advising the client to get the services of a junior advocate for that limited purpose. On one morning the clerk of the advocate *X* went to the advocate whose conduct we are considering with what purported to be a vakalatnama on behalf of the appellants authorizing him to withdraw the sum standing to the appellants' credit. The advocate being aware of *X's* general unwillingness to perform that kind of duty and being directly approached by *X's* clerk accepted the vakalatnama from the clerk. He should have of course ascertained that the vakalatnama was genuine and that the person who gave it to him had authority to do so, but acting, as the tribunal have found, and as we have no doubt, in perfect good faith in the circumstances, he crossed out the endorsement which stood on the vakalatnama shown to him by the clerk 'received through Firangi Rai', and simply signed his name with the word 'accepted'. When the application for withdrawal was presented in the office the irregularity of the precise form of acceptance was noticed and the advocate was called on for an explanation and eventually the matter was directed to be placed before the tribunal of the Bar Council who investigated the matter under the head of certain charges which the tribunal thought fit to hear against the advocate: firstly, that he had accepted a vakalatnama from a person who was not authorized to give it; secondly, that he had not complied with R. 5 (f), Chap. 4 of the General Rules and Circular Orders; thirdly, that he had accepted the vakalatnama without consulting Mr. *X* and thereby had assisted the client in an attempt to deprive Mr. *X* of the amount still due to him and, fourthly, that he had stated to the registrar that he had consulted Mr. *X* before doing so which statement was said to be untrue. The tribunal investigated the matter and found that there was nothing to throw the slightest imputation upon the advocate's professional honour. The tribunal found that in the particular circumstances of the case, the admitted fact that Mr. *X* was unwilling to perform the kind of duty mentioned and the circumstance that the advocate was approached by a person who was up to that time at least a clerk in the employ of Mr. *X* and trusted by him, deprived his mind of all cause for suspicion. With those findings we agree. The case is, however, of some importance, because it emphasizes the extremely clear necessity that advocates when having to withdraw money or to accept serious responsibility of the kind from and on behalf of clients should, even if there be no apparent circumstances to justify a suspicion, do everything in their power to verify the form of the vakalatnama and furthermore they should not accept a vakalatnama unless they have satisfied themselves of the bona fides of the person who offers it to them. Some discussion took place in the matter of the alleged statement by the advocate to the registrar as to the prior consultation with Mr. *X*, but the tribunal unanimously found that there was no intention on the part of the advocate to deceive the registrar and that the interpretation of his statement to the registrar was a matter of a misunderstanding. The tribunal make certain recommendations which will carefully be considered as to the advisability of altering the rules in

certain respects which at this time it is not necessary to discuss. With the emphasis of the importance to the profession and to the administration of justice of the accurate verification of vakalatnamas, we see no reason to disagree with the report of the tribunal or to make any further order in this matter.

W.D./A.L. *Order accordingly.*

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* A. I. R. 1937 Patna 435

FULL BENCH

COURTNEY-TERRELL, C. J., JAMES AND VARMA, JJ.

Karan Singh and *another* —
Plaintiffs — Appellants.

v.

Mt. Tetar Kuer and *others* —
Defendants — Respondents.

Appeal No. 50 of 1934, Decided on 23rd April 1937, from decision of Judicial Commissioner, Chota Nagpur, D/- 5th April 1933.

*** (a) Hindu Law — Joint family—Manager —Major elder brother who is also manager can without concurrence of his minor brothers give up right to sue for recovery of property alienated by guardian when all of them were minors—Suit to recover such property if barred against major elder brother who is karta is also barred against other brothers.**

In an undivided Hindu family governed by the law of Mitakshara, an elder brother who has attained majority and is the manager of the family can without the concurrence of his minor brother or brothers give up the right to sue for the recovery of property which has been improperly alienated by their guardian at a time when all the brothers were minors. Hence a suit to recover such property, if barred against the major elder brother who is karta, is also barred against other minor brothers : *Case law discussed.*

[P 436 C 1, 2; P 440 C 1]

(b) Limitation Act (1908), S. 7 — Term 'discharge'—Scope—It includes release of rights to institute suit.

The term 'discharge' in S. 7, Lim. Act, does not mean merely a discharge of pecuniary liability, but has a wider significance and includes a release of rights in immoveable property such as even the equity of redemption or a release of other rights, as for instance a right to institute a suit : *A I R 1915 Mad 723, Rel. on.* [P 439 C 2]

K. K. Banerji — for Appellants.

Ragho Saran Lal — for Respondents.

Judgment.—This appeal arises out of a suit for confirmation of possession or in the alternative for recovery of possession over 8 annas of mauza Kurpani after setting aside the sale dated 12th June 1914 executed by the plaintiffs' mother Mt. Hiran Kuer, in favour of one Sheoshankar Sahu with respect to the share on the ground that the alienation was not for any legal necessity and consequently not binding upon the plaintiffs. The plaintiff-appellants also sought to redeem a zarpeshgi of the properties mentioned in Sch. B of the plaint, for a partition of their share in the mauza and for mesne profits.

The plaintiffs Karan Singh and Charan Singh are two brothers. Their case shortly was that the entire mauza Kurpani belonged to Mahali Singh, their father, and his cousins Shankar and Sukhnath Singh, Mahali's share being 8 annas and the remaining 8 annas belonged to Shankar and Sukhnath, that in execution of a money decree obtained by Sheobhajan Sahu (the husband of defendants 1 and 2) against Shankar Singh 8 annas share of the mauza was sold and purchased by Sheobhajan Sahu on 30th March 1911, that on 18th September 1914 Sheobhajan succeeded in getting the remaining 8 annas interest in the zarpeshgi properties by a deed of assignment after paying Rupees 505-8-0, that during their minority their mother (defendant 3) sold their 8 annas share in the mauza by a sale deed dated 12th June 1914 to Sheoshankar Sahu reserving only a small quantity of land for their maintenance, and that she received no consideration from Sheoshankar Sahu, for the sale although it is mentioned in the sale deed to be Rs. 800, that fraud was practised upon the mother of the plaintiffs by Sheoshankar in collusion with Sukhnath and Shankar's son Jai Singh, that the said alienation was not for any legal necessity or for the benefit of the plaintiffs but was contrary or highly detrimental to their interest they being minors, that on 5th January 1917 Sheoshankar Sahu executed a sale deed in favour of Sheobhajan Sahu in respect of the 12 annas of the mauza, that plaintiff 1 attained majority only 8 months before the filing of the suit in 1928 (the suit having been filed on 21st January 1929) and having come to know the state of affairs approached defendants 1 and 2 to redeem their share of the zarpeshgi but the said defendants were unwilling to do so, that the plaintiffs accordingly deposited the sum of Rs. 505-8-0 representing their share of the zarpeshgi on 9th January 1925 in Court, that they also asked defen-

dants 1 and 2 to effect a partition of the shares in the mauza but that they refused to do so, and hence the suit.

Defendants 1 and 2 contesting the suit alleged that Mt. Hiran Kuar sold the property for full consideration, that there was no fraud or misrepresentation, that the sale was for legal necessity to pay off antecedent debt, that plaintiff 1 attained majority long ago and fought several suits with the defendants with regard to some of the lands but was throughout unsuccessful, that the suit was barred by limitation, and that the plaintiffs were not entitled to recover possession of the disputed properties or to redeem the zarpeshgi nor were they entitled to have the property partitioned and get mesne profits. The trial Court dismissed the suit and that decision was upheld by the Judicial Commissioner of Chota Nagpur. Various issues were raised in the case, the important ones being Nos. 3 and 4 :

(3) Is the suit barred by limitation ? and (4) Was the sale deed executed by defendant 3 obtained through fraud and misrepresentation and was it without consideration ? Was there any legal necessity for the said transfer ?

The findings of fact arrived at by the lower appellate Court are that the plaintiffs failed to prove that Karan Singh attained majority within three years before the institution of the present suit ; that Karan Singh was the managing member of the plaintiff's family; and that there was no legal necessity for the sale. The second appeal having come up for hearing before a Bench has been referred to this Full Bench in view of certain points of law involved in the case. On the findings of fact the question that arises and which has been referred to this Bench is, whether in an undivided Hindu family governed by the law of Mitakshara, an elder brother who has attained majority and is the manager of the family can without the concurrence of his minor brother or brothers give up the right to sue for the recovery of property which has been improperly alienated by their guardian at a time when all the brothers were minors. In the event of the answer to this question being in the negative, another question which arises is whether the suit would not be barred as regards the elder brother's share who notwithstanding his majority did not institute a suit within three years of his attaining majority. If the answer to the question is in the affirmative, then the question arises whether a suit brought by two or more brothers to set aside an alienation by their guardian more than three years after the elder brother attained majority is barred by limitation not only as regards the elder brother's share but also in respect of the share of the younger brother or brothers in the family property, though the latter attained majority within three years prior to the institution of the suit. The answer to the question depends mainly on the interpretation to be put on S. 7, Lim. Act of 1908. That section runs as follows :

Where one of several persons jointly entitled to institute a suit or make an application for the execution of a decree is under any such disability, and a discharge can be given without the concurrence of such person, time will run against them all ; but, where no such discharge can be given, time will not run as against any of them until one of them becomes capable of giving such discharge without the concurrence of the others or until the disability has ceased.

Mr. K. K. Banerji, appearing on behalf of the appellants, has with his usual thoroughness taken us through a number of decisions of the different High Courts and contends that every co-parcener has a right to challenge the acts of his guardian or the manager of the joint family irrespective of the rights of the other co-parceners, and if it is a case of a joint cause of action the elder brother could not give a valid discharge so as to bind the minor claimant who is his younger brother in this case. In 48 All 152,[1] where a Hindu father had contracted to sell a part of the joint family property to discharge a mortgage upon other parts of it, but the mortgage was discharged before the receipt of the purchase price which the father applied to his own purposes, it was held by their Lordships of the Judicial Committee that the sale could not be supported as having been made to discharge an antecedent debt, and the suit brought by the younger son within three years of attaining majority to avoid the sale was not barred by limitation, although the elder son had attained majority more than three years earlier and had taken no steps to question the alienation. But in that case it is to be noticed that although the elder son had attained majority more than three years earlier, the father was still alive and therefore it could not be said that the elder brother as the karta of the family

1. Jawahir Singh v. Udai Parkash, A I R 1926 P C 16=93 I C 216=53 I A 36=48 All 152 (P C).

could give a valid discharge as contemplated by S. 7 without the concurrence of the younger brother. In a later case of the Allahabad High Court in 52 All 768,[2] the joint Hindu family consisted of three brothers, two of whom were minors. The eldest brother together with the mother expressly acting as guardian of the minors, sold a portion of the joint family property. Another portion was sold by a second sale deed in which the mother did not expressly profess to act as guardian. The elder of the two minors attained majority, but did not sue within the statutory period to challenge the sales. The younger sued within three years of his attaining majority, although more than three years after the elder had attained majority. There it was held that the suit was not barred by limitation. Mukerji and Bennet, JJ. observed as follows :

> In a joint Hindu family every member, ordinarily, claims for himself. When a father alienates property every one of the sons has a right to impeach the transfer if it is not binding on the family. It is an individual right and is enjoyed severally by each of the joint members of the family. S. 7, Lim. Act, applies where any suit has to be brought "jointly" by several persons. A suit by one of several sons of a Hindu father who has transferred the property would be maintainable without the other sons joining in the suit. It cannot, therefore, be said that the right to sue is claimed "jointly" by several sons of a father who alienated the joint Hindu family property. Further, the use of the words 'a discharge can be given without the concurrence of such person' indicates that the section is applicable to cases like a debt where the question of discharge may arise. Here there is no question of discharge. The mother, on behalf of the minors, and the eldest brother alienated the property. If the head of the family (Debi Prasad at the time) could give a discharge within the meaning of S. 7, Lim. Act, no suit whatever could lie at the instance of the younger brother of Debi Prasad. We are of opinion that no question of giving a discharge arises in the present case.

Evidently the interpretation is due to the illustrations given under S. 7, Lim. Act. In A I R 1931 All 398[3] Banerji and King, JJ. of the Allahabad High Court referring to the decision in *Jawahir Singh* v. *Udai Parkash*[1] already referred to, held that :

> Section 7, Lim. Act, clearly has got no application to any but the cases to which it is made applicable, namely, to debts and to execution of decrees.

In Full Bench decision of the Madras High Court in 38 Mad 118[4] it was held that according to Ss. 7 and 8 and Art. 44, Lim. Act, a suit brought by two brothers of an undivided Hindu family to set aside an alienation by their guardian more than three years after the elder attained majority is barred by limitation not only as regards the elder brother's share but also in respect of the younger brother's, though the latter attained his majority within three years prior to the institution of the suit. In that case it is noticed that plaintiff 1 became the managing member of the family to which plaintiff 2 belonged and that as such plaintiff 1 represented the family. In 41 Mad 102,[5] the Full Bench decision in *Doraiswami Sirumadan's case*[4] was distinguished on the ground that the cause of action of the two sons one of whom was still in the womb on the date of sale was different, because at the time of the execution of the sale deed in question the mother was acting as the guardian of only one of the sons and not of the other who was in the womb, and therefore their Lordships held that although the claim of the elder son was barred, that of the latter was not so.

In 51 Mad 627[6] the earlier Full Bench decision of the Madras High Court in 38 Mad 118[4] was dissented from, and the view taken by the Allahabad High Court which was upheld by the Privy Council in 48 All 152[1] was followed. It was held there that a suit by a younger son within three years of his attaining majority, against his father and an alienee from the father, to set aside an alienation made by the father of joint ancestral family properties was not barred by limitation, even though the eldest son who had attained majority more than three years prior to the suit had allowed his claim to become barred by limitation. The facts of the case in 45 Bom 446[7] are hardly distinguishable from the facts of the case in hand. There the facts were that in 1915

2. Sheonandan Prasad v. Mt. Tahiran Bibi, A I R 1930 All 861=130 I C 691=1930 A L J 852=52 All 768.
3. Kamta Rai v. Jaduraj Kunwari, A I R 1931 All 398=133 I C 155.
4. Dorai Swami Sirumadan v. Nondisami Saluvan, A I R 1915 Mad 1201=21 I C 410=25 M L J 405=38 Mad 118 (F B).
5. Kandasami Naiken v. Irusappa Naiken, A I R 1918 Mad 724=40 I C 664=41 Mad 102=33 M L J 309.
6. Rajagopala Ayyangar v. Srinivasa Raghava Ayyangar, A I R 1928 Mad 1055=109 I C 572=55 M L J 30=51 Mad 627.
7. Bapu Tatya Desai v. Bala Ravji, A I R 1921 Bom 289=59 I C 759=45 Bom 446=22 Bom L R 1383.

three brothers, members of a joint Hindu family, sued to recover possession of property after setting aside a sale deed made by their mother during their minority on 28th July 1905. Plaintiffs 1 and 2 were minors and plaintiff 3 was more than 21 years of age at the date of the suit. The suit was held barred as against plaintiff 3 but a question having arisen whether it was barred as against plaintiffs 1 and 2 under S. 7, Lim. Act, 1908, it was held that it was barred as against plaintiffs 1 and 2 also inasmuch as plaintiff 3 on his attaining majority became the manager of the joint family and as such could give a valid discharge and acquittance of all claims against the defendants without the concurrence of the minor plaintiffs and the decision in 38 Mad 118[4] was followed. This decision was distinguished in 46 Bom 535[8] but this was a case in which the plaintiffs sued to redeem a property mortgaged by their father. The suit was brought more than three years after the elder brother had attained majority but within three years of the majority of the younger brother. Although it was argued that the suit was barred against both the brothers it was held that as there was nothing to show that the plaintiff who was a major could have given a discharge without the concurrence of plaintiff 2 who was a minor, the suit was in time with reference to both the plaintiffs under S. 7, Limitation Act.

The decision in 45 Bom 446[7] was however followed in 52 Bom 441[9] and it was held that a manager of a joint Hindu family could give a valid discharge without the concurrence of the minor members of the family in the case of an application to execute a decree just as he can in the case of a suit, and the mere fact that one of the members is a minor will not prevent time running against all the members of the family. In the Calcutta High Court in 48 C L J 555[10] it has been held that where some of the plaintiffs are major and some minor but they are all members of a joint Hindu family of which the major plaintiff is the karta, no extension of time can be availed of under the provisions of S. 7, Lim. Act, as the major plaintiff being the karta had authority to give discharge not only for himself but also for the minor plaintiff. In that case the suit was for accounts against the gomashta in charge of a business that had belonged to the father of the plaintiffs. That decision distinguishes the decision in 6 C L J 383.[11]

Mr. Ragho Saran Lal, appearing on behalf of the respondents has drawn our attention to the decision of this Court in 1936 P W N 856.[12] In that case two persons were jointly entitled to a share during their minority, and a suit was instituted, for recovery of possession of properties wrongly recorded during their minority, at a time when one of them was still a minor. It was contended that the suit having been instituted after the period of limitation after one of them had attained majority it was barred notwithstanding the minority of the other. James, J. sitting singly held that mere coming of age of one of them, so long as the other one was minor will not render the suit barred by limitation, unless there was evidence to show that the one who had attained majority was the manager of the family or was authorized to ratify the arrangements made during their minority, and that that was a question of fact. The decision emphasizes the importance of the question of fact whether the person who attained majority was in a position to give a valid discharge. If he was, then of course the suit will be barred, but if he was not then the suit will not be barred by limitation simply because it was filed beyond the period of limitation after the attainment of majority of one member and during the minority of the other.

In an unreported decision of this Court *S. A. No. 1397 of 1930*,[13] disposed of on 14th September 1933, Agarwala, J. under similar circumstances referred to the decision of the Allahabad High Court in 31 All 156,[14] where two brothers sued to set aside a sale effected by their guardian, more than three years after the elder of the two brothers attained majority, and

8. Bai Kewal v. Madhu Kala, A I R 1922 Bom 319=64 I C 972=46 Bom 535=23 Bom L R 1191.
9. Supdu Daulatsing v. Sakharam Ramji, A I R 1929 Bom 13=110 I C 276=30 Bom L R 537=52 Bom 441.
10. Ashutosh Ghose v. Sashi Mohan Roy, A I R 1929 Cal 165=115 I C 354=48 C L J 555.
11. Harihar Prashad v. Bholi Pershad, (1907) 6 C L J 383.
12. Gangdeo Singh v. Ramprasad Singh, A I R 1937 Pat 155=167 I C 934=18 P L T 383=1936 P W N 856.
13. Chaturgun Pande v. Bindhachal Dubey, Second Appeal No. 1397 of 1930.
14. Ganga Dayal v. Mani Ram, (1909) 31 All 156 =1 I C 824=6 A L J 62.

it was held that, in the absence of a finding that the elder brother was the karta of the family, the younger brother's suit was not barred by limitation. The learned Judge accordingly, while dismissing the suit of the major plaintiff 1, remanded the appeal of the minor plaintiff 2 to the lower appellate Court for disposal after coming to finding on the point as to whether the major plaintiff in the suit was the karta of the family.

The decision of the Judicial Committee in 52 I A 69[15] has also been referred to, but that is not quite applicable to the facts of the present case. That was a suit instituted in June 1920 by the four sons of a Hindu father, all members of a joint Mitakshara family, to set aside a sale made by their father on 3rd June 1893 of an ancestral village. They alleged that the sale was made without legal necessity. The time from which the period of limitation began to run in that case was 3rd June 1893 as the alienee took possession of the property on that date. The four plaintiffs were born respectively in the years 1886, 1891, 1897 and 1900. The Courts below had held that the suit was barred by limitation, but the contention on behalf of the appellants was that limitation was saved by S. 7, Limitation Act. It was conceded that the suit on behalf of the first three plaintiffs was barred by limitation but it was contended that the minority of plaintiff 4 saved limitation. Their Lordships held that the cause of action arose on 3rd June 1893 and plaintiff 4 was born in 1900 and that did not create a fresh cause of action or a new starting point from which limitation should be reckoned. Their Lordships held that the extended period can only be claimed by a person entitled to sue at the time from which the period of limitation is to be reckoned, and as the fourth was not in existence at that time he was not entitled to the benefits of S. 7, Limitation Act.

Two other decisions of the Allahabad High Court have been cited. In A I R 1924 All 738[16] the decision of the Madras High Court in 38 Mad 118[4] and that of the Bombay High Court in 45 Bom 446[7] were followed. In A I R 1925 All 672[17] the same view was taken and it was held that an elder brother of a joint Hindu family represented the entire family and therefore he could give a discharge within the meaning of S. 7, Limitation Act, on behalf of the minor brother, and the decision in 41 All 435[18] was followed. This being the trend of the various decisions, it is necessary to look into the wording of S. 7, Limitation Act, with reference to its applicability to the present case. It is clear that the disabilities in view under this section include that of being a minor as laid down in the foregoing S. 6. S. 7 clearly governs the case of persons jointly entitled to institute a suit: and it provides that if any one of such persons is under a disability and none of the other persons could give a discharge without the concurrence of the person under disability, time will not run as against any of them until the disability of the one has ceased or any one of them becomes capable of giving a discharge. If the position is that any one of such persons is capable of giving a discharge then time will run against them all. In the case before us, Karan Singh (plaintiff 1) attained majority more than three years before the institution of the suit, and it has also been found that he was the karta of the plaintiffs' family. The plaintiffs' action in the present case will be governed by the provisions of S. 7, Limitation Act. The question whether Karan Singh could or could not give a valid discharge will depend upon the law which governs him and his brother.

The term 'discharge' in this section does not mean merely a discharge of pecuniary liability, but has a wider significance and includes a release of rights in immoveable property such as even the equity of redemption or a release of other rights, as for instance, a right to institute a suit: *see* 25 I C 755.[19] It is settled law that a karta of a joint Hindu family can give a valid discharge without the concurrence of the other members: *see* 6 C L J 383.[11] The divergence of opinions on the particular point has arisen chiefly on

15. Ranodip Singh v. Parmeshwar Pershad, A I R 1925 P C 33=86 I C 249=52 I A 69=47 All 165=27 O C 343 (P C).
16. Baijnath v. Ram Bilas, A I R 1924 All 738=80 I C 12.
17. Shiam Lal v. Mool Chand, A I R 1925 All 672=87 I C 177.
18. Rati Ram v. Nadar, A I R 1919 All 209 = 49 I C 990=17 A L J 649=41 All 435.
19. Parmeswaran Nambudripad v. Sankaran Nambudripad, A I R 1915 Mad 723 = 25 I C 755.

account of the difference in the facts of the various cases decided. The cases in which it has been held that the minor's claim was not time-barred were those in which either the brother who had attained majority was not the karta of the family or could not give a valid discharge. Agreeing with the cases reported in 38 Mad 118,[4] 45 Bom 446,[7] 48 C L J 555[10] and 1936 P W N 856[12] we answer the question referred to us in the affirmative. That being the answer, it is not necessary to deal with the supplementary questions mentioned in the order of reference. On the findings of fact it must be held that the suit is barred by limitation, and the appeal must be dismissed with costs.

S.C./D.S. *Appeal dismissed.*

A. I. R. 1937 Patna 440

MOHAMAD NOOR AND ROWLAND, JJ.

Rameshwar Singh — Accused.

v.

Emperor.

Criminal Ref. No. 5 of 1937, Decided on 18th March 1937, made by Addl. Sess. Judge, Shahabad, D/- 30th January 1937.

(a) Criminal P. C. (1898), S. 307—Grounds for reference—Power of reference is not confined to cases only where verdict of jury is entirely perverse—Judge must apply his mind to case and decide whether ends of justice demand reference.

Though on the one hand reference should not be made in every case in which the Judge finds himself in disagreement with the jury, on the other, the power of reference is not confined to those cases only in which in the opinion of the Judge the verdict of the jury is entirely perverse. No hard and fast rule can be laid down. The Judge must apply his mind and decide whether the ends of justice demand a reference : *A I R 1932 Pat 246, Rel. on.* [P 442 C 1, 2]

(b) Criminal P. C. (1898), S. 307—Powers of High Court—Sessions Judge is sole judge to decide whether reference should be made to High Court in case—When he does not think it proper to do so, High Court cannot direct him to do so.

The Legislature has made the Sessions Judge the sole judge to decide whether a reference should be made in a case. The decision whether a reference should or should not be made depends upon the extent of disagreement which the Judge alone can feel. There is no power in the High Court in a case in which the Judge has not thought fit to refer a case to the High Court under S. 307, Criminal P. C., to direct him to do so : *A I R 1925 Cal 795, Dissent.*; *A I R 1928 Pat 120*; *A I R 1929 Pat 313* and *A I R 1928 Cal 444, Ref.* [P 443 C 1]

(c) Criminal P. C. (1898), Ss. 423 (2) and 438—Trial Judge accepting verdict of jury and convicting accused — Appellate Court finding itself unable to interfere under S. 423 (2) as there was no misdirection to jury referring case to High Court—Record of case being before High Court, though on incompetent reference by appellate Court, High Court held could interfere with decision if case for interference was made out.

Where the trial Court accepting the verdict of the jury convicted the accused but the appellate Court finding itself unable to interfere under S. 423 (2), Criminal P. C., as there was no misdirection in the charge to the jury by the trial Court made a reference to the High Court instead of referring the case to the Local Government for orders :

Held : that though the lower appellate Court did not expressly dismiss the appeal, it had practically done so. If it had done so, the accused would have as of right come in revision to the High Court and the High Court then could have interfered with the decision. The record of the case being before the High Court, and it being clear that injustice had been done in the case to the accused, the mere fact that the record was examined by the High Court on an incompetent reference by the appellate Court, was not enough to prevent the High Court from interfering with the decision if a case for interference was made out. [P 448 C 1, 2]

(d) Criminal Trial — Jury — Misdirection—Accused charged of kidnapping and abduction — Jury finding accused not guilty of kidnapping and thus finding girl over 16 years—Story of prosecution that girl was taken away for marriage without her consent—Not a word in charge to jury by Court if accused had such intention—Non-direction to jury by Court on such vital ingredient of S. 366, Penal Code, held amounted to serious misdirection and occasioned miscarriage of justice.

Accused was tried for offences of kidnapping and abduction. The jury found the accused 'not guilty' of the offence of kidnapping and thus found that the girl was not below 16 years of age. The story of the prosecution was that the girl was taken away by the accused for marriage. This fact was also admitted by accused. Of the two intentions specified in S. 366, Penal Code, for the offence of abduction, the question of taking the girl away for illicit intercourse did not arise in face of these facts. The question therefore was whether the girl was taken away by the accused for marriage without her consent. Not a word could be found in the charge to the jury by the Court to find out if there was such intention on the part of the accused. The accused was found guilty of the offence of abduction :

Held : that the non-direction to the jury on one of such vital ingredients of S. 366, Penal Code, amounted to a serious misdirection and occasioned miscarriage of justice. [P 444 C 1, 2]

S. Naqui Imam — for Accused.

B. P. Sinha — for Complainant.

Mohamad Noor, J. — This case has come up to us in somewhat unusual circumstances. The facts leading up to this reference by the Additional Sessions Judge of Shahabad are these: The accused Rameshwar Singh was tried before the Assistant Sessions Judge of Shahabad under S. 417 and S. 366, I. P. C. There were two alternative charges under S. 366, one of abducting and the other of kidnapping a girl Chhatia with intent that she may either be compelled to marry against her will or seduced or forced to illicit intercourse. The case of the prosecution was that one Mt. Chhatia, daughter of one Gajinder Rai, the complainant in the case, was kidnapped by one Khublal Singh. On his complaint the Subdivisional Magistrate issued a search warrant for her recovery. Later on, somehow or other Gajinder Rai got back the girl, and filed an application to this effect before the Subdivisional Magistrate who recalled the search warrant and ordered the girl to be produced before him on 20th May 1936. This was not done and the learned Magistrate ordered her production on 29th May 1936. Gajinder Rai's case is that the accused Rameshwar Singh who was looking after the criminal case on his behalf went to his house on 20th May 1936, and in his absence told his wife Moti Jhari that the girl had to be produced before the Subdivisional Officer and asked her to allow the girl to accompany him for production before the Court. Moti Jhari allowed the girl to go with the accused, but instead of taking her to the Court the accused took her on an ekka to his own house at Sinha.

When Gajinder Rai returned home from Arrah and heard that the girl had been sent with the accused, he suspected his intentions and went to his house at Sinha and demanded the restoration of the girl. The accused did not consent and said that he intended to marry her. Thereupon Gajinder Rai apprehending a breach of the peace left the village and came to Arrah for filing a complaint in Court. As the time for filing the complaint was over it was not filed on the 21st, but on the next day, that is, on 22nd May 1936. On that complaint the Subdivisional Magistrate issued a search warrant for recovery of the girl, which was not executed for about two months. The accused surrendered in Court on 22nd June and produced the girl on 22nd July 1936 ; in the meantime the case was made over for disposal to an Honorary Magistrate, who did not examine the girl till a very late stage of the case. The accused was committed for trial to the Court of Session on the facts stated above. The defence of the accused was that the girl was made over to him by her parents for marriage for a consideration of Rs. 400 out of which Rs. 300 was actually paid and the marriage was in fact performed by the father himself and that this false case was instituted as the accused did not pay the balance, i. e. Rs. 100.

The offence under S. 366, I. P. C., is triable by a jury, and the one under S. 417, I. P. C., with the aid of assessors. The same gentlemen who constituted the jury for the trial of the first offence acted as assessors for the trial of the second offence. The charge of the learned Assistant Sessions Judge to which I will come later was as strongly for the acquittal of the accused as a charge can be. He pointed out to the jury the weakness and improbabilities of the prosecution case and the discrepancies in the evidence of witnesses. The jury, however, unanimously found the accused guilty of abduction under S. 366, I. P. C., and as assessors, found him guilty under S. 417, I. P. C. The learned Assistant Sessions Judge wrote a short judgment referring mostly to his charge to the jury, did not agree with the opinion of the assessors in respect of the offence under S. 417, I. P. C., and acquitted the accused of that charge. He did not, however, think himself justified in referring the case to this Court under S. 307, Criminal P. C., in respect of the offence of abduction and accepting the verdict of the jury sentenced the accused to one year's rigorous imprisonment.

Rameshwar Singh appealed to the Sessions Court. The learned Additional Sessions Judge who heard the appeal agreed with the views of the learned Assistant Sessions Judge and held that the charge was not proved. He was strongly of opinion that in the circumstances of the case it was the duty of the learned Assistant Sessions Judge to refer the case to this Court under S. 307, Criminal P. C. He held, and in my opinion rightly held, that cheating which is punishable under S. 417, I. P. C., was an ingredient of the offence of abduction as the prosecution case was that the girl was induced to go with the

accused by deceitful means and these deceitful means were the subject matter of the charge of cheating. Therefore, if the learned Assistant Sessions Judge was strongly of opinion that deceitful means were not used by the accused and acquitted him of cheating, he ought not to have accepted the verdict of the jury in respect of abduction. The learned Additional Sessions Judge was however of opinion that there was no misdirection in the charge to the jury, and the case did not come under S. 423 (2), Criminal P. C., and he therefore found himself unable to interfere in appeal. He considered two alternative courses which he thought were open to him. One was to make a recommendation to the Local Government to intervene and remit the sentence and the other was to refer the case to this Court under S. 438, Criminal P. C., for an order on the Assistant Sessions Judge to refer the case to this Court under S. 307, Criminal P. C. He adopted the latter course and relying upon the observation of Mukerji, J., in A I R 1925 Cal 795=26 Cr L J 1006=41 C L J 320[1] has recommended for an order on the Assistant Sessions Judge to refer the case to this Court.

I agree with the learned Additional Sessions Judge's opinion that having expressed himself so strongly in favour of the accused and having held that deceitful means were not used and further that the story of the accused about the negotiation of marriage had a ring of truth, the learned Assistant Sessions Judge would have been well advised if he had referred the case to this Court. Perhaps he was under the impression that reference is to be made only if a Judge finds the verdict of the jury to be entirely perverse. That view is incorrect as has been clearly pointed out by Courtney-Terrell, C. J., in 11 Pat 669.[2] Though on the one hand reference should not be made in every case in which the Judge finds himself in disagreement with the jury, on the other, the power of reference is not confined to those cases only in which in the opinion of the Judge the verdict of the jury is entirely perverse. No hard and fast rule can be laid down. The Judge must apply his mind and decide whether the ends of justice demand a reference. No doubt, when a Judge finds himself in disagreement with the jury and has to decide whether a reference should be made, there is a heavy responsibility upon him as is the responsibility of the Magistrate in a case triable by a Court of Session to decide whether the case should or should not be committed. But because the responsibility is great, there is no reason why it should not be undertaken. The fact, however, is that the learned Assistant Sessions Judge has decided not to refer, and the question is whether we can order him to do so. The observations of Mukerji, J., in the case referred to by the learned Additional Sessions Judge are as follows :

> If under circumstances such as those that are in this case the learned Judge fails to do what the law requires him to do and thus deprives this Court of an opportunity to deal with the case on its merits, he does something more than merely acting in the erroneous exercise of his discretion. He fails to exercise his jurisdiction and this failure operates to the prejudice either of the Crown or of the accused, and speaking for myself, I am of opinion that it is well within our power under S. 439, Criminal P. C., to direct him to submit the case to us for our consideration under S. 307, Criminal P. C.

Strictly speaking the observations of that eminent and learned Judge are obiter dicta. The procedure indicated by him was not adopted in that case and the conviction was set aside on the ground that the verdict of the jury was erroneous owing to a misunderstanding on their part of the law as laid down by the trial Judge. Duval, J. who added a short judgment of his own, does not appear to have shared the view of Mukerji, J. which seems to have been dissented from in the same High Court in A I R 1928 Cal 444.[3] Rankin, C. J. said:

> Now, I am not of opinion that it is correct law to say that if the High Court thinks that the Judge ought to have been of opinion that it is necessary for the ends of justice to submit the case this Court can direct him so to do or can act as though he has, in fact, submitted the case. The conditions laid down are not merely that the Judge disagrees with the verdict of the jury, but also that the Judge is clearly of opinion that it is necessary for the ends of justice to submit the case. The Judge is either clearly of opinion or not clearly of opinion and according as he acts in that matter the consequences must be. It is quite impossible, in my judgment, to direct the

1. Saroda Charan Mistri v. Emperor, A I R 1925 Cal 795=87 I C 606 = 26 Cr L J 1006 = 41 C L J 320.
2. Emperor v. Rafi Mian, A I R 1932 Pat 246 = 1932 Cr C 643 = 139 I C 885=33 Cr L J 877 =13 P L T 418=11 Pat 669.
3. Bepin Chandra Mondal v. Emperor, A I R 1928 Cal 444=111 I C 323=29 Cr L J 819= 32 C W N 673=47 C L J 483.

learned Judge to be clearly of a certain opinion and the language used by the statute shows that the Judge's view on that point is to be final for that purpose; and I am not prepared, in a case such as this, to enquire into the question whether or not the learned Judge ought to have been of opinion that it was necessary for the ends of justice to submit the case.

In this Court also the case of *Saroda Charan Mistri*[1] was distinguished in 6 Pat 817 [4] which was followed in 8 Pat 344.[5] In the last mentioned case Macpherson, J. held that :

It is not in every case where a Judge disagrees with the verdict of the jury that he should make a reference under S. 307, Criminal P. C. A reference should be made only when the verdict of the jury is manifestly wrong, and this is equally so whether the verdict with which the Judge disagrees is one of acquittal or one of conviction. S. 307 does not impose an obligation on the Judge to refer a case to the High Court except where the conditions set out in S. 307 are satisfied.

In my opinion, it is highly undesirable that in every case in which the Judge finds himself in disagreement with the jury a reference should be made to the High Court. This will practically make him a judge of fact which in cases triable by jury he is not, and will minimise the responsibility of the jury. In order to make a reference there should be disagreement of such a nature that the Judge holds that for the ends of justice the verdict of the jury should be superseded. With my profoundest respect to the view expressed by Mukerji, J. I think there is no power in this Court in a case in which the Judge has not thought fit to refer a case to this Court under S. 307, Criminal P. C., to direct him to do so. The Legislature has made him the sole judge to decide whether a reference should be made. The decision whether a reference should or should not be made depends upon the extent of disagreement which the Judge alone can feel. An order by this Court will, as pointed out by Rankin, C. J. amount to directing the Judge to form a particular opinion about the verdict of the jury. The reference of the learned Additional Sessions Judge therefore cannot be accepted. He ought to have adopted the course which was taken by Rankin, C. J. in A I R 1928 Cal 444,[3] and should have left the case in the hands of the executive authorities if he thought that injustice had been done and he could not interfere under the law.

The next question for consideration is what order should be passed when the record of the case is before us and the facts have been brought to our notice. It appears that though the learned Additional Sessions Judge has not expressly dismissed the appeal he has practically done so. He seems to have clearly come to the conclusion that the view of the learned Assistant Sessions Judge about the merits of the case was correct and had it been open to him to do so he would have set aside the conviction, but having found that there was no misdirection in the charge of the learned Assistant Sessions Judge he refrained from doing so and instead of referring the case for orders of the Local Government has made a reference to this Court. The position therefore, in my opinion, is that the appeal of the accused has been dismissed. Had not the learned Additional Sessions Judge referred the case to this Court, it would have been open to the accused to move this Court in revision and ask us to interfere on the ground that the learned Additional Sessions Judge was wrong in holding that there was no misdirection and if we had found that there was misdirection by the learned Assistant Sessions Judge which had been ignored by the learned Additional Sessions Judge and which has occasioned failure of justice we would have interfered. The fact that we have examined the record on an incompetent reference by the Additional Sessions Judge does not alter the position. We must interfere if a case for interference has been made out. Therefore we have to consider whether there is a misdirection which has occasioned a failure of justice and the case comes within S. 423 (2), Criminal P. C. That there has been injustice admits of no doubt. Both the learned Additional Sessions Judge and the learned Assistant Sessions Judge were of opinion that the case was not proved and I agree with them. The only question is whether there is a misdirection in the charge.

I have said that the accused was tried for two alternative charges under S. 366, I. P. C., i. e., abduction and kidnapping. The learned Assistant Sessions Judge placed before the jury the difference between kidnapping and abduction and

4. Bajit Mian v. Emperor, A I R 1928 Pat 120=106 I C 673=29 Cr L J 81=6 Pat 817=9 P L T 191.

5. Ramdas Rai v. Emperor, A I R 1929 Pat 313=1929 Cr C 99=117 I C 173=30 Cr L J 721=10 P L T 409=8 Pat 344.

pointed out that the offence was kidnapping if the girl was below 16 years and abduction if she was above 16 years of age, and if she was taken away by deceitful means. The jury definitely stated that they did not find the accused guilty of kidnapping, and thus found the girl not to be below 16 years of age. This being the case, in my opinion the verdict of abduction was due to a very important omission in the charge of the learned Assistant Sessions Judge about the intention of the accused. The jurors in their capacity as assessors found the accused guilty of cheating, showing that they believed that the girl was taken away by deceitful means, but this alone was not sufficient to convict the accused of abduction unless she was taken away with a certain specified intention, that is to say, either to be forced or seduced to illicit intercourse or for being married against her will. On this point there is practically no direction. The learned Assistant Sessions Judge at one place says :

If there be no evidence that the girl was compelled to accompany the accused by force or deceitful means, the accused cannot be convicted under S. 366, I. P. C. He may be convicted under some other sections but there is no charge under any other section.

So far he was perfectly right. But he ought to have told them further that if they held that the girl was not below 16 years of age they could only find the accused guilty of abduction if they found that he took her away by deceitful means with a certain intent and ought to have placed before them the points to be considered in this connection. Now, the two intentions specified in S. 366 are illicit intercourse and marriage against the will of the girl. The girl made no allegation of illicit intercourse which in fact was not the case of the prosecution. I have said that the defence of the accused was that he took the girl away with the consent of her parents who had arranged to marry her to him for a consideration of Rs. 400 out of which Rs. 300 was paid, and, as the accused did not pay the remaining Rs. 100, this false case had been instituted against him. It was also alleged that in fact the ceremony of marriage was performed by the girl's father. The complainant also stated that when he had gone to the accused and asked him to let the girl go, the accused said that he was going to marry her. In fact, the case of the prosecution also was that the girl was taken away for marriage. Therefore, it was admitted that the girl was taken away for marriage. But the prosecution contended that on account of a certain relationship existing between the girl and the accused, there could not be a legal marriage between them and therefore the connection between them was to be illicit.

The learned Judge clearly pointed out to the jury that no law was placed before him which prohibited the marriage of the girl with the accused. In other words, he directed them to hold that the marriage between them was legal. If so, the question of illicit intercourse did not arise. The only question, therefore, was whether the marriage was to take place without the consent of the girl. Consent of the parents was absolutely immaterial as the girl was found to be of age. But in the whole charge to the jury there is not a word by which the jury has been asked to find whether the marriage which the accused intended to perform was going to be without the consent of the girl. On this vital ingredient of S. 366 of the I. P. C. the learned Judge gave absolutely no assistance to the jury. This non-direction, in my opinion, amounted to a serious misdirection and in the present case I hold that it has occasioned miscarriage of justice. The result is that the reference is discharged and in the exercise of our powers under S. 439, Criminal P. C., I would set aside the conviction and sentence, and acquit the accused.

Rowland, J.—I entirely agree.

W.D./A.L. *Reference discharged.*

A. I. R. 1937 Patna 444

WORT AND DHAVLE, JJ.

Secretary of State — Plaintiff — Appellant.

v.

Babu Beni Prasad Sahu — Defendant — Respondent.

Appeal No. 29 of 1933, Decided on 1st March 1937, from original decree of Addl. Sub-Judge, Palamau, D/- 26th September 1932.

(a) Landlord and Tenant— Permanent tenancy—Presumption — Land held at variable rent—Mere erection of buildings with knowledge of landlord does not show that tenancy is permanent.

Where land has been held at a rent which is variable, the mere fact that buildings have been

erected on the land with the knowledge of the landlord is not in itself sufficient to raise the presumption that the tenancy is permanent : *10 C L R 25, Disting.* ; *21 All 496 (P C), Rel. on.*
[P 446 C 2]

(b) Landlord and Tenant — Occupancy right — Occupancy right does not accrue where main object of occupation is dwelling house itself and when cultivation of soil is entirely subordinate to it — Occupancy right accrues only to bona fide cultivator.

The essence of occupancy right is security of tenure of agricultural land as long as the land is not misused and rent is paid. The occupation which gives right of occupancy does not include occupation, the main object of which is the dwelling house itself and where the cultivation of the soil is entirely subordinate to that. The occupancy right can only accrue to a raiyat and it has been settled that the word raiyat means an actual *bona fide* cultivator in the sense of deriving his profits from the produce of the land directly : *12 W R 404* and *9 W R 579, Ref.* [P 449 C 2; P 450 C 1]

(c) Chota Nagpur Tenancy Act (6 of 1908), S. 78—Object — Tenant is not turned out of his homestead as long as he holds his raiyati land—Tenant parting with raiyati land—Tenancy of homestead becomes subject to ordinary incidents.

Section 78, Chota Nagpur Tenancy Act, was enacted as a protection to the cultivating tenant, so that he may not be turned out of his homestead as long as he holds his raiyati land. If he parts with the raiyati land, his tenancy of the homestead becomes subject to the ordinary incidents and does not suffice to keep up his status as a raiyat : *A I R 1930 Pat 224, Rel. on.*
[P 450 C 2; P 451 C 1]

(d) Chota Nagpur Tenancy Act (6 of 1908), S. 78—Object and scope.

The Legislature could not possibly have meant that though a raiyat may hold one homestead otherwise than as part of his holding as a raiyat and use it for carrying on his cultivation, the incidents of his tenancy of some other homestead held somewhere else for other business shall be regulated by the provisions of the Act applicable to land held by a raiyat. [P 451 C 1]

Govt. Pleader — for Appellant.

P. R. Das, B. C. De and *Thakur A. D. Sinha* — for Respondent.

Wort, J.—This appeal by the plaintiff, the Secretary of State, arises out of an action in ejectment with which was joined an alternative claim for the settlement of a fair rent. The land originally consisted of several plots but which are now amalgamated into holding No. 363. The plots were first 580 and 581 which equal plot 280 and being the subject matter of two unregistered leases must be treated on the footing of oral agreements. The other plots which were the subject matter of three registered leases dated respectively 22nd January 1918, for the term "until the new settlement of the Palamau Government estate was made" at an annual rent of Rs. 1/6 ; the second lease (Ex. 1-b) dated 29th September 1920, being for a term of 30 years or until the new settlement of the town of Daltonganj was made (whichever is less) at an annual rent of Rs. 5/14 ; and the third lease (Ex. 1-C) of the same date and for the same period at a rental of Rs. 1/3. As regards plots 580 and 581, which are now known as plot 280 under the oral agreement, the plaintiff's claim has failed so far as ejectment is concerned, but the Judge has assessed the rent at Rs. 3/4. With regard to the plots, the subject matter of the three written leases, the plaintiff's claim succeeded and the Court held the plaintiff entitled to eject the defendants failing execution by them of new leases at an annual rent of Rs. 27. As regards plot 280 (equals Nos. 580 and 581) there could be no doubt that the Court had no jurisdiction to assess rent and thus make a bargain between the parties. With regard to those plots which are the subject matter of the leases, it is contended that other considerations apply with regard to this part of the relief claimed, and with that contention I propose to deal later.

We are not concerned in this case with the situation of the plots in dispute in the town of Daltonganj as this was a matter which was to be considered only with regard to the value of the land and the assessment of fair rent. The facts relating to these plots are as follows : Plots 580 and 581 (now known as plot 280) were purchased from one Eda Sheikh. Eda Sheikh was recorded in respect of this land in Mr. Sunder's settlement which commenced in 1894 and concluded in 1896. Plot 580 was purchased from the son of Eda Sheikh on 10th May 1910 and plot 581 was purchased in a Court sale in execution of a decree in 1903. Plots 233, 230 and 271 were the subject matter of the lease dated 29th September 1920 (Ex. 1-b), and the present survey plot No. 505 was the subject matter of the lease (Ex. 1-c) of the same date. The plots dealt with by the lease (Ex. 1-b), September 1920, were also the subject matter of a lease dated 6th July 1914 to defendant's father Srikishun Sahu, and it was after Srikishun's death that the fresh lease of September 1920 was granted. The Judge in the Court below has held, contrary to the defendant's contention, that the Chota Nagpur Tenancy Act did not apply but that the

matter was governed by the Transfer of Property Act, and in regard to plot 280 (equals Nos. 580 and 581) he has held that the defendants have got a permanent tenancy drawing the inference to that effect from the circumstances of the case. With regard to the others, he has held that the plaintiff having terminated the tenancies by a notice to quit, is entitled to eject the defendant. These plots were the subject matter of enhancement of rent at the time of Mr. Sunder's settlement. It is to be noticed in this case that Mr. Sinha on behalf of the Government and the learned advocate on behalf of the defendant agree that the case is governed by the law of landlord and tenant, either under the Chota Nagpur Tenancy Act or otherwise and although khas mahal property is not to be determined by any considerations of the Revenue law.

The first contention advanced by the defendant is that the defendant has occupancy rights under the provisions of the Chota Nagpur Tenancy Act. There was no point raised by the defendant in his written statement in this connection and no issue was settled. The argument is based almost entirely on the fact that in Mr. Sunder's Settlement Record, either the defendant, or his predecessor in title was recorded as an occupancy tenant. It was the contention of the defendant that as his father Srikishun Sahu held some tanr lands at Sahpur in which makai crops were grown, and holding admittedly homestead land at Daltonganj as ancillary to or in conjunction with agricultural tenancy, he would have rights of occupancy under S. 78, Chota Nagpur Tenancy Act. There is, in my judgment, no evidence of this; and, as the learned Judge has pointed out, even assuming that Srikishun had some tanr land in Sahpur that would not be sufficient to constitute him an agriculturist, holding his homestead land in Daltonganj as an agriculturist. The position shortly is this. It is admitted in all these cases that the Record of Rights has not the statutory presumption of correctness ; at most it could be admitted in evidence under S. 33, Evidence Act, Mr. Sunder being dead, and therefore could only be used as some evidence in the case of the facts which it states. There is nothing else to support the defendant's contention in this regard, and there having been no issue raised in the Court below, and the plaintiff not having had an opportunity to adduce evidence as to the status of the defendant or his predecessors, it would be unjust in the circumstances to hold that the record which has no presumption of correctness established the plaintiff's contention. Furthermore it has always been the case of both parties that the land was homestead or building land. That being so, the position of the defendant is to be judged apart from the Chota Nagpur Tenancy Act. The Judge has held that these tenancies are governed by the Transfer of Property Act. This, as I have pointed out in other appeals, is clearly an error for the Crown Grants Act (15 of 1895) applies.

As regards plot 280 (equals 580 and 581), the learned Judge has held as I have already stated that the tenancy was a permanent one and seems to have come to that conclusion on the footing that there were permanent structures on the land to the knowledge of the landlord and relies upon the decision in 10 C L R 25.[1] That decision, however, does not support the Judge's conclusion. There is no case here of the land having been held at a rent which was not varied and the mere fact that buildings have been erected on the land with the knowledge of the landlord is not in itself sufficient to raise that presumption : *see* 26 I A 58[2] — a decision already quoted. The question therefore arises whether the notice served on the defendant on 11th September 1928, calling upon him to give up possession on 31st March 1929, was valid. At common law, applied as the rule of justice, equity and good conscience, the tenancy was from year to year which is to be inferred from the reservation of a yearly rent in the absence of other facts and would require six months' notice expiring on the anniversary of the commencement of the tenancy. There is no dispute as regards the date upon which the tenancy commenced as there is no evidence on that point. And, as no question is raised on this point, we must assume that a notice expiring on 31st March which was the end of the financial year was valid at any rate so far as its expiration is concerned, and as from the judgment of the Court below it would appear that the notice on the defendant on 11th September 1928 would give the

1. Prosunno Coomar Chatterjee v. Jagunnath Bysack, (1882) 10 C L R 25.
2. Beni Ram v. Kundan Lal, (1906) 21 All 496= 26 I A 58=1906 A W N 245 (P C).

defendant fully six months, the notice would be valid.

As regards the other plots, the subject matter of the three leases, the position is different. At the conclusion of the argument in this case the question arose as to the meaning of the word "settlement" as used in the three leases (Exs. 1-a, 1-b and 1-c). The words used in the first lease are "hereby leases to you until a 'new settlement' of the Palamau Government Estate is made" and the question was whether the expression 'settlement' referred to settlement of revenue or whether it referred to the action of Government acting as landlord in letting out their property. This point arose as it was argued that the leases were void for uncertainty. I have no doubt, however, that the meaning of the word 'settlement' as used in these leases referred to a new letting of the estate by Government and did not refer to a new settlement of land revenue. In any event it cannot be argued that the time of the new settlement was ascertained and the term of the lease therefore certain. The facts are these : Mr. Sundar's settlement was a settlement for 15 years. In 1918 that 15 years had elapsed and even supposing that the word 'settlement' was referable to a settlement of land revenue, that new settlement of land revenue could be made by a notification at any date. There was nothing to prevent Government issuing a notice the day after the lease was entered into and the clause therefore was in the circumstances tantamount to the landlord saying that the lease was to subsist at his will. Supposing the word 'settlement' had reference to a new letting by Government the same result would be obtained. On the plain construction of the document the lease was a tenancy-at-will. Cl. 12 of the lease provided that :

> On the expiry of the term of this lease you shall, if you have duly observed all the conditions thereof, be entitled to its renewal on such terms as may be agreed upon.

It is contended that this, on its proper construction gives an absolute right of renewal to the defendant at a reasonable rent which may be determined by the Court. If on its true construction the lease is no more than a tenancy-at-will the right to renewal, if such there be, is worthless; the tenant would be entitled to another tenancy-at-will which is no right at all as the tenant could be ejected at once. Indeed there can be no such right of renewal in the case of a tenancy-at-will. The contention that the condition 'on such terms as may be agreed upon' on its true construction means at a reasonable rent and that the Court has jurisdiction in such a case as this to say what is a reasonable rent in my judgment is not sustainable. The terms are plain 'as agreed upon' and certainly cannot be construed as meaning that the parties have agreed that rent should be reasonable and that it is only for the Court to say what that rent should be. Such a construction would be substituting the decision of the Court for the agreement of the parties. As regards the lease dated 29th September 1920 (Ex. 1-b), the same considerations apply as to the term, but the clause relating to renewal is different. Cl. 14 provides :

> If three months prior to expiration of the said term the lessee shall notify the Deputy Commissioner that he is desirous of taking a new lease of the said premises and shall have duly observed and performed all the terms and conditions aforesaid he shall be entitled to a new lease for such terms and at such rent enhanced or otherwise and on such terms and conditions as the Deputy Commissioner or in the event of disagreement the Commissioner may deem proper.

It is not suggested in the circumstances that the notification of 1926 was insufficient to prevent the defendant giving three months' notice of his intention to take new leases and even if it might be held that the Deputy Commissioner has fixed the terms of that lease, it seems to me that the condition precedent has not been followed in this case. Neither the notice required from the tenant nor the reference to the Commissioner has been made, and therefore the landlord is entitled to re-enter. As regards the third of these leases, dated 29th September 1920 (Ex. 1-C), the term is the same and the considerations which apply to Ex. 1-B also apply to this case in the matter of renewal. In all cases therefore the plaintiff was entitled to eject the defendant, in the case of plot 280 as the tenant had a lease from year to year, and in the case of the three leases in writing as a tenancy-at-will and and that in all cases valid notices to quit had been served. I should add with regard to plot 280 the fact that the plaintiff gave a longer notice to quit than was necessary makes no difference to the rights of the parties. I would set aside the judgment of the Court below as regards the fixing of rent and allow the appeal with regard

to the claim for ejectment in the case of plot 280 and affirm the decision of the Court below entitling the plaintiff to ejectment with regard to the land the subject matter of the leases. The appellant is entitled to his costs throughout. The cross-objection is dismissed.

Dhavle, J.—I agree. As regards plots 850 and 851 of Sunder's Survey (making up plot 280 of the new Survey) the lower Court holds that there have been several transfers of these lands, that they contained permanent pucca structures and that therefore it must be presumed that the defendant has got a permanent interest in the plots. The appellant's claim for ejectment was therefore disallowed, and the rent payable was assessed at Rs. 3-4-0. As regards the presumption of permanency the learned Subordinate Judge purports to follow the authority in 10 C L R 25[1] in which it was observed :

> No doubt, if land is let for building pucca houses upon it, or if the tenant with the knowledge of landlord does in fact lay out large sums upon it in holdings .... that fact coupled with a long continued enjoyment of the property by the tenant or his predecessors-in-title, might justify any Court in presuming a permanent grant, especially if the origin of the tenancy could not be ascertained.

This observation would not have been applied by the learned Subordinate Judge to this case if even such circumstances had not been overlooked as that the pucca structure on the plots, the Thakurbari, was erected only about 20 years ago by the defendant's father and not by the tenants who were in possession of the land at the time of Mr. Sunder's Survey. Plot No. 850 was recorded at that time in the name of Thakuri Barhi carrying an old rent of 3 annas 6 pies which Mr. Sunder raised to 7 annas. The learned Subordinate Judge says that it was purchased in a Court sale in 1903, but the jamabandi register shows a mutation of 1908 at an enhanced rate of Rs. 1-1-0 in favour apparently of a predecessor-in-title of defendant's father. Langtu Sahu. D. W. 7, deposes to a somewhat different series of transfers before the land came to defendant's father. Be that as it may, there is nothing to show that Thakuri had any pucca structure upon the land before it was sold out or that the land had been let out to him for building pucca houses on it, to say nothing of the fact that there is no good indication of any long continued enjoyment of the property by Thakuri or his predecessors-in-title. Plot No. 851 is recorded as in the possession of Edu Sheikh with an old rent of 2 annas 6 pies which Mr. Sunder raised to 10 annas. Defendant's father purchased it from Edu's son, Dost Muhammad in 1910 and obtained his mutation in 1912 at an enhanced rent of Re. 1. The sale deed describes the house as kutcha. The learned Subordinate Judge has paid no attention not only to the nature of the old structures but also to the repeated enhancements of the rent. As regards the presumption of permanency, Garth, C. J. himself whose observation from *Prosunno Coomar Chatterjee's case*[1] has been cited above had pointed out in 3 Cal 696[3] why it cannot be presumed in this country that a tenancy is permanent merely because the tenant has erected a dwelling house upon it. The whole matter was recently considered by Rankin, C. J. in 56 Cal 738[4] after the ruling of the Privy Council in 8 Lah 573[5] that the question whether a tenancy was permanent or precarious is in such cases a legal inference from facts and not itself a question of fact. Long possession on the part of the tenant together with abstention on the part of the landlord to enhance the rent was considered in *Kamal Kumar's case*[4]—a case where the absence of permanent masonry structures upon the land was explicable by the circumstance that the defendant was a labourer—insufficient to justify a legal inference of permanency; and in the present case there are the repeated enhancements of rent which are unquestioned. The finding of permanency on the grounds given by the lower Court cannot, therefore, be supported.

It has been contended on behalf of the respondent that there should, in such circumstances, be an inference of permanency with a variable rent. But such an inference, even if otherwise justifiable, would be unmeaning where, as in the present case, the enhancement of rent is not referable to any specific provision of the law or to any scale laid down by the parties themselves. If the enhancement is to be at the discretion of the landlord,

3. Prosunno Coomaree Debea v. Rutton Bepary, (1877) 3 Cal 696=1 C L R 577.
4. Kamal Kumar Dutta v. Nand Lal Dube, A I R 1929 Cal 37=116 I C 378=56 Cal 738 =33 C W N 211.
5. Dhanna Mal v. Moti Sagar, A I R 1927 P C 102=101 I C 355=8 Lah 573=54 I A 178 (P C).

the defendant will either have to accept it or give the tenancy up, so that—as pointed out by my learned brother during the argument—permanency will become an idle expression. It has also been contended on behalf of the respondent that he had an occupancy right in these and the other five plots in suit. Reliance is placed in the first instance upon the entries in Sunder's khatians of the then tenants as *dakhilkars*, the entry in the case of plot No. 1359 being *dakhilkar maqabazat*. But Sunder's khatians do not carry any such specified presumption of correctness as is attached by statute to Records of Rights under the Tenancy Act. Mr. Sunder it is clear issued khatians in one and the same form to non-agricultural as well as agricultural tenants, and applied the classification of the Bengal Tenancy Act to a tract of country governed not by that Act, but by the Chota Nagpur Landlord and Tenant Procedure Act, 1879. The occupancy right was doubtless recorded because Government had decided that it

> should be allowed and recorded in the case of all raiyats paying direct to Government or to the farmer.

But the question would still remain whether the men with whom we are concerned were raiyats. It is true that though Daltonganj was a Municipality, there may have been raiyati rights within it : 9 C W N 141.[6] But there is no evidence that Thakuri and Edu, whom Mr. Sunder found in possession of plots Nos. 850 and 851 with houses on them, had ever cultivated these plots, or taken them for purposes of cultivation and then erected houses on them with the leave or acquiescence of the landlord. There was also no such provision of the law in force at that time as we now find in S. 78, Chota Nagpur Tenancy Act, nor is there any indication in the record that Thakuri and Edu had any raiyati land anywhere else. Upon this Mr. Das has contended that there was no definition or description of a raiyat as meaning primarily a person who has acquired a right to hold land for the purpose of cultivation (such as we now find in S. 6, Chota Nagpur Tenancy Act) in force in Chota Nagpur prior to the amendment of the Chota Nagpur Landlord and Tenant Procedure Act, 1879 by Bengal Act 5 of 1903, and that the Bengal General Clauses Act. No. 5 of 1867, (which I see was extended to Lohardaga by a Notification of 1881 under S. 3, Scheduled District Act, 14 of 1874) had provided that "the word 'land' shall include houses and buildings . . . . unless where there are words to exclude them". The argument is that under the laws then in force occupancy rights could be acquired in building land no less than in agricultural land, as the Chota Nagpur Landlord and Tenant Procedure Act, 1879 gave a right of occupancy to "every raiyat who has cultivated or held land for a period of twelve years". Much the same ingenious argument was advanced in 21 W R 400,[7] where it was held that the similar section in Bengal Act, 8 of 1869 referred to the occupation of land which is the subject of agricultural or horticultural cultivation or used for purposes incidental thereto, and does not include land exclusively used for dwelling houses, buildings, etc. The Landlord and Tenant Procedure Act, 1879, replaced the Bengal Rent Act, (Act 10 of 1859), in this area, and under this latter Act it had been repeatedly held, (*see* for instance 12 W R 404[8]) that the occupation which gives an occupancy right does not include occupation

> the main object of which is the dwelling house itself, and where the cultivation of the soil, if any there be, is entirely subordinate to that.

The Landlord and Tenant Procedure Act reproduced S. 6, Bengal Rent Act, 1859, without any change which is material for present purposes. Assuming that the word 'land' in S. 6 of the Act included building sites and houses and buildings, the occupancy right could only accrue to a raiyat, and it had been settled under the law previously in force, that the word raiyat meant an actual bona fide cultivator in the sense of deriving his profits from the produce of the land directly : 9 W R 579.[9] It was of course possible for a raiyat, instead of cultivating the land, to erect shops thereon and receive the profit from the shopkeepers—presumably with the consent of the landlord or in accordance with a local custom—and keep his right of occupancy, as was held in 11 W R 88,[10] a case referred to by

6. Syed Hussan Ali v. Gobind Lal Basak, (1905) 9 C W N 141.
7. Mohur Ali Khan Pathan v. Ram Ruttan Sen, (1874) 21 W R 400.
8. Ramdhun Khan v. Haradun Puramanick, (1869) 12 W R 404=9 Beng L R 107*n*.
9. Kalee Churn Singh v. Ameerooddeen, (1868) 9 W R 579.
10. Khajuranissa Begum v. Ahmed Reza, (1869) 11 W R 88=8 Beng L R 166*n*.

Mr. Das; but, as I have already shown, this has no application to cases where the land was occupied exclusively by buildings and the man was not a raiyat. The essence of an occupancy right is security of tenure of agricultural land as long as the land is not misused and rent is paid, subject to enhancement, in Chota Nagpur, not by contract but by order from the Court of the Deputy Commissioner. The Chota Nagpur Tenancy Act of 1908 contains no provision for enhancement of rent of tenants of non-agricultural land, and it is significant that in replacing by this Act the Landlord and Tenant Procedure Act the Legislature made no provision for enhancement in such cases, while by S. 16 it saved occupancy rights already acquired by raiyats. The dealings of the parties with the land—the repeated enhancements—also point to the absence of an occupancy right, though it is obvious that much stress must not be laid on this circumstance.

There is a further difficulty in the way of the respondent. Even if it be assumed that men like Thakuri and Edu had occupancy rights in the building plots recorded in their names in Sunder's khatians, these rights could not have passed to their successors. It is true that Edu's holding only was transferred in 1910 after the amendment of the tenancy law by Bengal Act, 5 of 1903 which made the transfer by a raiyat of his right in his holding altogether invalid, and that we do not know definitely when exactly Thakuri parted with his holding. But even before the Amending Act of 1903 occupancy rights were not transferable without the consent of the landlord, save by local custom which had to be established by the tenant or his transferee. That was the law under the Bengal Rent Act, 10 of 1859, and it was not changed by the Landlord and Tenant Procedure Act of 1879. Since the Act of 1903, transfers of occupancy rights with or without the consent of the landlord are impossible in Chota Nagpur, and if the transferee is recognized by the landlord and the transferor does not assert his rights under the Tenancy Act, the transferee's tenancy becomes a new tenancy altogether, which is what seems to have happened to the defendant or his father in respect not only of plot No. 851 but also of plot No. 850, especially as the rent was enhanced. Defendant's father thus held these plots on his own leases. These leases have not been put in evidence, apparently because (as we know from the connected case dealt with in First Appeal No. 28 of 1933) the learned Subordinate Judge was of opinion that the Crown Grants Act, 1895, was inapplicable to such cases and that therefore unregistered leases were inadmissible in evidence. This was erroneous: *see* 6 Pat 446.[11] The present was, therefore, not really a case where the origin of the tenancy of plots Nos. 850 and 851 can be said to be unknown, and as Mr. Sunder's was a 15 year's settlement, a presumption or inference of permanency would be all the more violent in the circumstances.

Mr. Das has also endeavoured to support the defendant's occupancy right on the basis of S. 78, Chota Nagpur Tenancy Act. Defendant's father was recorded as *dakhilkar* in Sunder's Settlement in respect of plots Nos. 879 and 1157 (corresponding to new plots Nos. 230 and 271). Each of these plots was entered in the khatian as a *makan*; it is not pretended that defendant's father had taken either of them for raiyati cultivation or that he had any such cultivation in Daltonganj. He lived in these houses at one time and carried on the profession of mahajani. His acquisition of the other plots in suit, especially plots Nos. 850 and 851 on which he built a Thakurbari, will therefore not be within S. 78. In the old plots, Nos. 879 and 1157 he could have no raiyati interest on the principle of S. 78 at the time of Mr. Sunder's Settlement because (even if he carried on agriculture anywhere) there was no provision in the Landlord and Tenant Procedure Act, 1879, which was then in force making the incidents of the tenancy of a homestead held otherwise than as part of a raiyat's holding identical with those applicable to land held by a raiyat. S. 78 is sometimes loosely described as creating an occupancy right in a homestead held by a raiyat otherwise than as part of his holding as a raiyat. But as was pointed out in 11 P L T 107,[12] the section was enacted as a protection to the cultivating tenant, so that he may not be turned out of his homestead as long as he holds his raiyati land. If he parts with the raiyati land, his tenancy of the homestead becomes

11. Secy. of State v. Nistarini Annie Mitter, A I R 1927 Pat 319=104 I C 209=6 Pat 446.
12. Bishnath Singh v. Mt. Bibi Ayesha, A I R 1930 Pat 224=120 I C 477=11 P L T 107.

subject to the ordinary incidents and does not suffice to keep up his status as a raiyat. There was no suggestion of any occupancy right in the written statement of the defendant, whose case was that his father and his vendors had taken settlement of the lands in suit for the purpose of constructing permanent pucca structures thereon. It was, however, brought out in the cross-examination of plaintiff's mutation clerk, P. W. 1, that defendant's father "had raiyati land in Shahpur", a mauza just across the river. When he had this land and whether he continued to have it after the introduction of the Chota Nagpur Tenancy Act, 1908, was not brought out by the defendant. In his own evidence the defendant said nothing about any raiyati cultivation. In the cross-examination Gulab Chand Sahu, defence witness 6, who stated that defendant's father had a house, *bagicha* and *bari* at Shahpur, it came out that:

> In the *bari* adjoining his house, *makai* used to be grown. Near the *bagicha* he had some tanr land in which *makai* used to be grown.

This again leaves an uncertainty about time so as to make it impossible to hold that the incidents of the tenancy of the two old and five recently acquired homestead plots in Daltonganj by defendant's father are to be regulated as laid down in S. 78, Chota Nagpur Tenancy Act, to say nothing of the fact that the homestead plots in Daltonganj were plainly not ancillary to the raiyati tenancy if any in Shahpur. That S. 78 must be so restricted seems clear, and was actually held in 42 C L J 197.[13] The Legislature could not possibly have meant that though a raiyat may hold one homestead otherwise than as part of his holding as a raiyat and use it for carrying on his cultivation, the incidents of his tenancy of some other homestead held somewhere else for other business shall be regulated by the provisions of the Act applicable to land held by a raiyat. Mr. Das has cited 40 C W N 599[14] which followed 44 C L J 302.[15] But we are not concerned in the present case with the point decided in these cases. Finally, the question whether defendant or his father held any raiyati land at all was not properly raised in the pleadings nor investigated below and it is therefore impossible to give the respondent the benefit of S. 78 of the Act. Though the learned Subordinate Judge found that the defendant has a permanent interest in plots 850 and 851, he proceeded to assess a fair rent "according to the suggestion of both parties" so that "an opportunity be given to the defendant by way of equitable relief against forfeiture". The learned Judge took the plaintiff's pleader to concede in his argument

> that the plaintiff has no intention to turn out tenants who are ready and willing to pay the rent to be fixed by the Court.

He was plainly in error. The plaintiff's case was that if the Court should hold that the occupier had acquired a permanent tenancy right and was not liable to be evicted, then it should be declared that he was liable to pay the rent as already assessed by the plaintiff. The lower Court assessed rents for the various holdings in suit, and in respect of four new plots (corresponding to five old plots) other than the Thakurbari site ordered the defendant to execute a lease on a rent of Rs. 27 within two months, failing which the plaintiff was to recover khas possession. Within two months of the judgment of the lower Court the defendant filed a petition stating that without prejudice to his right of preferring an appeal or cross-appeal he was willing to execute the lease, and praying that a form of lease be given to him. When this matter came on for hearing, it was found that the plaintiff was not ready to accept a lease from the defendant on the rent fixed by the Court. Plainly the plaintiff could have conceded nothing. The assessment made by the Court was entirely without jurisdiction: see *Nistarini's case*,[11] already referred to. There was also no forfeiture involved in putting an end to a tenancy which was not permanent and could at most be treated as a tenancy from year to year. The alternative prayer of the plaintiff was that a rent of Rupees 132-10-0 a year be declared payable "for a period of 30 years or till the next settlement", and the learned Judge below completely missed the limitation, quite irrespective of the question of jurisdiction.

Jurisdiction was also wanting as regards the assessment of the other plots in suit, for which there were registered leases executed by the defendant. Old plot No. 881

13. Purusottom Mahesri v. Panchanan Mazumdar, A I R 1926 Cal 373=90 I C 805=42 C L J 197.
14. Pulin Chandra Daw v. Abu Bakkar Naskar, A I R 1936 Cal 565=163 I C 406=40 C W N 599.
15. Sukh Lal v. Prosanna Kumar, A I R 1926 Cal 1199=96 I C 541=44 C L J 302.

(corresponding to new plot 233 in part) was settled with the defendant under Ex. 1 (a) in 1918 "until a new settlement of the Palamau Government Estate". It has been contended on behalf of the respondent that this meant a settlement under the Chota Nagpur Tenancy Act. The plaintiff's interpretation was what is called re-settlement in R. 28 (8) of the Government Estates Manual. Whether or not such a settlement or re-settlement means a settlement of land revenue, and whether or not it is referable to any specific statutory provision—points which were not raised in the evidence and regarding which there is much uncertainty on the record—it is clear that the term of the lease depended merely upon the volition of the plaintiff. Mr. Sunder's Settlement which has been referred to in several places as land revenue settlement was completed in 1896 and had a currency of fifteen years, a period which had expired long before the execution of Ex. 1 (a). A fresh settlement was thus overdue, and there was nothing to prevent the plaintiff from making it as soon after Ex. 1 (a) as he liked. Old plots 879 and 1157 (corresponding to new plots 230 and 271) together with old plot 882 (corresponding to new plot 233 in part) purchased by defendant's father from Tilakram in 1908 were settled with defendant's father by Ex. 1 in 1914. But that lease was replaced in 1920 by another lease, Ex. 1 (b), executed by the defendant himself. This lease is in the same form as another lease Ex. 1 (c), executed by the defendant on the same date in respect of old plot 1359 (corresponding to new plot 505). Both the leases were "for the term of thirty years or until the new Settlement of town Daltonganj is made, whichever is less". For the reasons already indicated the term of these leases was dependant merely on the plaintiff's will. Defendant was therefore only a tenant-at-will under these leases.

Mr. Das has urged that these tenancies have not been properly terminated because renewal was of their essence. Cl. 12 of Ex. 1 (a) provides for "renewal on such terms as may be agreed upon —the land being liable to enhancement at each renewal". Plaintiff was willing to give the defendant a fresh lease on the rent he proposed, but this was not acceptable to the defendant. No rent was therefore agreed upon and it is impossible to read the renewal clause like that in 7 I A 107[16] cited by Mr. Das so as to give jurisdiction to the Court to fix a rent. The renewal clause in Exs. 1 (b) and 1 (c) is even less useful to the defendant because it requires the tenant, three months prior to the expiration of the said term, to notify the Deputy Commissioner that he is desirous of taking the new lease. Mr. Das has himself contended that this is bad because of the uncertainty of the term. The proceedings of the Settlement were conducted with detailed publicity, and the defendant could have notified his intention to the Deputy Commissioner if he had chosen to do so when the plaintiff made a survey of the town under a public notification obviously as a preliminary to the "Settlement". Apart, therefore, from the uncertainty of the term the renewal clause is of no assistance to the defendant who did not notify his intention as required by it. Mr. Das has also urged that the notice to quit was invalid because the year of the tenancy was not the financial year. So far as plots 850 and 851 are concerned, we have no lease before us, and the implication in the plaint that the year of tenancy was the financial year has not been met by any appropriate counter suggestion. In 27 Cal 570[17] there was a tenancy created by a document of the 19th of Chait, but rent had all along been paid according to the old Bengali year, and it was held that the year of the tenancy would be the ordinary Bengali year. That, like the present, was a case not governed by the Transfer of Property Act. As regards the other plots, the registered leases were executed one on 22nd January 1918, and two on 29th September 1920, and rent was to be paid annually on or before the 15th of January. Mr. Das has cited 60 Cal 389[18] in support of the proposition that the date of payment of the rent will not affect the operation of S. 110, Transfer of Property Act. It is not necessary to pronounce upon this contention, though I may perhaps refer to the ruling in 30 Mad 109.[19] In the first place

16. New Beerobhoom Coal Co., Ltd. v. Bularam Mahata, (1880) 5 Cal 932=7 I A 107=4 Sar 145 (P C).
17. Ismail Khan Mahomed v. Jaigun Bibi, (1900) 27 Cal 570=4 C W N 210.
18. Benoy Krishna Das v. Salsiccioni, A I R 1932 P C 279=141 I C 514=59 I A 414=60 Cal 389 (P C).
19. Arunachella Chettiar v. Ramiah Naidu, (1907) 30 Mad 109=16 M L J 533.

the matter is governed not by the Transfer of Property Act but by the Crown Grants Act, and the principle of justice, equity and good conscience, and secondly, the leases only create tenancies-at-will, so that the lessee was not entitled to a formal notice, a demand for possession, such as the notice actually given amounts to, being sufficient.

Plaintiff might, however, perhaps consider whether the form of lease for use in what is intended to be a model zamindary should not be improved, giving the lessee something more than a mere tenancy-at-will and making clearer provision regarding the year of tenancy and the notice necessary. I would allow the appeal with costs of both Courts, and decree the suit in terms of the first two prayers made in the plaint. The cross-objection of the respondent is dismissed.

P.R./D.S. *Appeal allowed.*

A. I. R. 1937 Patna 453

MOHAMAD NOOR, J.

Dwarka Ram — Appellant.

v.

Mt. Jaleswari — Respondent.

Appeal No. 803 of 1934, Decided on 19th January 1937, from appellate decree of Sub-Judge, Purnea, D/- 23rd July 1934.

Fraud—Party to fraud—Sale by defendant in plaintiff's favour to save property from decree-holder—In execution plaintiff's claim thereto upheld — Defendant cannot subsequently challenge sale deed and plaintiff's title.

If a document is brought into existence to commit a fraud, the party who intends committing the fraud will not be allowed in the Court of justice to repudiate it, if fraud was actually committed by means of that deed. [P 453 C 2]

Where the defendant executes a sale deed in favour of the plaintiff in order to save the property from the clutches of a decree-holder and in the course of execution of the decree, the plaintiff's claim to the property is allowed, the document of sale deed is a fraudulent one and the fraud is committed on the decree-holder. Thereafter the defendant cannot be allowed to challenge the deed and the title of the plaintiff in a suit by the plaintiff for the possession of the property sold to him : *A I R 1929 Pat 127* and *31 Bom 405*, *Rel. on.* [P 453 C 2 ; P 454 C 1]

R. S. Chattarji for *M. K. Mukharji* — for Appellant.

G. C. Das — for Respondent.

Judgment.—The suit out of which this appeal has arisen was instituted by the appellant for recovery of possession of a piece of land with a house standing thereon on the basis of a sale deed executed by the defendant in his favour. The defence was that the sale deed propounded by the plaintiff was a benami transaction executed by the defendant in order to save the disputed property from sale in execution of a decree obtained against her husband by one Profulla Ranjan Das Gupta. The trial Court held the sale to be genuine and real and gave the plaintiff a decree. The lower appellate Court, however, has dismissed the suit holding the sale to be farzi. The plaintiff has preferred this second appeal.

The judgment of the Court of appeal below is hardly satisfactory. At more than one place its reasons are faulty. For instance, the evidence of the plaintiff is that he paid the consideration money after the registration of the sale deed. The learned Subordinate Judge's comment upon this evidence is that it is inconsistent with what is mentioned in the sale deed itself. It is a matter of common knowledge that in a sale deed payment of consideration money is always mentioned in the past tense though at the time the sale deed is being written the consideration money remains due. The deed is written as if the sale has been completed, though in fact the deed completes the transaction and the consideration is paid at the time of registration of the deed or some time afterwards. Be that as it may, accepting the finding of fact to be correct, the plaintiff is entitled to succeed on a simple point of law. It is well settled law that if a document is brought into existence to commit a fraud, the party who intends committing the fraud, will not be allowed in the Court of justice to repudiate it if fraud was actually committed by means of that deed. The plaintiff's case is that she executed the sale deed in order to save the property from the clutches of a decree-holder. The name of the decree-holder as given by her was found to be incorrect. It has not been shown that there was any decree of Profulla Ranjan Das Gupta against her husband. What the Court below has found is that there was a decree obtained by a lady against her husband which was executed and in the course of the execution the plaintiff on the basis of the sale deed preferred a claim to the property. That claim was allowed. So if the document was a fraudulent one,

the fraud was committed on the decree-holder and thereafter the defendant cannot be allowed to challenge the deed and the title of the plaintiff. If any authority is needed for this well settled law, I may refer to the decisions of this Court in 10 P L T 138,[1] and of the Bombay High Court in 31 Bom 405.[2] The appeal is allowed ; the decree of the lower appellate Court is set aside and that of the trial Court restored. The appellant is entitled to his costs both in this Court and in the Court of appeal below.

V.B.B./A.L. *Appeal allowed.*

1. Surya Mull v. Dwarka Prasad, A I R 1929 Pat 127=115 I C 890=10 P L T 138.
2. Sidilngappa v. Hirassa, (1907) 31 Bom 405 = 9 Bom L R 542.

A. I. R. 1937 Patna 454

COURTNEY-TERRELL, C. J. AND JAMES, J.

Gurshai Mahton and *others* —
Appellants.

v.

Jugeshwari Prasad Singh and *others*
— Respondents.

Letters Patent Appeal No. 3 of 1936, Decided on 16th February 1937, from decision of Wort, J., D/- 4th December 1935, reported in *A I R 1936 Patna 133*.

Estoppel—Purchase of residential house by *A* from *B*, its previous occupier — Purchase completed by consent of landlord after receiving salami — *A* since then in possession and paying rent — Subsequent suit by landlord to eject *A*—Landlord held estopped: *161 I C 514=A I R 1936 Pat 133, Reversed.*

A purchased from *B*, the previous occupier, a residential house and applied to the landlord for permission to complete the purchase. The landlord willingly gave his consent to the purchase after having received certain salami. *A* was in possession of the house since the purchase and paid rent. The landlord subsequently brought a suit against *A* for ejectment:

Held: that as the landlord by his consent induced *A* to enter into possession and to pay rent, he was estopped from suing *A* for ejectment: *161 I C 514=A I R 1936 Pat 133*, **Reversed.** [P 455 C 1]

Mahabir Prasad and *U. N. Banerji* — for Appellants.

G. P. Singh — for Respondents.

Courtney-Terrell, C. J. — This is an appeal under the Letters Patent from a decision of a Single Judge of this Court. The suit out of which the appeal arises was one by the plaintiffs to eject the defendants from a house. The defendants first party are in occupation of the house and they had purchased the rights of the defendants second party who appear to have been in occupation of the house for some 40 years before the defendants first party appeared upon the scene. The defendants first party applied to the landlord, who is the plaintiff, for permission to complete the purchase with the defendants second party and the landlord thereupon gave his consent after having received a salami of Rs. 25. The terms of his consent were put into writing and are as follows :

Order for the purchase of Dih land (land for residential use) to Shiboo Mahton and others of village Barh, paragana Ghayaspore, etc. etc., by Jugeshwari Prasad Singh, the malik and the karta of the family, resident of village Gonawan. As prayed for, permission is given to you to purchase a residential house from Sham Lal Modi, son of Sanichar Modi. You do purchase the said residential house quite willingly with my permission and pay Rs. 25 as salami for recognizing you and registering your name. Hence an order in writing is given for future reference. Dated the 3rd Jaith, 1329 F.

The plaintiff served upon the defendants notice to quit and then began this suit. The suit was begun before the amendment to the Transfer of Property Act which resulted in S. 53-A, which is now in force, so that no question of part performance arises. The only question before us is whether by reason of the document, which I have set forth above, the plaintiff is estopped from suing to eject the defendants by reason of representations contained in the document. The defendants first party have since the document referred to, remained in possession and paid rent ; and it is said, but there does not seem to be any clarity in the findings, that they have since then added to the pucca structure in existence before they came into possession. The learned Judge of this Court, I think, rightly held that the document itself did not create a permanent tenancy ; but, in my opinion, he was wrong in holding that the document does not amount to a representation which would have the effect of estopping the plaintiff from suing for ejectment. Having regard to the fact that the house was a residential one, having regard to the fact that the pucca structure was standing thereon and having regard to the fact that salami was taken, and that after that the defendants first party were induced by this document to enter into possession and to pay rent, the pro-

per view is, to my mind, that the plaintiff is estopped from suing in ejectment. It is not necessary for the purpose of this decision to go into the question of the particular nature of the tenancy now enjoyed by the defendants first party : it is enough to say that the plaintiff's suit must fail. I would therefore allow the appeal under the Letters Patent. The defendants first party are entitled to their costs throughout.

James, J.—I agree.

P.R./D.S. *Appeal allowed.*

A. I. R. 1937 Patna 455

FAZL ALI AND MADAN, JJ.

Sirikant Lal and *another* — Defendants — Appellants.

v.

Sidheshwari Prasad Narain Singh and *another*, Plaintiffs and *another*, Defendant — Respondents.

Appeal No. 139 of 1934, Decided on 19th March 1937, from original decree of Addl. Sub-Judge, Gaya, D/- 26th February 1934.

(a) Hindu Law—Debts—Manager—Promissory note executed by manager in that capacity in his sole name is binding on whole family and family property — Manager is not agent of joint family — Joint Hindu family is 'a person' represented by managing member.

The managing member of a joint Hindu family can in that capacity execute in his sole name a promissory note which could be binding on the family as a whole and the property owned by it. The position of the head of the joint Hindu family is not the same as that of an ordinary business agent and a joint Hindu family, being a legal person according to Hindu law lawfully represented by and acting through the managing member or head thereof, is included ordinarily in the term 'a person' : *A I R 1922 All 116, Foll.* ; *Case law referred.* [P 456 C 2]

(b) Hindu Law—Debts — Liability — There is no distinction between liability of joint family when debt is contracted by karta under promissory note and when contracted otherwise — Every member is liable if debt is for legal necessity or for family benefit.

The Hindu law does not recognize any distinction between the liability of the joint family when the debt is contracted by its karta under a promissory note and its liability when the debt is contracted otherwise. All that is necessary to make every member of the family liable is that the debt should have been contracted for legal necessity or for the benefit of the family. Where therefore the benefit is proved, the Court will not be justified in refusing to grant the appropriate relief to the creditor, unless it is compelled to do so by something to be found in the Negotiable Instruments Act or the principles underlying it. [P 457 C 1]

(c) Hindu Law—Joint family — Manager — Powers of — Karta when borrowing money for family purpose is not acting as agent but as principal.

The joint Hindu family is an institution peculiar to this country and the law gives its karta the power to contract loans for the benefit of the family according to his own discretion and without any express authority from the other members of the family. Therefore when the karta borrows money for the family purpose he is not acting as an agent for the undisclosed principal or principals but may well be regarded as the principal. At any rate when he acts as a karta, he acts in a capacity which is so well known that there can be no misapprehension as to the identity of the person or persons whom he purports to bind by his act. [P 457 C 1]

(d) Hindu Law—Debts — Liability — Debts contracted by manager—Distinction between liability of manager and of co-parceners explained.

In the case of debts contracted by a manager, in pursuance of his implied authority in the ordinary course of the family business, there is a distinction between the liability of a manager and the liability of his co-parceners. The manager is liable not only to the extent of his share in the joint family property, but, being a party to the contract, he is liable personally, that is to say, his separate property is also liable. But as regards the other co-parceners, they are liable only to the extent of their interest in the family property, unless, in the case of adult co-parceners, the contract sued upon, though purporting to have been entered into by the manager alone, is in reality one to which they are actual contracting parties, or one to which they can be treated as being contracting parties by reason of their conduct, or one which they subsequently ratified : *A I R 1931 Pat 328, Rel. on.* [P 458 C 1]

S. M. Mullick, B. P. Sinha and *Raj Kishore* — for Appellants.

Khurshaid Husnain and *Pares Nath* — for Respondent 3.

S. N. Rai — for Respondents 1 and 2.

Fazl Ali, J.—This is an appeal from a decree passed by the Subordinate Judge of Gaya in a suit brought by the plaintiff to recover a sum of Rs. 26,795-11-8 from defendants 1 to 3. Defendants 1 and 2 are full brothers and defendant 3 is the son of defendant 1. These three defendants were admittedly members of a joint family of which defendant 1 was the manager or karta till 1932 (1339 F). The case of the plaintiff is that defendant 1 as karta of the family borrowed (1) Rs. 4,869 on 5th December 1929, (2) Rs. 7,200 on 22nd March 1931, (3) Rs. 10,034-7-0 on 27th September 1931, and executed a promissory note in favour of the plaintiff for the particular sum borrowed on each occasion.

The trial Court decreed the suit against all three defendants holding that the hand-notes were genuine and that defendant 1 had borrowed the sums mentioned in them for family necessity. This appeal has been preferred by defendants 2 and 3 (defendant 1 not appealing) and the only questions which are raised by them are (1) that the plaintiff's action being based upon promissory notes, no decree should have been passed against defendants 2 and 3 who had not signed them, and (2) that the finding of the trial Court as to the existence of legal necessity for the loans taken by defendant 1 was not correct. In arguing the first point the learned advocate for the appellant greatly relied on 46 I A 33 =46 Cal 663.[1] In that case a question arose whether a person whose name did not appear on certain hundis (which are negotiable instruments) could be made liable under them on the ground that the person who had drawn the hundis was his agent. Their Lordships of the Judicial Committee answered the question in the negative and observed as follows :

> It is not sufficient that the principal's name should be 'in some way' disclosed; it must be disclosed in such a way that on any fair interpretation of the instrument his name is the real name of the person liable upon the bills. Their Lordships' attention was directed to Ss. 26, 27 and 28, Negotiable Instruments Act 1881, and the terms of these sections were contrasted with the corresponding provisions of the English Statute. It is unnecessary in this connexion to decide whether their effect is identical. It is sufficient to say that these sections contain nothing inconsistent with the principles already enunciated, and nothing to support the contention, which is contrary to all established rules, that in an action on a bill of exchange or promissory note against a person whose name properly appears as party to the instrument, it is open either by way of claim or defence to show that the signatory was in reality acting for an undisclosed principal.

In view of these observations it has been held in a number of recent cases that the karta of a joint Hindu family cannot by executing a promissory note in his own name bind the other members of the family, no other names appearing on the document as those of persons to be charged: *see* 52 Cal 802;[2] 41 C L J 535;[3] 21 M L J 526;[4] 15 P L T 100[5] and 16 P L T 117.[6] The Allahabad High Court has, however, taken a different view in 44 All 393[7] and held that there is no inherent reason why the managing member of a joint Hindu family cannot in that capacity execute in his sole name a promissory note which should be binding on the family as a whole and the property owned by it. The learned Judges who decided that case have explained the decision of the Privy Council by pointing out that the position of the head of the joint Hindu family is not the same as that of an ordinary business agent and that a joint Hindu family, being a legal person according to Hindu law lawfully represented by and acting through the managing member or head thereof, is included ordinarily in term 'a person'. A similar view had been expressed by two eminent Judges of the Madras High Court in 23 Mad 597[8] and both these decisions have been followed by the Lahore High Court in A I R 1933 Lah 494[9] and by a Single Judge of this Court in 14 P L T 623.[10] It may also be stated that before the decision of the Judicial Committee in *Janki Das* v. *Maharaja Sir Kishan Prasad*[1] the High Court of Calcutta had also held in several cases that the karta of a joint Hindu family could bind the other members of the family by signing a promissory note for family purposes: *see* 7 C W N 725[11] and 11 C W N 139.[12]

Now the view expressed in these cases has this advantage that it enables the Court to grant the same relief in a suit based on a promissory note as in a suit for debt and therefore makes it unneces-

1. Sadasukh Janki Das v. Sir Kishan Prasad, A I R 1918 P C 146=50 I C 216=46 Cal 663 =46 I A 33 (P C).
2. Sreelal Mangtulal v. Lister Antiseptic Dressing Co., Ltd., A I R 1925 Cal 1062=89 I C 328=52 Cal 802=29 C W N 828.
3. Hari Mohan Ghose v. Sourendra Nath Mitter, A I R 1925 Cal 1153=88 I C 1025=41 C L J 535.
4. Kutti Ammu v. Purushotam Doss, (1911) 21 M L J 526=8 I C 851.
5. Jibach Mahto v. Shib Shanker Chaudhary, A I R 1933 Pat 687=147 I C 1065=15 P L T 100.
6. Birkeshwar Raut v. Ram Lochan Pandey, A I R 1934 Pat 629=154 I C 95=16 P L T 117.
7. Krishnanand Nath Khare v. Raja Ram Singh, A I R 1922 All 116=66 I C 150=44 All 393 =20 A L J 233.
8. Krishna Ayyar v. Krishnasami Ayyar, (1900) 23 Mad 597.
9. Bhagwan Singh & Co. v. Bakshi Ram, A I R 1933 Lah 494=149 I C 556.
10. Tikam Chand Chaudhury v. Sudarsan Trigunait, A I R 1933 Pat 263=144 I C 325=14 P L T 623.
11. Nagendra Chandra Dey v. Amar Chandra Kundu, (1903) 7 C W N 725.
12. Baisnab Chandra De v. Ramdhon Dhor, (1907) 11 C W N 139.

sary for it to decide whether the suit belongs to one category or the other. The distinction between these two classes of suits is too well recognized to be overlooked, but so far as this country is concerned, the line of distinction becomes highly artificial in many cases, firstly because except in a few mercantile towns a promissory note is not popularly regarded as a negotiable instrument; and, secondly, because the distinction depends largely on the view one takes of the pleadings, and the pleadings in the mofussil Courts are generally defective and badly drafted. Besides, so far as the Hindu law goes, it does not recognize any distinction between the liability of the joint family when the debt is contracted by its karta under a promissory note and its liability when the debt is contracted otherwise. Under that law all that is necessary to make every member of the family liable is that the debt should have been contracted for legal necessity or for the benefit of the family. Where therefore the benefit is proved, the Court will not be justified in refusing to grant the appropriate relief to the creditor, unless it is compelled to do so by something to be found in the Negotiable Instruments Act or the principles underlying it.

Under the law of negotiable instruments, as has been explained by the Judicial Committee in *Sadasukh Janki Das* v. *Sir Kishan Prasad*[1] it seems necessary that the name of the person to be charged should be disclosed in the document in such a way that the responsibility is made plain and can be instantly recognized as the document passes from hand to hand. Now, the joint Hindu family is an institution peculiar to this country and the law gives its karta the power to contract loans for the benefit of the family according to his own discretion and without any express authority from the other members of the family. Therefore when the karta borrows money for the family purpose he is not acting as an agent for an undisclosed principal or principals but may well be regarded as the principal. At any rate when he acts as a karta, he acts in a capacity which is so well known that there can be no misapprehension as to the identity of the person or persons whom he purports to bind by his act. On the whole therefore I am inclined to think that the rule laid down in *Sadasukh Janki Das* v. *Sir Kishan Prasad*[1] is not applicable to a Hindu family and I am to some extent fortified in my view by the later pronouncement of the Judicial Committee in 15 P L T 99.[13] In that case a suit had been brought on the basis of two promissory notes executed by the manager of a joint Hindu family against the surviving members of that family after the death of the manager who had executed the promissory notes. The Judicial Committee in dealing with the case observed: (1) that it would be within the authority of the karta of the joint family to borrow money in his own name if it be necessary for the proper conduct of the joint family business that money should be borrowed from time to time on promissory notes, and (2) the fact of the promissory note being signed by the karta is equally consistent with the borrowing by him for his own individual purpose or borrowing for the purpose of the joint family business.

The matter, however, need not be pursued any further because I agree with the learned Subordinate Judge that on the pleadings of the parties the present suit should be treated as a suit for recovery of debt. This is clear on reading paras. 3 and 4 of the plaint where after stating the amounts which were borrowed by defendant 1 on different occasions it is stated that the three handnotes were executed "in proof of his taking the aforesaid loans". Again in para. 6 of the plaint the defendants are sought to be made liable on the ground that "they were benefited by the loans" and in para. 8 it is clearly stated that the cause of action accrued on the dates on which the loans were taken and the handnotes sued upon were executed. It is true that in para. 9 of the plaint the plaintiff asked for a decree "on account of the three handnotes sued upon", but the plaint must be read as a whole and if read as a whole, it supports the view taken by the learned Subordinate Judge that the suit was in essence a suit for debt and therefore all the members of the family would be liable to repay the debt if they were contracted for legitimate family necessity. The next question to be considered is whether the debts were in fact contracted for family necessity. (After discussing the evidence his Lordship came to the conclusion that defendant 1 con-

13. Abdul Majid v. Saraswati Bai, A I R 1934 P C 4=147 I C 1=61 I A 90=30 N L R 60=15 P L T 99 (P C).

tracted the loans in question not for his own use but for the benefit of the family and that both defendants 2 and 3 were benefited by the loans, and the judgment proceeded.) There is only one other point which remains to be dealt with. In cases where a loan is contracted by the managing member of a joint family a question often arises at the time of the execution of the decree as to the extent of the liability of the other members of the family for the debt. This question has arisen in this particular case also as will appear from the connected miscellaneous appeal before us and it seems therefore to be necessary that the decree of the Court should be prepared in such a way as to make the position clear. In 12 P L T 707,[14] two learned Judges of this Court have quoted with approval the following passage from Mulla's Hindu Law as correctly summarizing the law on the subject:

> In the case of debts contracted by a manager, in pursuance of his implied authority in the ordinary course of the family business, there is a distinction between the liability of a manager and the liability of his co-parceners. The manager is liable not only to the extent of his share in the joint family property, but, being a party to the contract, he is liable personally, that is to say, his separate property is also liable. But as regards the other co-parceners, they are liable only to the extent of their interest in the family property, unless, in the case of adult co-parceners, the contract sued upon, though purporting to have been entered into by the manager alone is in reality one to which they are actual contracting parties, or one to which they can be treated as being contracting parties by reason of their conduct, or one which they have subsequently ratified.

Now in this particular case so far as defendants 1 and 3 are concerned, the position is perfectly simple. The former as the executant of the handnotes is personally liable for the debts contracted under all of them and defendant 3 who is a minor is liable for these debts only to the extent of his interest in the joint family property. As to defendant 2, I am of opinion that he is personally liable for the loan contracted under the handnote dated 27th September 1931. I have already stated that the mortgage bond (Ex. 3) dated 19th September 1932 which was executed by him as well as by defendant 1 refers in clear terms to the promissory note in question and I may quote the exact words used in the bond which are as follows:

> We paid rent with interest on the default of instalment for 1928 to the said ijaradar by taking a loan from Babu Sidheshwar Prasad Narain Singh etc. etc. under a handnote for Rs. 10,034-7-0.

I think that this statement, the correctness of which there is no reason to doubt, brings the case of defendant 1 within the exception referred to in the passage quoted above and amounts to a ratification of the loan. Defendant 2 is therefore personally liable so far as the debt contracted under the handnote of 27th September 1931 is concerned but he is liable only to the extent of his share in the joint family property in respect of the debts contracted under the other two handnotes. I would therefore dismiss this appeal with costs and direct that in the decree which is to be prepared in this Court the amount due under the three handnotes should be calculated separately and it should be made clear that defendant 1 is personally liable for the debts due under all the three handnotes that defendant 2 is personally liable only in respect of the debt contracted under the third handnote and that defendant 3 is not personally liable under any of the debts but is liable only to the extent of his interest in the joint family property.

Madan, J.—I fully agree.

S.C./D.S. *Appeal dismissed.*

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14. Jwala Prasad v. Bhuda Ram, A I R 1931 Pat 328=134 I C 420=12 P L T 707=10 Pat 503.

A. I. R. 1937 Patna 458

AGARWALA AND MADAN, JJ.

Rudra Narain Singh and others — Plaintiffs — Appellants.

v.

Kedar Nath Singh and *others* — Defendants — Respondents.

Appeal No. 967 of 1933, Decided on 1st April 1937, from appellate decree of Sub-Judge, Muzaffarpur, D/- 16th February 1933.

(a) Second Appeal — Facts found whether prove custom is question of law.

The question whether the facts found in any particular case prove the existence of the essential attributes of a custom or usage is a question of law which may be discussed in second appeal: *A I R 1918 Cal 979, Rel. on.* [P 460 C 2]

(b) Landlord and tenant—Abandonment.

The question of abandonment must be adjudged by the intention of the tenants concerned. [P 460 C 2]

(c) Bengal Tenancy Act (8 of 1885), S. 183—Custom that, on diluvion, occupancy tenant loses right to reduction of rent and to re-occupy land on its re-formation—Such custom, even if exists, is barred.

In the case of an occupancy holding it is clear that a usage whereby a tenant loses his right to reduction of rent on diluvion under S. 52, Bengal Tenancy Act, and to re-occupy the land on its re-formation is a serious derogation of the rights of an occupancy raiyat. [P 461 C 1]

Therefore such a usage even if it exits is barred by S. 183, Bengal Tenancy Act as being expressly or by necessary implication opposed to the provisions of the Act. [P 461 C 1]

(d) Bengal Tenancy Act (8 of 1885), Sch. 3, Art. 3—Tenant losing land by diluvion—On re-appearance landlord taking possession—This is no dispossession of tenant—Suit by tenant for possession does not fall under Art. 3.

Where a tenant loses land by diluvion, and it has been found in S. 145, Criminal P. C., proceedings that the landlord took possession of the land on its re-appearance, there is no dispossession of the tenant by the landlord, and the suit by tenant for possession does not fall under Sch. 3, Art. 3, Bengal Tenancy Act : *A I R 1933 Pat 224, Foll.* [P 462 C 1]

N. K. Prasad II and *Kameshwar Dayal* — for Appellants.

P. C. Manuk, Manohar Lal, A. K. Mitra, P. Misra, Bajrang Sahay for *Rajeshwari Prasad* and *Mrs. Dharmshila Lal* — for Respondents.

Madan, J.—This is an appeal by the plaintiffs who brought a suit for declaration of their occupancy right and for recovery of possession in respect of 15 bighas 8 kathas 17 dhurs of diara land situated in village Jurawanpore Barari and re-formed from the bed of the river Ganges. A portion of this land formed part of the former occupancy holding of the plaintiffs or their predecessors-in-interest, as recorded in the cadastral survey of the year 1892, and the remainder is said to have been acquired by the plaintiffs by purchase or mortgage after that date. The lands are situated in a temporarily settled khasmahal estate which was surveyed by the khasmahal in the year 1921, prior to the granting of a temporary settlement of the estate to the defendants third party in the year 1922. At that time a total area of 19 bighas 13 kathas and 3 dhurs is claimed to have been in possession of the plaintiffs. According to the plaintiffs the suit lands, forming the major portion of this area, diluviated in the year 1926 and re-formed in the year 1927 ; thereupon the defendant second party, who is a servant of the defendants third party, demanded a salami from the plaintiffs, and on their refusal to pay, the defendants third party set up the defendants first party as tenants of the lands. There were proceedings under S. 145, Criminal P. C., which the plaintiffs lost, and then the defendants third party took possession of the lands on 9th April 1928. The defendants first and third party contested the suit. They denied that the suit lands were identical with the lands formerly in possession of the plaintiffs, and claimed that they diluviated at different times after the year 1921, and that defendants third party settled them with the defendants first party on their re-appearance in the years 1926 and 1927. They also pleaded that the suit was barred by limitation, as well as by a local usage whereby tenants of the diara lose their rights in lands which diluviate. The trial Court held throughout in favour of the plaintiffs, but the Subordinate Judge on appeal held that the plaintiffs had not established their title to all the lands claimed by them, nor had they proved the identity of those lands with the re-formed lands in possession of the contesting defendants. He also found that the suit was barred by limitation, as well as by the local usage set up by the defendants.

In the trial Court a pleader commissioner was appointed to inquire whether the plots claimed by the plaintiffs according to the survey of 1921 formed part of the land found to be in possession of defendants first and third parties in the S. 145 case. He was also asked to report whether the plots had re-formed *in situ*. The commissioner's report shows that he measured from permanent fixed points pointed out by the parties, and then prepared a map showing the lands which formed the subject matter of the S. 145 case, as well as the plots claimed by the plaintiffs both according to the cadastral survey of 1892 and the khasmahal survey of 1921. According to the map and report the lands claimed by the plaintiffs are substantially identical with a portion of the lands covered by the S. 145 proceedings. If the plaintiffs are otherwise entitled to a decree there should be no difficulty in passing a decree on the basis of the commissioner's report. The learned Subordinate Judge rejected the commissioner's report on the strength of an observation therein that the lands had not re-formed *in situ*. A passage quoted by the Subordinate Judge himself from the commissioner's evidence shows that what the commissioner meant by this observation

was that landmarks such as trees and boundaries had not re-appeared after the re-formation, for which reason he had to re-measure the plots from the fixed points. The learned Subordinate Judge was therefore in error in rejecting the commissioner's report on this ground and holding that the plaintiffs had failed to identify the suit lands. The Subordinate Judge was also in error in remarking that the commissioner appointed in the S. 145 case had also failed to identify the plaintiff's land. The report (Ex. E) of that commissioner shows that the lands claimed by the plaintiffs were found to be part of the recently alluviated land which was the subject matter of the dispute. It is however unnecessary to remand the case on this issue as the trial Court's judgment shows that the contesting defendants did not challenge the Commissioner's report before it. This issue is dealt with by the learned Munsif as follows :

Issue 7. As described in the plaint the lands of khata Nos. 150, 152, 143 and 145 of Ex. 2 form the subject matter of the present dispute. From the evidence and report of the Commissioner appointed in this suit it is clear that the said lands in suit have re-formed on their old site. The learned advocate for the defendants have virtually conceded this point. So this issue is answered in the affirmative.

Later on, the Munsif again remarks that the identity of the re-formed lands in suit with the portion of the plaintiffs' original holding had been 'established and conceded to by the defendants'. In their memorandum of appeal to the Subordinate Judge the defendants denied having conceded the identity of the lands, but they did in effect concede it by not challenging the commissioner's report. I consider that the Subordinate Judge was bound by the Munsif's finding on this issue and was not in a position to re-open the matter. I find therefore that the lands claimed by the plaintiffs have been identified. The learned Subordinate Judge held that the defendants had established a usage whereby tenants of the diara lose their rights in lands which diluviate and cease to pay rent for those lands. He held that in view of the existence of this usage the plaintiffs must be held to have abandoned the suit lands on their diluvion. The Subordinate Judge based his finding on this issue on certain petitions (Ex. D series) whereby in the year 1921 a large number of tenants of the diara offered to take fresh settlement of certain re-formed lands. None of those tenants claimed the right to re-enter on those lands on the strength of their previous tenancy, whereas some of them applied for fresh settlement of the lands which they had previously held. It is said that the father of plaintiff 1 was a signatory to one of these petitions (Ex. D.8) which however for some reason was not forwarded to this Court with the record. The defendants also examined some tenants who deposed that they themselves had applied for fresh settlement of their lands as they had lost their tenancy rights on diluvion.

The learned Subordinate Judge was of opinion that their evidence proved the usage, but I do not think that the fact that one body of tenants did apply for re-settlement on the assumption that the former holdings had been abandoned, is sufficient to prove it. On the contrary the records show that not merely the plaintiffs, but other tenants also, did strongly assert their claim to their former holdings, with the result that it became necessary to take action under the preventive sections of the Criminal Procedure Code. It is true that both Courts have found that the plaintiffs have not paid rent for the disputed lands since the year 1921, but mere non-payment of rent in such circumstances is little evidence of abandonment and does not determine the tenancy. Moreover in the year 1925 defendants third party did sue the defendants fifth party, whom the plaintiffs say are their farzidars, for rent of a portion of one of the holdings covered by the suit, and the rent suit was withdrawn on objection that it was in respect of only part of the holding. The question whether the facts found in any particular case prove the existence of the essential attributes of a custom or usage is a question of law which may be discussed in second appeal (45 Cal 285[1]), and in this case I do not find that the usage has been established, still less can the plaintiffs be held to have abandoned their holdings on account of the existence of such a usage. The question of abandonment must be adjudged by the intention of the tenants concerned, and in this case the plaintiffs resisted the landlord when they attempted to take possession of the lands on their again becoming cultivable.

1. Kailash Chandra Datta v. Padmakishore Roy, A I R 1918 Cal 979=41 I C 959=45 Cal 285 =25 C L J 613=21 C W N 972.

I do not therefore find that the plaintiffs have lost their rights in the suit lands either by usage or by abandonment. Moreover in my view, which was also the view taken by the Court, such a usage even if it exists is barred by S. 183, Ben. Ten. Act, as being expressly or by necessary implication opposed to the provisions of that Act. In the case of an occupancy holding it is clear that a usage whereby a tenant loses his right to reduction of rent on diluvion under S. 52 of the Act, and to re-occupy the land on its re-formation, is a serious derogation of the rights of an occupancy raiyat. I have already observed that part of the land in suit is recorded as in possession of the plaintiffs so long ago as the cadastral survey of the year 1892. Although the record of that survey was not finally published still it is substantial evidence of a long existing occupancy right of the plaintiffs of which they ought not to be deprived.

It was pointed out for the defendants third party that the acquisition of occupancy rights in diara land is restricted under S. 180 of the Act. According to this section occupancy right is not acquired in char or diara land until the tenant has held the land in question for 12 continuous years during which period he remains liable to pay such rent for his holding as may be agreed on between him and his landlord. As has been held in 18 C W N 598[2] this section debars an application for reduction of rent under S. 52. It was suggested that a usage that relieves a tenant from payment of rent for the diluviated portion of his holding is of benefit to him and is not inconsistent with the Tenancy Act. Even so however serious hardship might arise, if for instance, a tenant having paid 11 years full rent for his holding were then to lose a substantial portion of it by temporary diluvion, and were debarred from retaining his right to that portion on payment of the rent. No instance was cited in which a usage of the character now set up by the contesting defendants has been held to have been established and to be in accordance with law. In my opinion the usage even if proved to exist is barred by S. 183, Tenancy Act, and the plaintiffs' suit cannot be defeated thereby.

2. Sri Newas Prasad Singh v. Ram Raj Tewari, A I R 1914 Cal 673=22 I C 822=18 C W N 598.

On the question of title, aud with reference to the plot numbers given in the cadastral survey of 1892, both Courts have found that plot 740 is part of the plaintiffs' original holding which was again recorded in their name in the year 1921. I may observe that the rest of the holding, which measured 19 bighas odd in 1892 is said to have diluviated prior to 1921, and to have re-formed shortly before the suit but not in a fit state for cultivation. These lands are not part of the subject matter of the present suit. Both Courts have also declared the plaintiffs' title to plots 741 and 751 of which the plaintiffs claimed possession through a farzidar and by oral purchase. The learned Subordinate Judge held that the plaintiffs had not established their title to plots 748 and 775. The plaintiffs' case is that they purchased these plots in 1919 in execution of a rent decree of defendant third party, in the farzi name of one Sheopragash. The plaintiffs filed a deed of surrender by Sheopragash, and defendants fifth party, who are his heirs, admitted their claim. It was in respect of a portion of this holding that defendants third party filed the above mentioned rent suit against defendants fifth party which was afterwards withdrawn. I consider that the trial Court was right in maintaining the plaintiffs' title to those plots against the contesting defendants on the strength of the admission of the defendants fifth party. All these plots, as set forth in Sch. 1 of the plaint, are claimed by the plaintiffs as tenants-in-possession. The remaining plots, set forth in Schs. 2 and 3 of the plaint, are claimed by the plaintiffs as usufructuary mortgagees.

As regards plots 773 and 774 it was conceded before us that the Subordinate Judge's finding that the plaintiffs had not established their title to these plots could not be challenged. Both Courts however found that plots 745, 747, 750 and 752 were in the plaintiffs' possession as usufructuary mortgagees. Out of the above mentioned plots the commissioner found that plots 740, 748 and 751 were substantially equal to plot 844 of the 1921 survey. He also found that plots 741 and 775 correspond to plots 861, 862 and 863 of the 1921 survey; plot 745 corresponds to plot 787, and plot 747 to plot 790. The suit must be decreed in respect of these plots as measured at the survey of 1921. The plaintiffs claimed

that plots 750 and 752, the remaining plots to which they have been found to have established their title, were equivalent to plot 799 of 1921. The commissioner however found that plot 799 corresponds to plot 749, which is not claimed by the plaintiffs. In the circumstances I do not find it possible to give the plaintiffs a decree in respect of plot 799. The suit must also be dismissed with respect to plots 773 and 774, corresponding to plot 850 of the survey of 1921, the plaintiffs having failed to establish their title to those plots.

On the issue of limitation the learned Subordinate Judge held that the suit was barred by two years' limitation under the Bengal Tenancy Act. In 14 P L T 113[3] it has been held that where a tenant loses land by diluvion, and it has been found in S. 145 proceedings that the landlord took possession of the land on its re-appearance, there was no dispossession of the tenant by the landlord, and the suit did not fall under Sch. 3, Art. 3, Ben. Ten. Act. The present case is similar, and I find that the suit was not barred. The result is that this appeal is allowed to the extent that the suit is decreed, and the plaintiffs are entitled to recover possession, in respect of plots 844, 861, 862, 863, 787 and 790 of the plaint. The suit is dismissed in respect of plots 850 and 799. The plaintiffs are entitled to costs throughout in proportion to their success. The claim for mesne profits may be determined in execution.

Agarwala, J.—I agree.

P.R./D.S. *Appeal partly allowed.*

3. Jurawan Singh v. Ramsarekh Singh, A I R 1933 Pat 224=149 I C 561=12 Pat 261=14 P L T 113.

A. I. R. 1937 Patna 462

MOHAMAD NOOR, J.

Ram Chandra Singh and *another*— Appellants.

v.

Jamuna Singh and *others* — Respondents.

Appeals Nos. 471 and 472 of 1934, Decided on 3rd February 1937, from appellate decrees of Sub-Judge, Chapra, D/- 14th April 1934.

Record of Rights—Documents either consisting of landlord's sarishta and based upon map or consisting of papers relating to plaintiff's name in earlier stages of settlement operations produced—They cannot override final entry in Record of Rights.

In a suit to recover land, alleged to be wrongly included in defendant's holding by the settlement authorities, documents either of landlord's sarishta and based upon the khasra and the map prepared for the assessment of rent by the landlord or consisting of papers relating to the entry of the plaintiff's name in the earlier stages of the settlement operations produced by plaintiff in support of his title cannot in any way override the final entry made in the Record of Rights.

[P 463 C 1]

Bhubaneshwar Prasad — for Appellants.

Manohar Lal, *Harinandan Singh* and *Rai Paras Nath* — for Respondents.

Judgment.—These two appeals arise out of two suits instituted by the same plaintiffs against the same defendants for recovery of two pieces of land which according to them formed parts of their holding in village Digrishuda in the district of Saran, and which were wrongly included by the settlement authorities in two holdings of the defendants. In Second Appeal No. 471 of 1934 the area involved is 3 bighas 14 kathas 6 dhurs which forms part of plot No. 124, being in khata No. 24 of the defendants; while in Second Appeal No. 472 the area involved is 11 bighas 15 kathas 17 dhurs, being plot No. 37 of the village which has been recorded in khata No. 3 of the defendants. Two suits were instituted perhaps on account of the fact that though according to the plaintiffs the lands of both the suits appertained to the same holding of theirs, they were recorded in two different khatas of the defendants. The only question to be decided was whether the presumption of the correctness of the Record of Rights has been rebutted by the plaintiffs; or, in other words, whether they proved that the lands, the subject matter of the two suits, were parts of their holding. The trial Court decreed both the suits, but the learned Subordinate Judge on appeal by the defendants has dismissed them. The plaintiffs have preferred these two second appeals.

In my opinion, no question of law arises in these cases. The trial Court relied upon a certain map and khasra which was prepared for purposes of assessment of rent by the landlord, the Maharaja of Dumraon. The learned Subordinate Judge for reasons which cannot be said to be unsound or contrary to law, has declined to act upon them. Then in order to decide whether

the plots in suit correspond to the particular plots of the khasra of the Raj the learned Munsif had relied upon the Commissioner's report. The learned Subordinate Judge has held that the Commissioner's report not being based upon any fixed point and the lands being situated in diara, his identification of the disputed lands with certain plots of the khasra of the Raj could not be relied upon. The learned advocate appearing for the appellants has, however, contended that the learned Subordinate Judge has ignored a number of documents. I do not think so. The documents referred to are either of the landlord's sarishta and are based upon the khasra and the map which the learned Subordinate Judge has not considered fit to rely upon, or they are the papers relating to the entry of the plaintiffs' names in the earlier stages of the settlement operations and cannot in any way override the final entry made in the Record of Rights. In my opinion the appeals are concluded by the findings of fact and I dismiss them with costs.

V.B.B./A.L. *Appeals dismissed.*

A. I. R. 1937 Patna 463

MOHAMAD NOOR, J.

Somar Ram and *another* — Appellants.

v.

Budhu Ram — Respondent.

Misc. Appeal No. 237 of 1936, Decided on 2nd April 1937, from order of Judicial Commissioner, Chota Nagpur, D/- 7th April 1936.

(a) Land Tenure — 'Thica dwami' in Chota Nagpur—Nature and incidents of.

The name 'thica dwami' in the Record of Rights in Chota Nagpur is given to a cultivating tenancy which partakes largely in its origin and development of a raiyati character and is in fact a raiyati tenancy which has grown into a tenure: *A I R 1928 Pat 451* and *A I R 1929 Pat 376*, *Rel. on.* [P 464 C 2]

(b) Evidence Act (1872), Ss. 35, 48, 57 (13) and 32 — Chota Nagpur tenancy — 'Dwami thica' — Sifton's Settlement Report containing statement that 'dwami thicas' being in origin cultivating tenancies are by custom non-transferable — Settlement report is admissible in evidence under Ss. 35, 48, 57 (13) and 32 without examining author.

Sifton's Settlement Report containing the statement that 'dwami thicas' being in their origin cultivating tenancies are by custom non-transferable is admissible in evidence to prove the custom of non-transferability of the 'dwami thicas'. Firstly because his report being an official book is admissible under S. 35, Evidence Act, as the statements in report were made in discharge of the official duty. Secondly it is admissible under S. 48 as his opinion about the custom of non-transferability of 'dwami thica' is the opinion of an officer who made special enquiry into it and was likely to know the existence of the custom. Thirdly the settlement report being a book of reference is admissible under S. 57 (13). Fourthly as calling the author as witness would cost unnecessary expense, the report is admissible under S. 32 without examining the author: *A I R 1925 All 648*, *Rel. on.* [P 464 C 2; P 465 C 1,2]

(c) Chota Nagpur Tenancy Act (6 of 1908), S. 76—S. 76 does not affect custom of non-transferability of 'dwami thicas'.

The non-transferability of 'dwami thicas' is not inconsistent with any provision of the Chota Nagpur Tenancy Act and therefore the custom of non-transferability of 'dwami thicas' is not affected by S. 76, Chota Nagpur Tenancy Act. [P 465 C 2; P 466 C 1]

(d) Land Tenure — 'Dwami thica' (Chota Nagpur) — Non-transferability of 'dwami thica' is absolute—Even landlord cannot sell it.

The custom in Chota Nagpur is the absolute non-transferability of 'dwami thica'; even the landlord cannot sell the tenure for arrears of rent but can eject the tenure-holder. [P 466 C 2]

(e) Landlord and Tenant—Tenancy, inalienable in its inception does not become alienable when reason for its inalienability disappears.

It cannot be said that a tenancy, which at its inception was inalienable, has become alienable when the reason for its inalienability has disappeared: *A I R 1928 P C 177*, *Ref.* [P 467 C 1]

(f) Landlord and Tenant — Non-transferable holding—Unilateral act of tenure-holder cannot break custom or destroy incidents of tenancy.

The transfer of a tenure by tenure-holder in violation of the custom which must be taken to be the law cannot in any sense be said to have broken the custom, nor does it discredit the incidents of tenure in the Settlement Report. An unilateral act of tenure-holders cannot destroy the incidents of tenancy. [P 467 C 1]

G. C. Mukharji — for Appellants.

S. S. Bose — for Respondent.

Judgment.—This appeal arises out of an execution proceeding. The appellants in execution of their money decree against the respondent wanted to sell certain properties of his described in khewat No. 3/3 and shamilat khewats Nos. 3/4, 3/5 and 3/7 of village Abardih in the District of Hazaribagh. The interest held by the judgment-debtor according to the Record of Rights is 'dwami thica', a peculiar tenure in Chota Nagpur. The judgment-debtor objected to the sale on the ground that his interest was not saleable. The executing Court, mainly relying upon the Sifton's Settlement Report of Hazaribagh where the incidents of 'dwami thica'

tenures are mentioned, allowed the objection and refused to sell the properties. This order has been upheld by the learned Judicial Commissioner. The decree-holders have preferred this appeal.

Mr. G. C. Mukharji, who has appeared on behalf of the appellants, has attacked the order of the Courts below on the following grounds : (1) The nature of the tenancy makes it transferable and the custom of non-transferability has not been proved. The settlement report is no evidence of custom. (2) Assuming that the dwami thica is not transferable, the protection is for the benefit of the landlord, and not that of the tenant. This restraint on the right of transfer does not apply to involuntary transfers. At any rate the tenure should be allowed to be sold, leaving it to the landlord to question the sale if he likes. (3) Whatever may be the incidents of thica dwami in general, this particular tenure has lost its character of non-transferability as it has been transferred from time to time. At any rate the judgment-debtor is estopped from questioning the saleability of this tenure. I shall take up the grounds in the order in which they have been mentioned. Regarding the first point the argument of the learned advocate is this. Dwami thica is a property. All properties are saleable unless exempted from sale. Dwami thica has not been exempted by S. 60, Civil P. C. If the landlord has created a tenure, and imposed a condition of non-transferability the condition is void, unless it is for the benefit of the landlord. Even if the condition be for the benefit of the landlord, nevertheless the tenure can be sold subject to the right of the landlord to avoid it. He relied upon S. 10, T. P. Act, and on para. 232 of Sifton's Settlement Report of Hazaribagh and contended that as the tenures of that district have in course of time become alienable no exception can be made in favour of the dwami thica which is a tenure. In order to determine the force of this argument it is necessary first of all to examine what a dwami thica is. The words "dwami thica" are not to be found in the leases of these tenures. It was introduced (if I may say so, coined) by the Settlement Department for a particular kind of tenure found in Chota Nagpur. This class of tenure has not been specifically dealt with in the Chota Nagpur Tenancy Act. When the settlement authorities found that there were tenure-holders who had non-resumable and heritable rights in their tenures and the rent was not fixed in perpetuity as that of mukarraridar, they called this class of tenure-holders "dwami thicadars". The incidents of such a tenure were considered in this Court in 7 Pat 752[1] where Macpherson, J. pointed out that the name 'thica dwami' in the Record of Rights in Chota Nagpur is given to a cultivating tenancy which partakes largely in its origin and development of a raiyati character and is in fact a raiyati tenancy which has grown into a tenure. In para. 195 of the Settlement Report the learned author says :

> The status of dwami in the Record of Rights has been restricted with a few exceptions not here material to cultivating tenancies which though they now must be interpreted as tenures partook largely in their origin and development of a raiyati character. They are in fact raiyati tenancies which have grown into tenures.

The same is the observation of another Bench of this Court in 10 P L T 359.[2] Therefore, it is clear that dwami thicas were at the time of their origin cultivating tenancies which under the peculiar circumstances of the locality have grown up into a tenure. The author of the Settlement Report has recorded on the basis of what he found in the locality that on account of the fact that they were in origin cultivating tenancies, they are by custom not transferable. The learned advocate, however, has contended that the Courts below were not justified in relying upon the Settlement Report for proof of the custom of non-transferability of the dwami thicas. He argued that the report could not be used in evidence unless the author of the report is examined. In my opinion, this argument is untenable. Mr. (now Sir James) Sifton, till recently the Governor of Bihar, was the Settlement Officer in the District of Hazaribagh. He was deputed by local Government to investigate and record the incidents of the tenancies of the district and the customary rights and liabilities of the holders thereof. His report, which is an official book, is admissible under S. 35, Evidence Act, as the statements in the report were made in discharge of an official duty, and preparation of the records was enjoined on him by law, that is, the Chota Nagpur

1. Tikait Krishna Prasad Singh v. Budhan Manjhi, A I R 1928 Pat 451=111 I C 675=7 Pat 752=9 P L T 379.
2. Jagdishwar Dayal Singh v. Bulak Mahto, A I R 1929 Pat 376=121 I C 360=10 P L T 359.

Tenancy Act. Then S. 48, Evidence Act, enacts that :

When the Court has to form an opinion as to the existence of any general custom or right, the opinions, as to the existence of such custom or right, of persons who would be likely to know of its existence if it existed, are relevant.

Therefore, the opinion of the author of the Settlement Report about the custom of non-transferability of dwami thica is the opinion of an officer who made special enquiry into it and was likely to know the existence of the custom, the custom of non-transferability being connected with the origin and development of the dwami thica. The origin of tenure is also a matter of public history, and if the Court has to form an opinion in respect of the history of the tenancies in the district in general, it may under S. 57 (13), Evidence Act, resort to books or documents of reference. Settlement Report is certainly a book of reference. The learned advocate, however, relied upon S. 60, Evidence Act, and contended that if the author of the report formed an opinion about the existence of a custom he ought to have been examined; but there is a proviso to this section which is to the effect that:

The opinions of experts expressed in any treatise commonly offered for sale, and the grounds on which such opinions are held, may be proved, by the production of such treatise. If the author is dead, or cannot be found, etc.,he cannot be called as a witness without an amount of delay or expense which the Court regards as unreasonable.

Then S. 32, Evidence Act, also provides that the opinion of any person on the existence of public right or customs or matters of the existence of which, if it existed, he would have been likely to be aware, and when such statement was made before any controversy as to such right, custom, or matter had arisen, can be proved without calling the man who has made the statement if his evidence cannot be procured without such amount of delay or expense which the Court under the circumstances of the case considers unnecessary. Now the author of the report having investigated and studied the origin of tenures and the custom in respect of them was an expert on the matters he wrote in the report and at the time when the case was heard was occupying the position of the Governor of the province. It is obvious that calling him as a witness would have cost unnecessary expense. His opinion is expressed in a book which he had written in the course of his official duty under the orders of Government. The book is commonly offered for sale. Therefore the contents of the report are admissible without examining the author. This view was adopted by the Allahabad High Court in A I R 1925 All 648.[3] The learned advocate for the appellant, however, relied upon a Privy Council decision in 23 All 37,[4] but there is nothing in the judgment of their Lordships which supports the contention that under the circumstances of the case the examination of the author of the report was necessary. I, therefore, overrule this contention.

Now according to the Record of Rights the tenure in question is thica dwami. It has been held in this Court in the two cases I have already referred to that in their origin the tenancies were cultivating or raiyati tenancies. This opinion of the author of the Settlement Report has been accepted by this Court in the two cases referred to above. The report says that as a general custom dwami thicas are inalienable. This statement about custom must be accepted unless the contrary is proved and it was for the decree-holder to rebut the presumption of the Record of Rights about the tenure being dwami thica or to prove that the custom as recorded in the Settlement Report was not prevailing. This has not been done. It is true that a number of documents (about thirty-five) have been filed to prove that dwami thicas have been transferred. Eight of them relate to this village and I shall deal with them later. The remaining ones are in respect of other five or six villages. Almost all of them with one or two exceptions are of dates after the Record of Rights of the district was prepared. They do not disprove the custom. Nor are they sufficient to show that the custom of non-transferability of dwami thicas was broken. There is nothing to show that these transfers were recognized by the landlord as a matter of right. Both the Courts below have held that the decree-holder has not established the custom of transferability of dwami thicas and the finding is conclusive. Now S. 76, Chota Nagpur Tenancy Act, enacts that nothing in the Act shall affect any custom, usage or customary right not inconsistent with or not expressly, or by necessary implication modified or abolished by its pro-

3. *In the matter of* Shyam Lal Shah, A I R 1925 All 648=86 I C 729=49 All 848.

4. Garurudhwaja Prasad v. Saparandhwaja Prasad, (1901) 23 All 37=27 I A 238 (P C).

visions. The non-transferability of dwami thicas is not inconsistent with any provision of the Act and therefore that custom must prevail.

The next branch of the argument of the learned advocate was that the non-transferability is for the benefit of the landlord and therefore the restriction cannot apply to involuntary transfers. He relied upon a decision of the Calcutta High Court in 20 Cal 273.[5] In that case the question for consideration was whether a covenant against transfer in a lease invalidates it in a case of involuntary transfer. It was held that it did not. It is obvious that this decision has no application to the present case where the non-transferability is not based upon any covenant between the landlord and the tenant but upon the custom based upon the nature of the tenancy itself. The learned advocate however contended that if the tenure was not transferable, it was for the benefit of the landlord and it was transferable with his consent and it was for him to object and not for the judgment-debtor. He relied upon the decision in 10 Cal 677[6] and the decision of the Privy Council in the same case reported in 15 Cal 471= 15 I A 18.[7] Both these decisions relate to ghatwalis of Kharagpur. The ghatwalis stand upon a different footing. They are service tenures and consent of landlord is necessary for their transfer as it is he who is by transfer deprived of the service for which the tenures were created. But non-transferability of dwami thicas is based upon custom which has grown along with the growth of the tenures themselves. As I have said, dwami thicas in their origin were cultivating tenancies which in course of time developed into tenures. It is unnecessary to enter into much debated controversy whether the cultivating tenancies were transferable under the custom of the country. An elaborate discussion will be found in a Special Bench decision of the Calcutta High Court in 48 Cal 184.[8]

The fact remains that the custom recorded is absolute non-transferability and, as I shall show, even the landlord cannot sell the tenure for arrears of rent but can eject the tenure-holder. It appears from the Settlement Report of Hazaribagh (para. 232 to which reference has already been made) that in Chota Nagpur at any rate the relation between the landlord and the tenure-holder was of a personal character and the tenancies were not transferable. They were granted for the purposes of reclamation and it is obvious that in such grants regard must be had to the position of persons who are most likely to develop the lands. As the author of the Report has pointed out, in course of time the civil Courts began to sell the tenures and now except where the custom has not been broken (as in the case of dwami thicas), the tenures are not transferable. The last argument of the learned advocate was that in this particular case this tenure has lost its characteristic of non-transferability; in other words, he contended that the custom has been broken. He relied upon a number of documents to show that the tenure in question had from time to time been transferred and the reason of non-transferability is no longer applicable. By the courtesy of the learned advocate for the appellant I have examined the khatians and terij of the khewats which are sought to be sold. The position is this:

Khewat No.	Land in possession of the tenure-holder. In acres.	Land in possession of raiyats. In acres.	Uncultivated land. In acres.	Total. In acres.
3/3	3.02		.25	3.27
3/4	2.14	1.17		3.31
3/5	2.28	1.41		3.69
3/7	4.46	37.42	16.38	58.26

The argument of the learned advocate was that as there is a very small area of uncultivated land no question of development arose. The judgment-debtor therefore must be held to be an ordinary tenure-holder and his tenure was liable to be sold. First of all, as the khatian shows, there is still some uncultivated land in the tenure. Then it cannot be said that a tenancy, which at its inception was inalienable, has become so when the reason for its inalienability has disap-

5. Golaknath v. Mathura Nath, (1893) 20 Cal 273.
6. Anundo Roy v. Kali Prosad, (1884) 10 Cal 677.
7. Kali Prosad Singh v. Anundo Roy, (1888) 15 Cal 471=15 I A 18=5 Sar 121 (P C).
8. Chandra Binode Kundu v. Ala Bux Dewan, A I R 1921 Cal 15=58 I C 353=48 Cal 184= 31 C L J 510=24 C W N 818 (S B).

peared. In 9 P L T 549[9] where it was urged that when the reason of non-saleability of the ghatwalis of the Santal Parganas was no longer existing the ghatwalis could be sold and the maxim *Cessante ratione legis cessat et ipsa lex* was sought to be applied. Their Lordships observed:

> The contention really amounts to a claim that a Court of law can inquire into the present utility of an ancient incident of tenure and annul it and its enjoyment by the ruling power, whenever in its opinion the incident has survived its usefulness. This is a matter of policy, and not of the interpretation of legislative instrument or of application of general law and is beyond judicial powers.

The next argument was that as there have been transfers of the shares of this particular tenure by the judgment-debtor himself, he is now estopped from raising the question of non-saleability of the tenure. Exs. A, A-4, A-5, B, B-1, C, C-1 and C-2 are documents showing transfers of different kinds of some interest or the other in the tenure. But these transfers in violation of the custom, which must be taken to be the law, cannot in any sense be said to have broken the custom, nor do they discredit the incidents of the tenure mentioned in the Settlement Report. The dwami thicadars are not the only persons who are interested in preserving the custom. There are the raiyats who may as well claim that their interest should not be jeopardized by the introduction of strangers as their immediate landlords. The landlord of the tenure is also interested, because under the Chota Nagpur Tenancy Act, when the interest of a tenant is not saleable, he is entitled to eject him (S. 59, Chota Nagpur Tenancy Act). A unilateral act of a tenure-holder cannot therefore destroy the incidents of the tenancy. No question of estoppel arises in this case. The most which can be said is that those transfers which have already been made and by virtue of which the transferees have taken possession of the land and have been recognized as such by the landlord should stand and the transferor and the landlord cannot turn round and question them. But in this particular case the tenure is sought to be sold in execution of a simple money decree. No doubt, the money claim, as it appears from the judgment of the suit in which the decree in execution was passed, was based upon mortgages, but we are not here called upon to enforce those mortgages but to enforce a simple money decree which was passed on the basis of those transactions. Furthermore even if we assume that the dwami tenures are transferable with the consent of the landlords there is nothing to show that the landlord has consented, and in my opinion it should not be sold when it is known that the title of the auction-purchaser will depend upon the pleasure of the landlord. I am therefore of opinion that the views of the Courts below are correct, and I dismiss this appeal with costs.

S.C./D.S. *Appeal dismissed.*

9. Ashutosh Deo Ghatwal v. Bansidhar Shroff, A I R 1928 P C 177=109 I C 730=55 I A 249=7 Pat 744=9 P L T 549 (P C).

A. I. R. 1937 Patna 467

FAZL ALI AND DHAVLE, JJ.

Kumar Chowdhury v. *Emperor.*

Criminal Revn. No. 3 of 1936, Decided on 22nd September 1936.

(a) Penal Code (1860), Ss. 197 and 198 — Scope — Sections must be read together — Certificate referred to in S. 198 must be either required by law to be given or signed or by law admissible in evidence as such certificate without further proof.

Sections 197 and 198 of the Penal Code should be read together. [P 468 C 2]

The certificate which is referred to in S. 198 must be one which is either "required by law to be given or signed" or "is by law admissible in evidence". S. 197 contemplates that "the certificate" should by some provision of law be admissible in evidence as such a certificate without further proof. [P 468 C 2]

Where therefore the accused is charged and convicted of an offence under S. 198 with reference to filing a certificate from the President of the Municipality about the date of death of his father, the conviction is not proper as the certificate cannot be treated as evidence unless it is formally proved by the Chairman : *A I R 1917 Cal 466, Rel. on.* [P 468 C 2]

(b) Penal Code (1860), S. 196 — Applicability — For offence under S. 196, evidence sought to be used must be proved to be in existence.

An offence under S. 196, Penal Code, can be held to have been committed only if it is shown that the evidence which the accused used or attempted to use as true or genuine was in existence at the time. Where therefore the accused relies on an entry in the almanac of a witness and such witness appears in the Court but is neither examined nor asked to produce such document, the accused cannot be even charged under S. 196 with attempting to use as evidence something which is not proved to be in existence : *A I R 1917 Mad 686, Rel. on.* [P 469 C 1, 2]

B. Mahapatra — for Petitioner.

C. M. Acharya — for the Crown.

Fazl Ali, J.—This is an application on behalf of one Kumar Chowdhury who was prosecuted by the Munsif of Cuttack for offences under Ss. 196 and 198, I. P. C.,

and having been found guilty of these offences has been sentenced to undergo rigorous imprisonment for nine months under each of these sections and to pay a fine of Rs. 50. The sentences of imprisonment passed under the two sections have been made concurrent. It appears that one Dr. Triguna Charan Ray, a private medical practitioner, instituted a Small Cause Court suit against the petitioner and his brother for a sum of Rs 59, and one of the questions which arose in that suit was whether the petitioner's father Behari Chowdhury was alive on 3rd June 1928 or had died before that date. In order to support his allegation that his father had died on 12th May 1928 the petitioner produced in the Court of the Munsif a certificate signed by the Chairman of Cuttack Municipality and also applied to the Munsif for issuing summons upon one Lokenath Naik, his family astrologer, to produce an almanac or diary in which, according to him, the date of his father's death had been noted. The Munsif, before he made up his mind to prosecute the petitioner, held an inquiry and was satisfied that the petitioner's father was alive on 3rd June 1928 or in other words he had not died on 12th May 1928 as alleged by the petitioner. The conclusion arrived at by the Munsif has been upheld by both the Courts below and the only question which was argued before us on behalf of the petitioner was whether the conviction of the petitioner under Ss. 196 and 198, I. P. C., could be sustained in law. It may be stated here that the charge under S. 198, I. P. C., was framed against the petitioner with reference to the certificate granted by the Chairman, Cuttack Municipality, to him which runs as follows :

> Certified that Behari Chowdhury of Biswanath Lane died of 'malarial fever' on 12th May 1928 and that his death was entered in the Death Register of Ward No. 2 on the same date; his age is shown as above 50 years.

This certificate was, as it purports to be, based upon an entry in the death register maintained by the Municipality and in the course of the trial it was found that the date noted in the register as the date of Behari Chowdhuri's death tallied with the date in the certificate. As, however, the Courts below were satisfied that the petitioner's father Behari Chowdhury was alive on 12th May 1928, they held that by producing this certificate which contained an incorrect statement with regard to his death, the petitioner had committed an offence under S. 198. S. 198, as will appear presently, must be read along with S. 197. S. 197 runs as follows :

> Whoever issues or signs any certificate required by law to be given or signed, or relating to any fact of which such certificate is by law admissible in evidence, knowing or believing that such certificate is false in any material point, shall be punished in the same manner as if he gave false evidence.

Section 198 provides that :

> Whoever corruptly uses or attempts to use any such certificate, as a true certificate, knowing the same to be false in any material point, shall be punished in the same manner as if he gave false evidence.

Now, upon reading these sections it is manifest that the certificate which is referred to in S. 198 must be one which is either "required by law to be given or signed" or "is by law admissible in evidence". It appears to me, however, that the certificate with reference to which the offence under S. 198 is said to have been committed by the petitioner does not fulfil any of these requirements. It is not suggested on behalf of the prosecution that it is a certificate which is required by law to be given or signed, but it is strongly contended that because such a certificate can be used in evidence when formally proved, it fulfils the second requirement of S. 197. In my opinion, however, this contention is not sound. The expression "by law admissible in evidence" was construed by a Division Bench of the Calcutta High Court in 23 C L J 423,[1] and it was pointed out there that what S. 197, contemplates is that "the certificate" should by some provision of law be admissible in evidence as such a certificate without further proof. In the present case it is not disputed that the certificate could not be treated as evidence, unless it was formally proved by the Chairman who had granted it and even then it would be only secondary evidence of the entry in the death register relating to the date of the death of Behari Chowdhury. It appears to me therefore that whatever other offence the petitioner may have committed, he did not commit an offence under S. 198, I. P. C.

I will now deal briefly with the other charge which has reference to the almanac which Lokenath Naik was summoned to

1. Mahabir Thakur v. Emperor, A I R 1917 Cal 466=33 I C 316 = 23 C L J 423 = 17 Cr L J 140=20 C W N 520.

produce before the Munsif. It is to be noted in this connexion that although Lokenath seems to have appeared in the Court of the Munsif in obedience to the summons issued on him, he was neither examined nor asked to produce the almanac before the prosecution was started against the petitioner. Thus there was no material before the Munsif to enable him to hold that the almanac which Lokenath had been called to produce was in existence or that it contained any false entry relating to the death of the petitioner's father. The question which is raised on behalf of the petitioner upon these facts is that the charge under S. 196 also has not been brought home against him. S. 196 runs as follows:

> Whoever corruptly uses or attempts to use as true or genuine evidence any evidence which he knows to be false or fabricated, shall be punished in the same manner as if he gave or fabricated false evidence.

From the mere reading of the section it seems to me to be clear that an offence under the section can be held to have been committed only if it is shown that the evidence which the accused used or attempted to use as true or genuine was in existence at the time. This view is also supported by the decision of the Madras High Court in 35 I C 820.[2] In the present case although Lokenath has been summoned to produce the almanac, he never produced it and we do not know whether he was in possession of any almanac containing a false entry as to the date of the death of the petitioner's father. It is said that even though there may not have been an actual user of fabricated evidence in this case there was at least an attempt on the part of the petitioner to use such evidence. Here again the prosecution is faced with the same difficulty because a person cannot be properly charged with attempting to use as evidence something which is not proved to be in existence. The prosecution is confronted with a further difficulty so far as this charge is concerned, because the complaint made by the Munsif makes no reference to the almanac or to the fact that an offence under S. 196 had been committed by the petitioner in his attempt to use the almanac in evidence. Under S. 195, Criminal P. C., the Courts are debarred from taking cognizance of any offence punishable under S. 196, I. P. C., when such offence is alleged to have been committed in, or in relation to, any proceeding in any Court except on the complaint in writing of such Court or of some other Court to which such Court is subordinate. But, as I have already stated, the Munsif has made no reference in his complaint to the almanac or to the fact that the petitioner had committed any offence in relation to the almanac. In my opinion, therefore, the charge under S. 196 also cannot be sustained in law.

I would, therefore, allow this application and set aside the conviction of the petitioner as well as the sentence passed on him. I might, however, observe that I do not consider it necessary to express any opinion as to whether the petitioner is liable to be prosecuted for any other offence or offences or as to whether by calling for the death register from the Municipality he did not commit an offence under S. 193 or S. 196, I. P. C. It is for the Crown to decide whether these offences have been committed or not and if they have been committed whether the petitioner should be prosecuted for the commission of these offences.

Dhavle, J. — I agree. The calling for the municipal register, or for the *panji* of Lokenath Naik also seems to me to fall short of an attempt to use as true or genuine evidence which the offenders knew to be false or fabricated and to go no further than the earlier stage of preparation. The offences with which the accused were to be charged in a case of this kind should have been carefully formulated with reference to the provisions of the Penal Code, and the failure to do so has led to this abortive trial.

K.B./A.L. *Application allowed.*

2. *In re* Katari Veeranna, A I R 1917 Mad 686 =35 I C 820=17 Cr L J 388.

A. I. R. 1937 Patna 469

COURTNEY-TERRELL, C. J. AND JAMES, J.

Raja Sri Sri Jyoti Prasad Singha Deo

v.

Chandra Kanta Mukhopadhya.

L. P. A. No. 87 of 1935, D/- 5-2-1937, from decision of Wort, J., D/- 26-11-1935.

(a) Chota Nagpur Tenancy Act (6 of 1908), S. 9-A—Suit for enhancement of rent—Jurisdiction of Deputy Commissioner would not be defeated by mere statement of defendant that there was no right to enhance rent (Per *Wort, J.*).

(Per *Wort, J.*)— It is quite clear from the general provisions of the Act that the jurisdiction lies in the Deputy Commissioner in cases of enhance-

ment of rent. The right thus given by the Act would not be defeated by the mere statement of the defendants, well founded or otherwise, that there was no right to enhance the rent. [P 471 C 1]

(b) Transfer of Property Act (1882), S. 43 —Permanent tenure at fixed rate granted by son in father's lifetime—Recital that son would not disturb grant after father's death —Rent paid to father and after his death to Court of Wards—Subsequent suit by son for enhancement of rent held not maintainable.

A son granted a permanent tenure at a fixed rate even though his father was alive and undertook not to disturb the grant after his father's death. The rent was regularly paid to and accepted by his father during his lifetime and by the Court of Wards after his death. Subsequently his son brought a suit for enhancement of rent:

Held: that the son was bound by his representation under S. 43, T. P. Act, and that he could not enhance the rent.

Held further: that the mention of his father was a mere emphasis upon the covenant of the son that he had implied authority to make the grant and it was an emphasis on his assurance that when he succeeds his father, the grant made by him would not be disturbed. [P 475 C 1]

Sultan Ahmed and *S. C. Mazumdar* and *G. C. Das* —for Appellant.

S. M. Mullick and *R. S. Chatterji* — for Respondents.

Judgment in S. A. No. 929 of 1934.

Wort, J.—This is an appeal from a decision of the Judicial Commissioner of Chota Nagpur in an action in which the plaintiff claimed assessment of a fair rent or enhancement of rent. The defence shortly was that the tenure was held by the defendants on a rent fixed in perpetuity and therefore the rent could not be altered or enhanced. The short facts are that in the year 1879 the Chota Maharaja of Chakla Panchkote granted to the ancestor of the defendants a patni of mauza Noabadi Shyamakata at an annual rental of Rs. 18. There is no dispute apart from the question of the validity of the grant as to the grant being a patni on a rent fixed in perpetuity. One of the recitals in the patta was:

At present I am the Chhota Maharaja of Panchkote Chakla. After the death of my father Maharajadhiraj Bahadur the entire Chakla Panchkote will come into my possession. At that time the condition of this taluk of yours will not at all be changed and this settlement shall remain intact; and at that time according to the rule of other patni taluks of Chakla Panchkote, you will continue to pay six-monthly and twelve-monthly rents, etc.

I might at this stage mention one other provision which has a bearing on one of the points raised by way of preliminary objection. That provision runs thus:

If you raise objection on the ground of drought, inundation, death and absondence (of tenants) lands lying waste and covered with sand and diluviated by river or on any other ground, etc., you shall get no remission of the amount of rent.

It is not necessary for me to mention any other provision of the patta except that it was described as a patni taluk and it was agreed between the parties that, apart from the question of the validity of the grant, it was a permanent taluka and had a rent fixed in perpetuity. The lower appellate Court, confirming the decision of the Deputy Collector of Manbhum, has enhanced the rent to a sum of Rs. 136-5-9 and from 1346 B. S. onwards to Rupees 181-13-0 per annum. The contention of the defendants, as I have indicated, was that the rent of the tenure was not liable to be enhanced and they also raised objections to the jurisdiction of the Courts below. The first objection was that the interest held by the defendants was not a tenure within the meaning of the Chota Nagpur Tenancy Act, and not being an ordinary agricultural tenancy it was governed by the Transfer of Property Act and was not liable to enhancement. Under S. 3 (27), Chota Nagpur Tenancy Act:

'Tenure' means the interest of a tenure holder, and includes an under-tenure, but does not include a mundari khunt kattidary tenancy.

Under S. 5 of the Act:

'Tenure holder' means primarily a person who has acquired from the proprietor, or from another tenure holder, a right to hold land for the purpose of collecting rents or bringing it under cultivation by establishing tenants on it.

Now the point was but faintly argued and, in any event, I have no difficulty in coming to the conclusion in this case that the defendants were tenure holders, and the interest that they held was a tenure within the meaning of the Act. I have already made reference to that clause in the patta which refers to 'tenants' and to its provisions against the objection on the ground of the tenants having absconded. There can be no doubt that amongst other rights which the tenure holder had under the patta he had the right of collection of rents from the tenants. To put it shortly, he was a person who came between the proprietor himself and the raiyats on the land, the agricultural tenants. The second point raised related to S. 9-A of the Act. S. 139, Cl. 2 (b), gives cognizance to the Deputy Collector or Deputy Commissioner in all suits and applications not otherwise provided for by the Act for assessment of rent and for alteration of rent payable by the tenant. It is contended that this is

a case otherwise provided for by S. 9-A of the Act which gives jurisdiction to the Deputy Commissioner to enhance the rent of a tenure holder or village headman whose rent was liable to enhancement. It was contended that the powers given to the Deputy Commissioner under that section were powers which existed only in those cases in which it was admitted that the rent was liable to enhancement. The substance of the argument was this that as soon as the defendants challenged the right of the plaintiffs to have the rent enhanced, the Deputy Commissioner ceased to have jurisdiction ; to put it in another way, the jurisdiction of the Deputy Commissioner extended only in those cases in which there was no question as to the right to enhance. In my judgment that objection is not well founded. It is quite clear from the general provisions of the Act that the jurisdiction lies in the Deputy Commissioner in cases of enhancement of rent. The right thus given by the Act would not be defeated by the mere statement of the defendants, well founded or otherwise, that there was no right to enhance the rent. In my judgment there is no substance in either of the objections taken on the part of the defendants. This leads me to the consideration of the merits of the case. I take a somewhat different view of the patta from that held by the Courts below, but having regard to the course the case took, that view is immaterial. It was held by the Court below that the very statement to which I have referred in the patta, namely that it would be confirmed on the death of the Raja when the Chhota Raja came into the estate, was an indication that the Chhota Raja had no power to make the grant. It was quite possible that the Raja himself had granted this power to the Chhota Raja. But I suppose if that question had to be determined, it would be held that the onus would be on the defendants to show that the Chhota Raja had such a power. But as I have already indicated, neither of these questions is material for the reason that the parties in the Court below appear to have agreed that the Chhota Raja himself had no power to make the grant and the case in this Court must therefore be decided on that basis.

Now the substantial point argued by the appellant was that S. 43, T. P. Act, applied because at the time the grant was made the Chhota Raja had presumably no power to make the grant, but he acquired the power when his father died and he became the proprietor. The grant would therefore operate on the interest when the Chhota Raja became the proprietor. That point however seems to be disposed of by the facts of this case. I do not think that it could be seriously contended in this case that the defendants or their ancestor were not fully aware of the true state of affairs at the time of the grant. Now the decision of this Court in 4 Pat 478[1] has held (and there are other decisions to the same effect) that S. 43, T. P. Act, is nothing more than extension of the principle of estoppel to the law of immoveable property. If that be so, it is impossible to say that S. 43 would apply to a case in which the party to whom the grant was made was well aware of the true facts of the case; and whatever my view about S. 43 may be, it is clear for the purpose of decision of this case at any rate that the authority to which I have referred is binding upon me. Shortly stated, the argument of the plaintiff-respondent on this point was that S. 43 did not apply and could not apply because the defendants themselves or their ancestor well knew the position and therefore could not be said to have been affected by the representation (if such there was) made by the Chhota Raja. Now another matter was argued in the Court below and that related to the fact that from 1879 almost to the present day rents had been accepted by the proprietors. In this connexion one fact must be stated, a fact referred to by the trial Court. Its finding is in these words :

> A perusal of Ex. 8 would show that the then Chhota Raja Hari Narain Singh Deo became the Raja from 1305 to 1309 B. S. when the estate was under the management of the Encumbered Estate (Act 6, Management). There is no evidence on record that Chhota Raja Hari Narain Singh Deo confirmed the patni grant when he became the Raja subsequently; as a matter of fact he did not obtain khas possession of the estate.

In this connexion it is necessary to notice that the learned Judicial Commissioner in the lower appellate Court seems to be under a misapprehension as to the provisions of the patta upon which he found a part of his decision. "It has been recited", says the Judicial Commissioner,

1. Ladu Narain Singh v. Gobardhan Das, A I R 1925 Pat 470=86 I C 721=4 Pat 478=6 P L T 497.

that when the grantor becomes the Raja or the proprietor the right granted will be confirmed. There is nothing to show that there was any confirmation of that right.

Now this misstatement was made in connexion with the question of whether rent had been accepted and whether the grant had been confirmed. Now the actual reading of the patta is this :

After the death of my father the entire Chakla Panchkote will come into my possession. At that time the conditions of this taluk of yours will not at all be changed and this settlement shall remain intact.

Now, that is a covenant not to challenge the right of the defendants or their ancestor; in other words a covenant that no action will be taken. There is no provision in the patta to the effect that the right will be confirmed. Now in my judgment that has a very serious and a very important bearing upon the question which was discussed by the Judge in the Court below. Both the Courts have come to the conclusion that rent was paid. There is no dispute that rent was paid by this patni taluk. Both Courts however have come to the conclusion that there is no evidence as to the condition or circumstance under which it was paid, and one of the Judges has expressed himself in these terms. The learned Judicial Commissioner says :

These receipts cannot validate the original grant in any way. These receipts do not however show that they were granted in respect of any patni right acknowledging the nature of that right.

The receipts referred to were certain rent receipts. What I understand the Judge to mean is that although the rent was paid in respect of the patni there was no assertion by the defendants or their ancestor of any such right, at the time of payment, nor was a receipt granted by the proprietor or a person who was entitled to grant the receipt acknowledging the right of the defendants. As I have already pointed out, although the Chhota Raja who had made this grant was in fact the Raja and the proprietor, the estate was under the management of the Court of Wards during his time. I shall have to consider that matter in a moment; but for the time being, I propose to consider the case from the point of view that the Chhota Raja eventually became the proprietor of the estate ignoring the fact that the estate was under the Court of Wards. Now having regard to the covenant which he made in the patta, what would be the position? Rent was received, and received for many years. Assuming that the estate had not gone under the Court of Wards management what would have been the position? Could it possibly be said that the acceptance of rent from the defendants or their ancestor was not in fact and in law a confirmation of the right that was granted by the Chhota Raja when perhaps he had no power to make such a grant. The effect of the acceptance of rent would in my judgment be irresistible. Now two cases are relied upon in this connexion. The first was the decision of the Privy Council in 25 Cal 1[2] and the other was the decision in 27 Cal 156.[3] In the first case there was a grant by a widow beyond her powers. After her death rent was paid to the person then entitled, but there was one instance at any rate (that referred to at p. 8 of the Report) when payment was made into Court by lawyers representing the tenant. It was held on the facts, including the fact that the money was drawn by the then proprietor, that it had the effect of operating as a recognition of the tenant's right in the tenancy and constituting some kind of tenancy which would require a notice to determine. That was the decision of the Courts in India. But their Lordships of the Judicial Committee held that the taking of the rent which the petition stated to be due under the patni was prima facie an admission that the patni was still subsisting and an election by the Raja to treat it as valid.

In the argument it is pointed out that there are two differences between that case and this case: first, that that was the case of a grant by a widow whose grant was not ab initio void but merely voidable; and secondly, that the rent was paid on a representation and statement that it was paid in respect of a patni. But those differences do not very materially affect the case. It must be remembered that for the moment I am dealing with the case on the assumption that rent was paid to the Chhota Raja when he became the Raja and therefore entitled to the estate. The differences to

2. Modhu Sudan Singh v. Rooke, (1898) 25 Cal 1=22 I A 164=1 C W N 433=7 Sar 194 (P C).

3. Beni Pershad Koeri v. Dudhnath Roy, (1900) 27 Cal 156=26 I A 216=7 Sar 580=4 C W N 274 (P C).

which I have made reference do not affect this case for the reason that the acceptance of the rent was by a person different from the person who made the grant which in my judgment is a very material difference. I have already said and repeat that in my judgment acceptance of the rent by the Chhota Raja, if it had been the fact, would have been conclusive of the matter.

Now the other case was the case of 27 Cal 156.[3] That was a case in which a grant had been made in lieu of maintenance. The grantor executed a document purporting to convey an interest greater than that which he had. It was held that the original grant not having extended to more than the life of the grantee, the kobala or patta executed by the grantor was void against the successor-in-title of the grantor and the acceptance of rent at the rate in the patta or kobala could not have the effect of confirming it in its entirety. That case therefore is easily distinguishable from the present one. Now that leads me to a consideration of the question of what is the effect of the estate being under the management of the Court of Wards throughout the period during which the so-called Chhota Raja was the proprietor. Ss. 1 to 3 of Act 6 of 1876 deal generally with the effect of the estate being taken over by the Court of Wards. S. 4 deals with the duties of the manager. Sections 5 onwards deal with the settlement of debts, and then we come to an important section. Sections 13 onwards deal with the powers of the manager. This S. 13 first of all gives the manager power to call for details of claims made. S. 14.A gives power to the manager to

> order all holders of tenures and under-tenures on property under his management to produce their evidence of title to such tenures and under-tenures.

Section 17 gives the manager power

> to demise all or any part of the property under his management for any term of years or in perpetuity to take effect in possession, in consideration of any fine or fines or without fine, and reserving such rules and under such conditions as may be agreed upon.

Now without any further examination of the Act I refer to the decision of their Lordships of the Judicial Committee of the Privy Council which was not referred to in the argument advanced but which is a well-known decision and relevant on the question. That is the decision in 51 I A 208.[4] Lord Shaw in delivering the opinion of their Lordships examined the Act and stated the effect of the Act and particularly the powers granted by the Act to the manager. In referring to the section to which I have made reference Lord Shaw made this statement:

> Up to this point it is clear that the owner is disabled not only from acts of management but from mortgaging, charging, leasing or alienating the property, whereas on the other hand the manager is vested, and alone vested, with such powers. The latter is in short, in the eye of the law, fully and completely vested in the management of the estate, and the vesting in him continues during the tenure of his office.

Later, at p. 214, the following observation was made:

> It is the further opinion of the Board that in the performance of such duties the manager is neither the servant nor the agent of another, be that other either a private intervenor or a public or political or departmental officer. The manager is himself the principal under the statute and he must conform in the discharge of his duties to the provisions of the Act.

Now let us examine the question of the effect of the receipt of the rent by the manager of the Court of Wards by asking this question. I am assuming for the moment that the Judge in the Court below is right in saying that the patta provided that when the Chhota Raja became the Raja the grant would be confirmed. That is not the case as I have already pointed out. It is merely an undertaking not to interfere or retract what has already been granted. But assuming that there was such an undertaking, what would be the effect of the manager specifically confirming the grant which had been made in 1879. If it had been so, having regard to the powers which the manager has under Ss. 14-A and 17, it would be impossible in my judgment to contend that the grant of 1879 was not subsisting, the short effect being that it would have been impossible in those circumstances for the plaintiff to succeed in obtaining an alteration of rent. Now if there had been this definite act on the part of the manager, the conclusion, at which I have arrived is that the grant would have been confirmed. Now that was the effect of his accepting rent. He was entitled to call for titles of persons holding tenures. He was entitled in this case to call upon the defendants or their predecessors-in-title to show what was their title, and I have no doubt,

4. Hukum Chand v. Ran Bahadur Singh, A I R 1924 P C 156=80 I C 841=51 I A 208=3 Pat 625 (P C).

had he been so disposed and had come to the conclusion that the Chhota Raja had no power to make such a grant and that the rent was inadequate, that he might have repudiated the grant made to the defendants. In connexion with S. 14-A I might say I am bound to assume that the manager had full knowledge of the facts and that he did his duty in the circumstances of the case. He did not repudiate the title of the grantee we know. He had powers, as I have already stated, under S. 17 of making a grant in perpetuity. Now, having regard to the position of the manager, as stated by their Lordships of the Judicial Committee, can it possibly be contended that the effect of the acceptance of rent with regard to this grant was not the same as if it had been accepted by the Raja himself? In my judgment, as I say, I find it impossible to come to the conclusion that the effect was not the same. I am not forgetting in this case that the Judge in the Court below has pointed out that there is no evidence that the rent was paid in respect of and acknowledging the nature of the patni right. I understand him to mean that no assertion was made that the defendants had a patni right at the time, but it is not a denial of the fact that the rent was paid in respect of the patni taluk. No evidence was needed of that fact. The rent was paid year by year at the rate of Rs. 18 and it could have been only in respect of the grant of 1879. In my judgment the effect of the acceptance of the rent is just the same as if the Chhota Raja himself coming into power had made the grant. In those circumstances, the rent of the tenure ought not to have been enhanced and the suit ought to have been dismissed. The result is that the appeal is allowed with costs throughout. As there will be a large number of cases depending on this decision, I grant leave to appeal under the Letters Patent.

Judgment of Letters Patent Appeal.

Courtney-Terrell, C. J. — This is a Letters Patent appeal from a decision of a learned Judge of this Court sitting singly. The suit was one by the plaintiff, who is the appellant before us, for enhancement of the rent of a tenure in Chota Nagpur. The defence of the defendants was that their predecessors were granted a permanent patni lease by the predecessors of the plaintiff and that the rent was a fixed rent of Rs. 18 which was not enhanceable. The lower Courts held that the tenure upon which the defendants held was not a permanent tenure and that the rent was enhanceable. The learned Judge reversed those findings and allowed the appeal, thus refusing enhancement. In addition to the ground relied upon by the learned Judge for allowing the appeal, there is a further ground which, in my opinion, is conclusive but which did not find favour with him and therefore I will explain it.

The grant upon which the defendants relied was made in the year 1879. It was a grant not by the present plaintiff, the Raja of the estate in question, but was made in the lifetime of a former Raja who is now dead. The grant, however, was not made by this former Raja in form but was made by his son then described as the Chhota Raja. The form of the grant is to this effect. The Chhota Raja purports to grant a permanent tenure at a fixed rate to the then predecessors of the defendants. He then states that his father, the Raja, is still alive, and then goes on further to state that when he (the grantor) shall come into the estate he will do nothing to disturb the permanent grant which he was at the time purporting to make. The persons to whom the grant was made were at that time in possession of a portion of the estate as tenants, though not on the terms of a permanent grant. After the date of the grant, they continued to pay the rent which they had heretofore been in the habit of paying, namely the same sum of Rs. 18 as fixed by the grant, and they paid that rent during the lifetime of the Raja (the father). The grantor received a consideration in the shape of salami on the grant of the lease. The receipts that were produced to the Court purported to be granted by the moharrir of the estate bearing the seal of his office and in all cases referring to the tenants as the Patni talukdars of this mauza in question. About 1897 the Raja died and was succeeded by the person hitherto known as the Chhota Raja and the grantor of the tenancy in question. For a considerable time the estate remained under the Court of Wards and they also received rents from the tenants, but the form of the acknowledgment of receipt was not forthcoming at the trial. It may or may not be true that the Chhota Raja was authorized by his father to grant permanent patnis. The evidence on this

question is inconclusive, but there is certainly no evidence that he had not such power. Let it be granted that he had not such power from his father; he nevertheless by granting this permanent tenure represented that he had authority and title to grant the permanent tenure. Now his subsequent mention of the fact that his father was still alive and that he would not interfere with the permanent grant when he should attain the gaddi cannot be interpreted as intimating to the tenants that he had not authority to make the grant which he purported to make. There is no evidence on the record tending to show the state of mind of the tenants as to the right of the Chhota Raja to grant the permanent lease other than the expression in the document itself of the fact of the Raja (the father) being still alive and of the intention of the Chhota Raja not to disturb the permanent tenure when he should become the Raja; and this, to my mind, cannot be interpreted as an intimation that there was any limitation on the power of the Chhota Raja to make the grant.

The Courts below have thought that S. 43, T. P. Act, was not applicable because they have imagined that both parties were aware of the defect in the grantor's title but the awareness of that defect is inferred only from the words of the document itself. In my opinion such awareness cannot be inferred from the document: in fact the mention of the Raja's father is a mere emphasis upon the covenant of the Chhota Raja that he had implied authority notwithstanding the fact that he had not yet attained the gaddi to make the grant, and it is an emphasis on his assurance that when he should attain the gaddi the grant now made should not be disturbed. Therefore, we have the double fact that the Raja (the father of the Chhota Raja) was granting receipts in his own lifetime, recognizing the defendants as patni talukdars which is evidence itself of the authority of the Chhota Raja, and we have the further fact that the Raja himself ultimately attained the gaddi and thereby would be bound under S. 43, T. P. Act, to make good the representation of his early authority in any event. For these reasons it is clear that the defence of the defendants that they had a permanent tenure should have succeeded. I agree with the learned Judge of this Court in his decision allowing the appeal with costs throughout and I would dismiss this appeal in Letters Patent from his decision also with costs.

James, J.—I agree.

P.R./D.S. *Appeal dismissed.*

A. I. R. 1937 Patna 475

ROWLAND, J.

Rai Krishna Bahadur — Appellant.

v.

Hari Charan Raut and *others*— Respondents.

Appeal No. 267 of 1935, Decided on 26th April 1937, from appellate decree of Sub-Judge, Saran, D/- 22nd December 1934.

Landlord and Tenant—Rent—Suit for — Diara lands—Suit for rent of part of holding is maintainable as rent varies according to area actually cultivated.

In the case of diara lands where the rent in a particular year varies according to the area under cultivation in that year, the fact that a tenant's entire holding is of a larger area is no obstacle against his landlord getting a decree for rent based upon the smaller area from which crop was actually obtained. [P 476 C 1]

Janak Kishore, *T. N. Sahay* and *A. N. Lal* — for Appellant.

Hareshwar Prasad Sinha — for Respondents.

Judgment. — Mr. Hareshwar Prasad Sinha for the respondents having said that he has no instructions, this second appeal has been barred ex parte. The plaintiff is the landlord to the extent of 2 annas 8 pies in an 8 annas patti in Taufir Mahrajganj, and he claims one-third of the rent of the defendant. One of the grounds on which the suit has been dismissed is that the plaintiff is not entered in Register D as a proprietor to the extent of one-third share. The Munsif examined this question and found that the patti being an 8 annas patti and not 16 annas patti, the plaintiff was in fact recorded for a 2 annas 8 pies share, i. e., one-third, in the patti, and it appears in the course of his judgment that the defendant also admitted that one-third of his rent was payable to the plaintiff. So the suit should not have failed for this reason, and observations of the Subordinate Judge on this aspect of the case cannot be supported. The other defect for which the suit was dismissed is that it is said to be not maintainable, because the area of which the rent is sued for is not the entire holding of the defendant but a part of a holding. The facts are that the holding is diara ; according

to the defence, which has been accepted by the Courts below, the total area is 20 bighas 5 kathas 5 dhurs and of this in the years in suit it is said that 15 bighas was under water, 2 bighas 10 kathas was sandy and unfit for cultivation, and approximately 2 bighas 10 kathas was cultivated. The defendant further alleged that for land under water rent was payable at 4 annas a bigha, for sandy land at 8 annas, and for culturable land at Rs. 4.10.0. Now the plaintiff claimed rent for 7 bighas 18 kathas at Rs. 4.10.0, but the Munsif held that 2 bighas 10 kathas was under cultivation in the years in suit ; that is to say, if the suit had been maintainable, the defendant would have been liable to pay rent at Rs. 4.10.0 for an area of 2 bighas 10 kathas, and of this rent the plaintiff would have been entitled to one-third. Now, in ordinary cases of naqdi rent, it has been held that the rent which a tenant is liable to pay is the rent payable for the total area, and neither the area nor the rent can be split without the consent of both the landlord and the tenant. Therefore if a suit is brought in such a case for the rent of a smaller area, it is not maintainable because there is no tenancy of that area and no amount of rent can be said to be payable for that smaller area. But in bhaoli lands, on the other hand, where rent is taken varying according to the area cultivated in a particular season and the outturn of produce obtained, the fact that a tenant's entire holding is of a larger area has not always been held to be an obstacle against his landlord getting a decree based on the outturn of a smaller area being the area from which crop was actually obtained ; and the same principle may be applicable in the case of diara lands where the rent in a particular year varies according to the area under cultivation in that year. I think, therefore, that the suit should not have been dismissed outright but a decree should have been passed, leaving open the question of the total area of defendant's holding, for plaintiff's share of rent calculated as above.

The appeal is therefore allowed in part; the plaintiff will get a decree accordingly for rent of 2 bighas 10 kathas with interest at 12½ per cent. simple ; but parties will bear their own costs throughout, as the plaintiff's claim was considerably higher than the amount now being decreed to him.

S.C./D.S. *Appeal partly allowed.*

A. I. R. 1937 Patna 476

FAZL ALI, J.

Satya Narain Prasad and *others* — Petitioners.

v.

Mahabir Prasad Marwari — Opposite Party.

Civil Revn. No. 26 of 1937, Decided on 2nd April 1937, from order of Sub-Judge, Monghyr, D/- 19th December 1936.

Civil P.C. (1908), S. 55 (4)—Security bond executed under S. 55 (4) — Judgment-debtor failing to apply within one month — Court discharging sureties—On remand of case on appeal Court holding that surety was liable—Subsequent order held was without jursidiction as option to proceed against judgment-debtor had already been exercised by Court previously in favour of surety.

A surety bond was executed by the surety under S. 55 (4), Civil P. C., when execution proceedings were pending against the judgment-debtor. It was provided by the bond that the surety would become liable for the decretal money upon the happening of two events: (1) if the judgment-debtor failed to apply to the District Judge within the period of one month for being adjudicated insolvent and (2) if he (surety) failed to produce the judgment-debtor before the Court when ordered to do so. The first condition was broken, while the second was complied with. Thereupon the surety was discharged from liability. On remand of the case on appeal the Court held that the surety was liable:

Held: that as the option of proceeding against the surety or the judgment-debtor on breach of any of the conditions lay with the Court and not with the decree-holder and as the Court had exercised that option on a previous occasion in favour of the surety, the matter could not be re-opened before him. The order, making the surety liable was therefore without jurisdiction and could be set aside: *A I R 1929 All 377*; *A I R 1935 Mad 543* and *A I R 1930 Lah 575*, *Rel. on.* [P 477 C 1]

Baldeva Sahay and *K. Dayal* — for Petitioners.

P. Misra — for Opposite Party.

Order.—The facts of this case are simple and may be shortly stated as follows : The opposite party obtained a decree in the Small Cause Court against one Gokhulanand Sahay and had him arrested in execution of the decree. The petitioners thereupon executed a security bond under S. 55, Civil P. C., which provided that they would become liable for the decretal money upon the happening of two events: (1) if the judgment-debtor failed to apply to the District Judge within the period of one month for being adjudicated insolvent and (2) if they (the sureties) failed to produce the judgment-debtor

before the Court when ordered to do so. The judgment-debtor did not apply to the insolvency Court within the period prescribed ; but the sureties did produce him before the Court on being called upon to do so by the Subordinate Judge before whom the execution proceeding was pending. The Subordinate Judge accordingly discharged the sureties on 29th June 1936 ; but the decree-holder preferred an appeal against the order of the Subordinate Judge to the District Judge without impleading the sureties as respondents and curiously enough the learned District Judge without hearing them and in their absence set aside the order passed by the learned Subordinate Judge. The learned Subordinate Judge took up the matter again and on this occasion he held, not without considerable hesitation, that the sureties were liable to pay the decretal amount. The reason for passing the order is stated by him in these words :

I think, though not without hesitation, I should follow the ruling reported in A I R 1929 All 377.[1] I therefore hold that the sureties are liable, etc. .....

Now the view taken in the decision, relied upon by the learned Subordinate Judge is opposed to the decisions of the Madras and Lahore High Courts in 1935 Mad 543 [2] and A I R 1930 Lah 575,[3] wherein it has been held that the security bond is to be interpreted according to the conditions expressly mentioned therein, and not independently of them even though it may have been executed under S. 55. Even the decision of the Allahabad High Court, on which the learned Subordinate Judge has relied, A I R 1929 All 377,[1] makes it clear that in case the conditions laid down in S. 55 are not fulfilled the option lies with the Court executing the decree and not with the decree-holder to proceed against the surety under that section or to proceed against the judgment-debtor. Assuming that this view is correct, the option had been exercised by the learned Subordinate Judge in this case in favour of the surety on a previous occasion and the matter could not be reopened before him. In my opinion the order of the learned Subordinate Judge cannot be upheld as it was without jurisdiction. I would therefore allow the application, set aside the order passed by the learned Subordinate Judge. There will be no order as to costs.

K.B./A.L. *Application allowed.*

1. Makhan Lal v. Narain Das, A I R 1929 All 377=119 I C 500.
2. Alagammai Achi v. Aurunachalam Chettiar, A I R 1935 Mad 543=156 I C 113.
3. Shaw Wallace & Co. v. Sundar Singh, A I R 1930 Lah 575=125 I C 324.

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* A. I. R. 1937 Patna 477

MOHAMAD NOOR, J.

Purna Chandra Mitra — Appellant.

v.

Secretary of State and *others* — Respondents.

Appeal No. 797 of 1934, Decided on 18th January 1937, from decision of Judicial Commissioner, Chota Nagpur, D/- 16th June 1934.

***(a) Criminal Trial—Costs—Expenses of witness—Discretion of Court summoning witness to award expenses—Remedy of party thinking it has been insufficiently paid is to approach higher tribunal for redress—Suit or appeal in civil Court against party, Government or presiding officer is not maintainable.**

It is entirely within the discretion of the Court which summons a witness to order how much expenses should be allowed to him and which party should pay it. In criminal cases the Court may within certain limits order the Government to pay the expenses of the complainant and witnesses. If a Court has ordered a certain sum to be paid to a witness and if he is aggrieved by that order and thinks that he has not been sufficiently paid it is open to him to approach a higher tribunal for redress; but he cannot appeal to the civil Court against the order nor can he sue the party or the Government for recovery of any additional amount, much less can he claim it from the presiding officer of the Court : *A I R 1926 Cal 289, Disting.* [P 478 C 2]

(b) Civil P. C. (1908), S. 35-A—Applicability —Suit filed in civil Court by witness in criminal case for recovery of additional expenses —Suit not vexatious but only misconceived—S. 35-A has no application—Order for special damages against such witness is without jurisdiction.

Where a suit for additional amount by witness summoned in a criminal case, thinking that he was insufficiently paid, is filed in a civil Court, not vexatiously, the suit is only one misconceived; S. 35-A, Civil P. C., has no application and an order for special damages, if passed against the witness, is without jurisdiction and can be set aside in revision. [P 479 C 1]

K. K. Banerji and *L. K. Chaudhury* — for Appellant.

Govt. Pleader — for Respondents.

Judgment.—This second appeal arises out of a suit which is of a novel character. The plaintiff who was for some time employed by Government as a Sub-Assistant Surgeon and who claims to be a private medical practitioner at Ranchi, was at the

instance of a complainant of a criminal case summoned by the Sub-Divisional Officer of Khunti to appear before him on 23rd September 1932. He appeared on that date and claimed Rs. 28 as travelling allowance and compensation for loss of professional income, Rs. 16 according to him being his compensation for loss of his professional fee and Rs. 12, the cost of hiring a taxi from Ranchi to Khunti and back. The learned Magistrate passed an order which runs thus: "Passed for second class fare". It appears that the complainant of that case Brindaban Manjhi (defendant 3 in the suit) filed a list of witnesses whom he wanted to be summoned. The learned Sub-Divisional Magistrate ordered that "respectable witnesses named in the list should be summoned only after expenses are deposited". Below this order there is a report of some ministerial officer which is to the effect that the lorry hire is Rs. 12-12-0 for first class and Rs. 6-6-0 for second class. On the margin of the list of witnesses opposite the names of some of them certain orders are written which are apparently in the handwriting of the Sub-Divisional Officer himself. "Second Class" is noted against the name of the plaintiff indicating that the complainant Brindaban Manjhi had to deposit second class fare for him. It is in evidence that in pursuance of this order Rs. 6-6-0 was deposited by the complainant on 15th September 1932. When the plaintiff asked for his compensation and travelling expenses the learned Magistrate simply ordered: "Passed for second class fare". That is to say, the plaintiff was allowed Rs. 6-6. The plaintiff did not draw the money and after giving notice under S. 80, Civil P. C., brought the present suit for recovery of Rs. 33 against (1) the Secretary of State, (2) the then Sub-Divisional Officer Mr. Hardman, and (3) Brindaban Manjhi, the complainant, at whose instance the plaintiff was summoned. The trial Court dismissed the suit on merits and further held that it was not maintainable. He has awarded to defendants 1 and 2 Rs. 100 as special damages to be paid by the plaintiff. The decree has been affirmed by the learned Judicial Commissioner of Chota Nagpur. He has not expressed any opinion about the maintainability of the suit, but has held that Rs. 6-6-0 which was ordered to be paid to the plaintiff was sufficient. The plaintiff has preferred this second appeal.

In my opinion the suit was not maintainable in the civil Court. It is entirely within the discretion of the Court which summons a witness to order how much expenses should be allowed to him and which party should pay it. In criminal cases the Court may within certain limits order the Government to pay the expenses of the complainant and witnesses. If a Court has ordered a certain sum to be paid to a witness and if he is aggrieved by that order and thinks that he has not been sufficiently paid it is open to him to approach a higher tribunal for the redress; but I am clearly of opinion that he cannot appeal to the civil Court against the order nor can he sue the party or the Government for recovery of any additional amount, much less can he claim it from the presiding officer of the Court. The learned advocate of the plaintiff has relied on 29 C W N 1033.[1] In that case the Court had ordered a particular party to pay a certain amount to a particular witness. That party failed to do so and then a suit was instituted to compel him to pay the money which was due to the plaintiff in pursuance of an order of the Court. But here it is not a case for realization of the money ordered to be paid to the plaintiff by the Court. In my opinion the trial Court was right in holding that the suit was not maintainable in the civil Court because, this is in effect a suit for either compelling the Magistrate to pass an order of payment of costs against the Government under S. 544, Criminal P. C., or on the party to pay more than what he had ordered him to pay or is an appeal to the civil Court against the order of the Magistrate. In either case it is not maintainable.

This being my view I do not wish to enter into the merits of the case, that is to say, to express any opinion whether the amount allowed to the plaintiff for his attendance at Khunti on 23rd September 1932, was sufficient or otherwise, but I have no hesitation in saying that the plaintiff might have honestly felt that he was unfairly treated. It is not disputed that he hired a taxi for his journey from Ranchi to Khunti and back. The learned Munsif who tried the suit is not justified in saying that though the time for his

1. Kamal Mandalini v. Paramsukh Chakrabutty, A I R 1926 Cal 289=90 I C 488=29 C W N 1033.

attendance in Court was fixed at 10 a. m. he could have attended even by 10-30 as he ought to have known that the Court did not sit before 10-30 a. m. I think it is necessary that witnesses should try to be in attendance in the Court which summons them at the time specified in the summons and should not speculate that the time given is not correct. On the other hand, it may be said that it was open to the plaintiff to go to Khunti a day earlier or he ought to have made enquiries whether there was any bus other than that of United Motor Company available. Though the learned Magistrate allowed only second class bus fare the learned Judicial Commissioner has held that on analysis it includes Rs. 4-14.0 compensation of loss of professional income also. I am discussing these matters in order to decide whether or not I should interfere with the order of special damages which has been passed against the plaintiff by the trial Court and confirmed by the Court of appeal. This case cannot be said to be false and I am not prepared to hold that it was vexatious. It may be that the plaintiff attached too much importance to himself and thought that accepting only Rs. 6-6.0 was something beneath his dignity. He had certainly spent Rs. 16 on taxi hire. The suit was no doubt misconceived but does not call for special damages. The learned Government Pleader has contended that I have got no power to interfere as no second appeal lies in this case, the suit being of a nature which is cognizable by the Court of Small Causes. On the other hand, it is contended on behalf of the appellant that the suit comes within Cl. (3), Sch. 1, Small Cause Courts Act. I do not, however, wish to give any decision on this point as I am of opinion that S. 35-A, Civil P. C., has no application and the order has been passed without jurisdiction and can be set aside in revision. The result is that the decree of the learned Munsif is modified only to this extent that the order of damages passed in favour of defendants 1 and 2 is set aside. The plaintiff's suit will be dismissed with costs to defendants throughout. Hearing fee of this Court will be one gold mohur.

V.B.B./A.L. *Order modified.*

A. I. R. 1937 Patna 479

MOHAMAD NOOR, J.

Jagat Mohan Prasad — Appellant.

v.

L. W. Bion — Respondent.

Appeal No. 820 of 1934, Decided on 3rd February 1937, from appellate decree of Offg. Sub-Judge, Motihari, D/- 8th May 1934.

(a) Bihar Tenancy Act (8 of 1934), S. 87 — Applicability—S. 87 applies also where without abandonment landlord publishes notice under S. 87—Taking steps under S. 87 is not obligatory—Possession otherwise than in conformity with S. 87 — Landlord loses advantage of shorter limitation prescribed — On raiyat satisfying Court there is no voluntary abandonment, possession is restored.

Section 87, Bihar Tenancy Act, applies not only in cases where there has been abandonment, but also in cases in which without abandonment the landlord fraudulently publishes a notice under that section. Whenever a landlord takes a proceeding under S. 87 and a notice is published in conformity with it, the tenant must have the matter settled within the time prescribed in the section. Taking steps under that section is not obligatory upon the landlord, but if he takes possession of the holding otherwise than in conformity with that section, he does so at his own risk and in that case he will not get the advantage of a shorter period of limitation prescribed for suits by the raiyats. The section clearly specifies that the suit must be instituted within the time prescribed therein and if the raiyat satisfies the Court that there was no voluntary abandonment, the possession of the land will be restored to him, thereby indicating that the section applies even in those cases where there has been no abandonment : *11 C L J 433, Rel. on.*

[P 480 C 1, 2]

(b) Second Appeal — Interference— Notice under S. 87, Bihar Tenancy Act — Lower Court inferring that notice was published on certain date from material before it—Finding cannot be interfered with in second appeal.

Where the question was whether the notice under S. 87, Bihar Tenancy Act, was served on 19th or on the 22nd, the date of the report of the serving peon, the lower Court basing its finding on the material before it, drew the inference that the notice was published on the 19th and only the report was written on the 22nd :

Held : that the High Court would not interfere with such a finding in second appeal.

[P 481 C 1]

Rai T. N. Sahay and *W. H. Akbari* — for Appellant.

Harnarain Prasad — for Respondent.

Judgment.—The facts of the case out of which this appeal has arisen are these: The plaintiff instituted a suit for recovery of possession of a piece of land against his landlord, on the allegation that the latter had settled it with him under an

unregistered patta and thereafter having taken a proceeding under S. 87, Bihar Tenancy Act, on the allegation that the plaintiff had abandoned it, took forcible possession of it. The plaintiff's case was that having taken settlement of the land from the respondent he had settled it with under raiyats and had enjoined them to make a payment of rent to the defendant. It was therefore urged that the proceeding taken by the defendant purporting to be under S. 87, Bihar Tenancy Act, was fraudulent. The defence was that the land was never settled with the plaintiff, as there was a stipulation that the plaintiff would pay salami and then take registered patta. As this was not done, the unregistered patta remained inoperative and though it was under the circumstances not necessary for the defendant to take any proceeding under S. 87, Bihar Tenancy Act, he did so only by way of precaution. The trial Court disbelieved the defence and held that the land was actually settled with the plaintiff who was in possession of it, that he never abandoned it and that the defendant wrongfully dispossessed him from it. On these findings the trial Court decreed the suit. These findings of fact have been affirmed on appeal by the learned Subordinate Judge. He has however dismissed the suit on the ground of limitation, holding that as there was nothing to show that the plaintiff was a settled raiyat of the village, therefore his status was that of a non-occupancy raiyat and as the proceeding was taken under S. 87, Bihar Tenancy Act, and the required notice was published on 19th December 1931, the suit which was instituted on 22nd June 1932, was barred by limitation under the provisions of S. 87 of the Act. The plaintiff has preferred this second appeal.

Two points have been urged before me. One is that S. 87 of the Act applies only in cases where there has been actual abandonment, and not in a case in which without abandonment the landlord fraudulently publishes a notice under that section. I am unable to accept this contention. A reading of the section as a whole clearly shows that whenever a landlord takes a proceeding under S. 87 of the Act and a notice is published in conformity with it, the tenant must have the matter settled within the time prescribed in the section. Taking steps under that section is not obligatory upon the landlord, but if he takes possession of the holding otherwise than in conformity with that section, he does so at his own risk and in that case he will not get the advantage of a shorter period of limitation prescribed for suits by the raiyats. There are observations in the decision of Mookerjee, J. in 11 C L J 433,[1] to the effect that the Legislature deliberately prescribed short periods for the institution of a suit by a raiyat who finds that notice has been published about his abandonment, where in fact there has been no abandonment. The section clearly specifies that the suit must be instituted within the time prescribed therein and if the raiyat satisfies the Court that there was no voluntary abandonment, the possession of the land will be restored to him, thereby indicating that the section applies even in those cases where there has been no abandonment. The reason is obvious. As I have said, the Legislature has all along been particular in providing that disputes between landlords and tenants should be settled in as short a time as possible so that the title of the raiyat in respect of the land may not remain undecided for a very long time. Therefore, in my opinion, the contention of the learned advocate in this respect must be rejected.

The next contention of the learned advocate has been that the learned Subordinate Judge was not justified in holding that notice was published on 19th December 1931. According to the statement in the plaint the notice was served on 22nd December. Now the publication of notice being admitted, the only question before the learned Subordinate Judge was whether it was published on 19th December or on 22nd December. The date of the report of the serving peon is 22nd December. But the learned Subordinate Judge referred to the date, 19th December, which is mentioned below the marks of thumb-impressions of the various persons on the back of the notice just above the report of the peon, and he concluded that that date was the date on which the peon visited the spot and took steps for publication and posting of the notice as required by the rules framed by the Local Government. The report along with the notice was produced by the plaintiff and was exhibited at his instance. It was open

1. Suresh Chandra Mookerjee v. Nesa Bibi, (1910) 11 C L J 433=6 I C 553.

to the learned Subordinate Judge as a Court of fact to draw such inference as could be drawn from the various parts of the exhibit before him and the learned Subordinate Judge drew the inference that the notice was published on 19th December, and that the report was written on 22nd December. He had materials on which he could base that finding, which cannot be interfered with in second appeal. I dismiss this appeal with costs. Leave for a Letters Patent appeal is applied for and is granted.

V.B.B./A.L. *Appeal dismissed.*

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* A. I. R. 1937 Patna 481

WORT, J.

Ramghulam Khatik and *others* — Defendants Nos. 1 to 4 — Appellants.

v.

Ramkhelawan Ram and *another*, Plaintiffs and *others*, Defendants Nos. 5 and 6—Respondents.

Appeal No. 496 of 1934, Decided on 24th November 1936, from appellate decree of First Sub-Judge, Chapra, D/- 30th April 1934.

*** (a) Civil P. C. (1908), S. 91—Scope.**

Where all members of the public have suffered inconvenience or damage, an action by an individual will not lie excepting as indicated by S. 91, Civil P. C. The real test is whether it is a public nuisance or not. [P 482 C 1]

*** (b) Civil P. C. (1908), O. 1, R. 8 — Rule is merely enabling—It does not force one to represent many if action is maintainable without joinder of others.**

Order 1, Rule 8, Civil P. C., is an enabling section which entitles one party to represent many who have a common cause of action; but it does not force one to represent many if his action is maintainable without the joinder of the other persons. [P 482 C 2]

Where therefore the user of certain well, which is enjoyed by the plaintiff as one of the limited members is disturbed by the action of the defendant, an action for injunction against the defendant is maintainable at the instance of the plaintiff alone without proof of any special damage. The fact that the plaintiff has not complied strictly with O. 1, R. 8, Civil P. C., does not prevent the action, as it has nothing to do with the matter : *A I R 1933 Cal 884, Commented upon*; *A I R 1925 P C 36, Expl.* and *Disting.*; *Harrop* v. *Hirst, 4 Ex 43, Rel. on*; *Case law discussed.* [P 483 C 1]

S. M. Mullick and *C. S. Sinha*— for Appellants.

B. C. De and *S. N. Banerji*— for Respondents.

Judgment.—This is an appeal by defendants 1 to 4 in an action brought by the plaintiffs in which they claimed a declaration as regards the rights of the public to use a certain well, also that the public had a right of way over seven dhurs of land appertaining to the well. They sought also recovery of possession after demolition of the wall erected by the defendants which the plaintiffs claimed to be an obstruction to his right of user. The case in the Court below was held to be maintainable in spite of the fact that the provisions of O. 1, R. 8, Civil P. C., had not been complied with, and also in spite of the fact that the plaintiffs failed either to allege or prove special damage. In my judgment, the case is disposed of on the authority of the decision which has not been referred to at the Bar by either party. Before dealing with that authority I would like to make some observation regarding the decision in 60 Cal 1003,[1] where two learned Judges of the Calcutta High Court are reported to have held that :

> Any individual member of the public has the right to maintain a suit for removal of obstruction of a public highway, if his right of passage through it is obstructed, without proving special damage.

If the learned Judges intended to hold that a single member of the public might bring an action, without the consent of the Advocate-General and without proving special damage, in respect of a public nuisance, I most respectfully disagree with them. A very long line of decisions in India has established the proposition that the law with regard to this matter in India is the same as in England; and, indeed in my judgment, it would be quite impossible to hold a contrary view having regard to the provisions of S. 91, Civil P. C., which, by necessary implication states that to be the position. Had the facts of that case been brought to the notice of the learned Judges of the Calcutta High Court, they would have seen (specially in the Patna case) that this Court has not laid down any proposition which is not in conformity with the law as laid down by a large number of decisions of the Indian High Courts, and it would have been observed that the decision of their Lordships of the Judicial Committee of the Privy Council in 47 All 151,[2] did

1. Mandakinee Debee v. Basantakumaree Debee, AIR 1933 Cal 884=147 I C 811=60 Cal 1008.
2. Manzur Hasan v. Muhammad Zaman, A I R 1925 P C 36=86 I C 236=52 I A 61=47 All 151 (P C).

not (as it is suggested) reverse the decision of the Indian High Courts to the effect that an action with regard to a public nuisance to be maintained, must establish special damage, or be brought under the provisions of S. 91, Civil P. C.

There Lord Dunedin, delivering the judgment of their Lordships of the Privy Council, and referring to a number of cases, accepted the Madras view as against the Bombay view on a very limited question relating to the conduct of religious processions through the streets and over the public highway, and it is with regard to that matter and that matter alone that their Lordships' decision was directed in the case in 47 All 151.[2] If the matter ever comes up for decision before their Lordships of the Privy Council, I have no doubt that it will be pointed out that their decision was limited to the narrower and not to the wider question whether an action with regard to a public nuisance could be maintained without the proof of special damage. I would add that every one of the decisions to which their Lordships of the Privy Council referred, namely, the decisions in 2 Bom 457,[3] 18 Bom 693,[4] 34 Bom 571[5] and 24 Cal 524,[6] related expressly to religious processions and not to what I describe as the 'wider question'. In my judgment the law in India is precisely the same in this regard as it is in England and it does not depend on the technical question of whether in the circumstances of the case an indictment could be maintained. Technical objections of that kind do not obtain in India. But the main principle upon which this question is to be discussed and upon which the whole matter rests is that where all members of the public have suffered inconvenience or damage, an action by an individual will not lie excepting as indicated by S. 91, Civil P. C. The law in England in this respect has never been altered, and with regard to the case in hand the principle laid down in the well-known case in 4 Ex 43,[7] applies.

There is no doubt with regard to the facts of this case in spite of the loose pleadings, and it is quite clear that the plaintiff is one of the limited members who enjoys the use of a certain well. The user of that well has been obstructed by the action of the defendants, and the short question is whether an action in those circumstances would lie at the instance of the plaintiff alone. O. 1, R. 8, Civil P. C., has nothing to do with the matter at all. O. 1, R. 8, as has been pointed out by a number of decisions, is an enabling section which entitles one party to represent many who have a common cause of action; but it does not force one to represent many if his action is maintainable without the joinder of the other persons. In any event the test in this case is not whether O. 1, R. 8, applies, and for the reason which I have stated clearly it has nothing to do with the matter. The fact that he has not complied strictly with the order and rule does not in any way prevent his action. The real test, as I have indicated, is whether this is a public nuisance or not.

Now, I do not think I can do better than referring to the decision of Kelly, C. B., in 4 Ex 43.[7] In that case a number of inhabitants of a village had a right by prescription to a continuous flow of water for domestic purposes from what was called a spout. This right had been obstructed by the defendant and by which the quantity of water coming from the spout had been diminished. In an action brought by the plaintiff alone, in which he alleged that he in common with the other inhabitants, enjoyed this customary right, the question arose whether his action was maintainable without the proof of special damage, Kelly, C. B., in his judgment (Martin and Bramwell, B. B. concurred and Channel, B., expressed an opinion in the same sense) made this observation :

> I think it is clear on the authorities, and especially on the case of *Westbury* v. *Powel* cited in *Fineux* v. *Hovenden*,[8] that such an action is maintainable. It was there determined that where the inhabitants of Southwark had a common watering place, and the defendant stopped it, the plaintiff being an inhabitant, might bring an action on the case, there being no other remedy but by action; and the action was accordingly held maintainable without actual and particular damage to the plaintiff.

Later he observes :

> It is conceded that any inhabitant who had suffered actual damage from want of water could maintain an action for the injury done him. But

3. Satku Kadir v. Ibrahim Aga, (1877) 2 Bom 457.
4. Kazi Sujaudin v. Madhavdas, (1894) 18 Bom 693.
5. Baslingappa v. Dharmappa, (1910) 34 Bom 571 =7 I C 663=12 Bom L R 586.
6. Mohammad Abdul Hafiz v. Latif Hosein, (1897) 24 Cal 524.
7. Harrop v. Hirst, (1868) 4 Ex 43=38 L J Ex 1 =19 L T 426=17 W R 164.
8. (1599) Cro Eliz 664=78 E R 902.

that actual damage is not in such a case a necessary ingredient, is established by the passage cited by my brother Martin from *1 Wms Saunders 346 (a)*, in the note to *Mellor* v. *Spateman*,[9] where it is laid down that a commoner may have an action on the case without proving any specific injury to himself against a person wrongfully depasturing cattle on the common; and the author observes: 'The law considers that the right of the commoner is injured by such an act, and, therefore, allows him to bring an action for it to prevent a wrong-doer from gaining a right by repeated acts of encroachment. For wherever any act injures another's right, and would be evidence in future in favour of the wrong-doer, an action may be maintained for an invasion of the right without proof of any specific injury'.

The learned Chief Baron later refers to 1 Bing (N S) 549,[10] in which Tindal, C. J. made this observation :

The erection of the tunnel is to be considered as a permanent obstruction to the plaintiff's right, and, therefore, an injury to the plaintiff, even though he receives no immediate damage thereby. The right of the plaintiff to this way is injured if there is an obstruction in its nature permanent. If acquiesced in for twenty years, it would become evidence of an abandonment and renunciation of the right of way.

It is needless to say that the observations which I have read from a case precisely similar to the one before me, clearly show that an action would lie without proof of special damage. In my opinion, the decision of the learned Judge in the Court below was right although perhaps for reasons somewhat different from the ones which he expressed. That in my view concludes the matter and for the reasons which I have stated I think the appeal fails and must be dismissed with costs. In the circumstances the plaintiffs are entitled to the declaration they claimed and I would grant an injunction restraining the defendants from obstructing the user of the well by the plaintiffs and other individuals. Leave to appeal is refused.

V.B.B./A.L. *Appeal dismissed.*

9. (1669) 1 Wms Saund 346 (a)=85 E R 497*n*.
10. Bower v. Hill, (1835) 1 Bing (N S) 549=131 E R 1229=1 Hodges 45=4 L J C P 153=1 Scott 526.

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* A. I. R. 1937 Patna 483

COURTNEY-TERREL, C. J. AND JAMES, J.

Jagarnath Prasad Singh and *another* Defendants—Appellants.

v.

Surajdeo Narain Singh and *others*— Plaintiffs—Respondents.

Appeal No. 19 of 1934, Decided on 22nd April 1937, from decision of Sub-Judge, Muzaffarpur, D/. 6th December 1933.

(a) Hindu Law— Schools of law — Mithila law—Applicability—Babhan caste natives of Tirhoot are governed by Mithila law as their lex loci.

Mithila law is the *lex loci* of Mithila and high caste Hindus or any Hindu natives of Mithila should be prima facie regarded as governed by Mithila law unless they plead that they are not. Hence Babhan caste natives of Tirhoot are governed by Mithila law as their *lex loci* : *20 Cal 409, Ref.* [P 485 C 2]

(b) Hindu Law — Schools of law — Mithila law — Widows take absolute interest in moveables left by their husbands.

Under Mithila law the widows would take an absolute interest in the moveables left by their husbands with complete right of disposal, as if they were gifts by their husbands : *A I R 1921 P C 107, Ref.* [P 485 C 2]

(c) Hindu Law—English equitable doctrines —Applicability—English doctrine, whereby inheritance of right under contract for sale has been treated as inheritance of property itself, cannot be applied.

It is difficult to apply the English doctrine whereby the inheritance of rights under a contract for sale has been treated as inheritance of the property itself, because the provisions of S. 54, T. P. Act, expressly rule out the theory on which that doctrine rests. It is dangerous to act upon apparent analogies of position to import into Hindu law English equitable doctrines, which might apply if the parties were governed by English law and if the facts were slightly different. [P 486 C 1]

*** (d) Hindu Law—Widow — Husband contemplating accretion to estate by purchasing larger share and depositing purchase money with contemplated vendor—After his death two widows acting jointly and representing him carrying out contemplated purchase — Purchase must be regarded as accretion to their husband's estate — One widow after death of her co-widow cannot convert such property into her own personal property.**

Where a Hindu had contemplated making an accretion to his estate by the purchase of a larger share and had gone so far as to deposit the whole of the purchase money with the agent of the contemplated vendor, and his two widows acting jointly and representing their husband carry out his intentions by completing the contemplated purchase, the purchase must be regarded as an accretion to their husband's estate whether the widows are governed by Mithila or Mitakshara law. One of the widows cannot, after the death of her co-widow, change the character of the property which had been created by the two widows jointly and convert it into her own personal property. [P 486 C 1, 2]

S. N. Rai and *B. N. Rai* — for Appellants.

A. B. Mukharji, *D. C. Varma* and *G. Sharma* — for Respondents.

James, J. — The late Kodai Singh of Bishunpur Saraiya in Muzaffarpur had three sons, Lachmi Narain, Deodip Narain, and Kuldip Narain. Kuldip survived both of his brothers each of whom left a family

of sons, but Kuldip, when he died towards the end of 1921, left two widows but no children. The names of the widows were substituted for the name of Kuldip in the Collector's registers. The family possessed small shares in two estates in Cheutaha ; of four annas in the estate bearing tauzi No. 6901/1, in which Kuldip's share was recorded as of one anna six gandas ; and of two annas twelve gandas in the estate bearing tauzi No. 6899/1, in which Kuldip's share was recorded as eight gandas. The Deoria factory had a share of eight annas in the first estate and of twelve annas odd in the other. Kuldip in the beginning of 1919 had entered into negotiations with the manager of the factory for the purchase of these shares, but the manager could not enter into a definite contract without authority from the proprietors in England and without a power of attorney. It was contemplated that the property should be purchased for Rs. 1,26,00 on which account early in 1919 Kuldip deposited Rs. 13,000 with the manager of the factory, with the arrangement that until the conveyance should be executed, the deposit should be treated as a loan to the factory bearing interest at the rate of six per cent. per annum. Kuldip died before the conveyance could be made ; but on 17th February 1922 the manager, Mr. R. H. Waller, obtained a power of attorney with authority to complete the sale, which was completed on 21st March 1922, when the shares in the two estates were conveyed by Mr. Waller to the widows of Kuldip, Mt. Sita Kuer and Mt. Bhagwati Kuer, whose names were in due course substituted in the Collector's land register for those of the proprietors of the factory. Sita Kuer died in the autumn of 1928. In 1931, the surviving widow, Mt. Bhagwati Kuer, executed a deed of gift, whereby she gave to her nephew, Jagarnath Prasad, grandson of Lachmi Narain, the elder brother of Kuldip, the shares of proprietary interest of which she and Sita Kuer had completed the purchase in 1922. In the deed of gift Bhagwati Kuer described Jagarnath Prasad as the adopted son of Kuldip (karta putra). Thereupon the three sons of Deodip Narain, Kuldip's other brother, instituted a suit out of which this appeal arises. They alleged that Kuldip had been joint with his brother Deodip Narain, and that he died in a state of jointness with Deodip Narain's sons, the plaintiffs. They alleged also that Kuldip had adopted as a karta putra Rajindra Prasad Singh, one of the three plaintiffs, and that in 1920 he had made a will whereby he bequeathed his property to Rajindra Prasad, providing that if Rajindra should become a Sadhu his widow should enjoy a life interest with remainder to a son of the plaintiff, Surajdeo Narain.

The limitations of the will are not very clearly expressed ; but the matter does not appear to be of any great importance. The plaintiffs prayed for a declaration that the deed of gift should be declared to be of no effect against them, and for a declaration that Jagarnath Prasad was not the adopted son of Kuldip. The defendants denied that Kuldip had been joint with the members of Surajdeo Narain's family or that he had ever adopted Rajindra ; and they alleged that the shares purchased in 1922 had been acquired with money which Bhagwati Kuer had obtained from her own family, so that they were her stridhan property. They alleged that Jagarnath Prasad had been adopted by Kuldip. On these pleadings the Subordinate Judge framed the following issues : (1) Whether the suit as framed is maintainable ? (2) Whether the plaintiffs have got any right to sue or cause of action ? (3) Whether the suit is barred under S. 42, Sp. Rel. Act ? (4) Whether the genealogical table given in the plaint is correct ? (5) Whether Kuldip Narain died while living joint with plaintiffs ? (6) Whether Jagarnath Prasad was adopted by Kuldip Narain as his karta putra ? Whether he adopted Rajindra Prasad as his karta putra as alleged by the plaintiffs ? (7) Whether the will propounded by the plaintiffs is genuine and valid ? (8) Whether the disputed land was acquired out of the joint family funds of the plaintiffs or it was stridhan of Mt. Bhagwati Kuer ? (9) Whether the Atainama, dated 9th October 1931, is valid and genuine ? (10) Whether the Atainama, dated 9th October 1931, is binding on the plaintiffs after the death of defendant 1 ? (11) To what other relief, if any, are the plaintiffs entitled ?

The Subordinate Judge found that the account of the genealogy given by the plaintiffs was correct, that Kuldip died in a state of separation, and that he had not adopted Jagarnath or Rajindra. He found that the will propounded by the plaintiffs was not genuine ; that the disputed land

was acquired out of Kuldip's own funds and not from the money of Mt. Bhagwati Kuer. He found that the deed of gift was valid and genuine. On these findings of fact, applying the ordinary Mitakshara law, he gave to the plaintiffs the declarations that the deed of gift would not be binding on the plaintiffs after the death of Mt. Bhagwati Kuer, and that Jagarnath Prasad was not the adopted son of Kuldip Narain. The defendants Bhagwati Kuer and Jagarnath Prasad and his father appealed from that decision ; but Bhagwati Kuer died during the pendency of the appeal, so that Jagarnath Prasad and his father remain as appellants. The appellants attack the Subordinate Judge's findings of fact to the effect that the elder brother Lachmi Narain had not the same mother as his two brothers Deodip and Kuldip ; that Jagarnath Prasad had not been adopted as karta putra and that the purchase was not made with money which was the stridhan of Mt. Bhagwati Kuer. The respondents by their cross-objection supporting the decree on grounds decided against them in the Court below, attack all those findings of fact of the learned Subordinate Judge which are in favour of the defendants. It will be convenient to treat these issues of fact seriatim in the order in which they have been stated by the learned Subordinate Judge. (After discussing evidence the judgment proceeded further.) I would thus accept all the findings of fact of the learned Subordinate Judge which are to the following effect. Kuldip was separate from the family of his brothers ; he died without issue leaving two widows, who would enjoy a widow's estate in his property according to the school of Hindu law by which they were governed ; so that the property or at least the immoveable property would after the death of the last surviving widow go to the reversionary heirs of Kuldip. Kuldip adopted no son ; he made no will. He left Rs. 13,000 earmarked for the purchase of shares in estates in which he already held an interest ; and his widows after his death applied his money to the completion of that transaction which he had contemplated. On these points we affirm the findings of fact of the learned Subordinate Judge and we now come to the discussion of the questions of law which arise on these findings.

The parties are high-caste Hindus living in Mithila ; and from an answer given by the plaintiff Surajdeo to a question put to him in cross-examination, it would appear that they are long established natives of Mithila and not immigrants. The learned Subordinate Judge refused to enter into the question of what would have been the position on the facts under Mithila law, because the parties had not pleaded that they were governed by the Mithila law. Mr. S. N. Rai, on behalf of the appellants, argues that Mithila law is the *lex loci* of Mithila and that high-caste Hindus or any Hindu natives of Mithila should be prima facie regarded as governed by Mithila law unless they plead that they are not. Mr. A. B. Mukharji suggests that the Mithila law governs Mithila Brahmins and not other castes in Mithila, and he suggests that Babhans are by tradition immigrants from the north-west. Mr. Mukharji was not able to produce any authority in support of his contention that Babhans, the most numerous caste in Mithila, are not governed by Mithila law, and since in a sense all high caste Hindus in this part of India are necessarily by tradition immigrants from some other part of India or beyond, it would not be possible to hold that the members of the Babhan caste natives of Tirhoot are not governed by Mithila law. As admittedly natives of Tirhoot, with not even a tradition of immigration, the parties to the present suit must be regarded as governed by Mithila law as their *lex loci* : 20 Cal 409.[1] Under Mithila law the widows would take an absolute interest in the moveables left by their husbands with complete right of disposal, as if they were gifts by their husbands : 48 Cal 100.[2] Mr. S. N. Rai argues that since they enjoyed an absolute interest in the moveables, the deposit of Rs. 13,000, which Kuldip had made, became their absolute property ; and if they utilized it for the purchase of shares in these estates, those shares became their stridhan which they enjoyed jointly with right of survivorship, so that in the end the acquired property became the stridhan of Bhagwati Kuer. Mr. A. B. Mukharji suggests that the English doctrines of conversion and election should be held to apply in a case like this, that when Kuldip left Rs. 13,000

1. Ram Das v. Chundra Dassia, (1893) 20 Cal 409.
2. Sureshwar Misser v. Mt. Maheshrani Misrain, A I R 1921 P C 107=57 I C 325=48 Cal 100=47 I A 233 (P C).

earmarked for the purchase of particular real property, the money should be regarded as impressed with the character of real property, and that in any event it should be so regarded when the widows elected to carry out their husband's intentions.

It is difficult to apply the English doctrine whereby the inheritance of rights under a contract for sale has been treated as inheritance of the property itself, because the provisions of S. 54, T. P. Act, expressly rule out the theory on which that doctrine rests. It is dangerous to act upon apparent analogies of position to import into Hindu law English equitable doctrines, which might apply if the parties were governed by English law and if the facts were slightly different ; but in the present case it appears to us that whether the parties are governed by Mithila law or by the ordinary law of the Mitakshara school, the decision of the learned Subordinate Judge was in the end correct. The case should be regarded as governed by the principles laid down by the Judicial Committee of the Privy Council in 10 Cal 324.[3] Kuldip before his death had contemplated making an accretion to his estate by the purchase of a larger share in the two estates in which he already held shares ; and he had gone so far as to deposit the whole of the purchase money with the agent of the contemplated vendor. The widows when they succeeded to his estate may or may not have been entitled to decline to make this intended accretion : perhaps if they were governed by the Mithila law they might have taken that money, and have used it entirely for their own purpose ; but they did, acting jointly as widows of their late husband and apparently representing him, carry out his intentions, and they did make this accretion to their husband's estate. Since the transaction was made in this way by the two widows in their express capacity of successors to their deceased husband, I think that the purchase must be regarded as an accretion to their husband's estate. We need not enter into the question of whether if this transaction had been carried out by a sole Mithila widow, she might subsequently have resiled from it and treated the property as her own, though it appears probable that she could not ; *Isri Dutt's case*[3] was a case from Mithila. But here the two widows jointly made this accretion ; and Bhagwati Kuer could certainly not, after the death of her co-widow, change the character of the property which had been created by the two widows jointly, that is to say, Bhagwati Kuer could not convert into her own personal property that which by mutual consent she and Sita Kuer had made an accretion to the estate of her husband.

For these reasons I consider that the decree of the learned Subordinate Judge should be confirmed and I would dismiss this appeal with costs.

Courtney-Terrell, C. J.—I agree.

P.R./D.S. *Appeal dismissed.*

3. Isri Dutt v. Hansbutti Koerain, (1884) 10 Cal 324=10 I A 150=4 Sar 459 (P C).

A. I. R. 1937 Patna 486

DHAVLE AND ROWLAND, JJ.

Beni Madhab Mahto and *others* — Decree-holders — Appellants.

v.

Ganesh Singh Sardar and *others* — Judgment-debtors—Respondents.

Appeals Nos. 58 and 59 of 1936, Decided on 1st April 1937, from appellate orders of Dist. Judge, Manbhum-Sambalpur, D/- 18th November 1935.

(a) Chota Nagpur Encumbered Estates Act (6 of 1876)—Object of.

The object of the Chota Nagpur Encumbered Estates Act is to protect the estate and at the same time do justice to its creditors by administering it in such a manner as to satisfy all claims against it in respect of debts antecedently incurred by the proprietor. For these claims all other remedies are barred except one which is to apply to the manager and get the debt entered on the schedule of debts and paid by the manager ; failing recourse to this procedure not only all remedies are barred, but the debt itself is barred. The aim of the whole proceedings is to hand back the property to the proprietor unencumbered by any of his old liabilities : *20 Cal 609, Rel. on ; A I R 1919 Pat 578* and *A I R 1931 Pat 364, Ref.*

[P 489 C 1]

(b) Chota Nagpur Encumbered Estates Act (6 of 1876), S. 3 (b)—Scope—Pending appeal in mortgage suit, mortgagor's estate taken under management under Act — Manager made party to appeal—Execution of decree on mortgage cannot be taken against manager as it was for debt contracted by proprietor and not by manager.

Pending appeal from a decree on mortgage against the mortgagor proprietor the mortgagor's estate was taken under management in accordance with the provisions of the Chota Nagpur Encumbered Estates Act, and the manager was made a party to the appeal. On appeal being dis-

missed, the decree-holder sought to execute it against the manager as he was made a party to the litigation :

Held : that the decree could not be executed against the manager as the decree was not on a debt contracted by the manager, but by the proprietor himself : *61 I C 902, Disting.*; *A I R 1928 Pat 457, Ref.* [P 489 C 2]

(c) Chota Nagpur Encumbered Estates Act (6 of 1876), Ss. 3 and 7—S. 7, unlike S. 3, does not merely create bar of proceedings in respect of debts during management only but bars debts not duly notified to manager.

Section 7, Chota Nagpur Encumbered Estates Act, expressly declares that every debt or liability other than those mentioned in the section and which is not duly notified to the manager shall be barred. S. 3 merely bars all proceedings pending in Courts and institution of new proceedings in respect of such debt during the continuance of the management of the estate of the proprietor under the Act. S. 7 thus does not merely, like para. 1, S. 3, create a bar not restricted to the continuance of the management, but takes away the very foundation for any proceedings by the creditors after the release of the estate. [P 491 C 2]

(d) Chota Nagpur Encumbered Estates Act (6 of 1876, as amended by Act 8 of 1922), S. 12, Paras. 1, 2, 3 and 6—Restoration of estate to proprietor—Revival of debts is confined to restoration of estate under S. 12, Para. 2, only—There is no such revival when estate is restored under S. 12, Paras. 1 and 3.

Section 12, Para. 6, Chota Nagpur Encumbered Estates Act, does not apply to a case to which Para. 2, as amended by Act 8 of 1922, does not in terms apply. The revival of debts is expressly confined to the case dealt with in para. 2, S. 12. There is no revival of barred proceedings and debts if the restoration takes place under para. 1 or under para. 3, S. 12. [P 489 C 1, 2]

S. C. Majumdar — for Appellants.

R. S. Chatterji — for Respondents.

Rowland, J.—These are appeals by a decree-holder whose application to execute a mortgage decree has been refused on an objection by the judgment-debtor (mortgagor's successor) on two grounds. One is that the application to execute the decree is barred by time, more than twelve years having elapsed since the passing of the decree. The other objection was that the whole claim was barred by the Encumbered Estates Act (6 of 1876). The debt which is the foundation of the claim of the decree-holder was a debt incurred by Kartick Singh Sardar, proprietor of the Mudali estate, and secured by a mortgage executed in the year 1908. The mortgagee brought a suit on this mortgage on 9th April 1915, impleading as defendant first party the mortgagor and as defendants second party persons who have been referred to as the Trigunaits. These were purchasers in 1914 from two pleaders who had bought the property in 1912 in an execution sale on foot of a mortgage decree on a mortgage which admittedly had priority over the mortgage of the plaintiff. The plaintiff, however, had not been impleaded in the earlier mortgage suit and was thus able to obtain, on 11th July 1916, a preliminary decree for sale subject to the lien of defendants second party over the property for the prior encumbrance consisting of the mortgage debt for which the property had been sold up in 1912. The defendant first party allowed the plaintiff's suit to go uncontested so far as he was concerned, but the Trigunaits defended the suit and appealed to the District Judge who on 12th February 1917 affirmed the decision of the first Court.

The Trigunaits presented a second appeal to the High Court, making the plaintiff a first party respondent and the mortgagor second party respondent. While this appeal was pending, the estate of Kartick Singh Sardar, the mortgagor, was taken under management under the Encumbered Estates Act on 19th October 1917. The effect of this would naturally be that the Trigunaits' appeal was not maintainable against the proprietor of the encumbered estate except through the manager. The manager's name was substituted for that of the mortgagor as respondent on 19th February 1919, and the appeal was dismissed the same day. The plaintiff on the dismissal of the second appeal against the preliminary decree moved the Court of first instance for preparing final decree which was done on 18th December 1920. Thereafter the question arose whether the decree could be excuted against the mortgaged property or not. An execution was taken (No. 160 of 1921), and the manager of the Encumbered Estates objected that it should not be allowed to proceed. But the Court overruled the objection, holding that the village Kinutanr having been sold by auction in 1912 had never vested in the manager, and therefore there was no bar to the execution proceeding. The execution was infructuous as no bidder came forward to purchase the property. This was not surprising as the interest of the judgment-debtor in the property had already been sold. The decree-holder took out executions in 1922, in 1925 and in 1926. All these were infructuous because no bidder was forthcoming or because the decree-holder declined to proceed with

the case up to the stage of sale. The last execution taken during the period of management was numbered 221 of 1928. In this the prayer was to put the property to sale and the manager objected pleading the Act. The objection was allowed on 1st December 1928, and the execution dismissed.

The present application was presented on 6th June 1934. The application is more than fourteen years from the date of the decree, and it is more than five years from the date of disposal of the last previous application. The application, therefore, is prima facie barred by S. 48, Civil P. C., as well as by Art. 182, Limitation Act. It was also held in 1928 by the Subordinate Judge that execution was barred by the Encumbered Estates Act; and that decision whether correct or not has become final and is binding on the parties. The contention of the decree-holder is that the release of the estate from management on 18th July 1931 removed the bar of the Act, and revived the proceedings which terminated in 1928 so that the present application to bring the property to sale may be considered to be in continuation of the earlier proceeding. Mr. Mazumdar argues that the effect of the release of the estate from management in 1931 was to revive his client's execution proceeding of 1928. The argument involves serious difficulties. The effect of an order under the Encumbered Estates Act S. 2 is considered in 20 Cal 609[1] where it is pointed out that all pending proceedings in respect of antecedent debts of the holder are barred by S. 3 and that any new processes, execution and attachments for such debts are null and void in their inception :

> Section 7 further expressly declares that every debt or liability other than debts etc., due to Government or rent due to the superior landlord, which is not duly notified to the manager shall be barred.

The Judges thought that that section must be read in connexion with S. 3 and indeed in the light of the whole scope of the Act :

> The only remedy enjoyed by the creditors is by claiming before the manager and by payment, if he does pay, under the powers given to him. (p. 628).

It is conceded that the plaintiff decree-holder did not notify either his debt or his decree to the Manager with a view to obtaining satisfaction of his dues in the course of administration of his estate, and it seems to me hopeless to argue in face of the words of the Act that the appellant's debt was not barred by S. 7. Then it is contended that the release of the estate operated to revive the debt by virtue of S. 12, para. 6. What that paragraph says is that debts and proceedings will be revived if the estate is restored to the proprietor under S. 12, para. 2. Para. 2 provides for the cases in which it is not possible to frame and carry out a scheme by which all the notified debts can be satisfied. In these circumstances, the Act restores to the creditors their ordinary remedies, because the alternative remedy of payment of their claims through administration under the Act has failed. This was recognized to be the object of S. 12, paras. 2 and 6, in 5 Pat 404,[2] and the Judges construed and applied S. 12 liberally in order to give effect to that intention. The section which was being construed was the section as it stood before the amendment made in 1922 and to give effect to the intention of the statute the Judges held that where a scheme had been framed but had proved infructuous, the debt was revived and the creditor could use an acknowledgment of the debt in proceedings before the manager as a starting point for limitation. The Full Bench decision in 9 Pat 385[3] approved the decision in 5 Pat 404[2] on both points. These two were cases of creditors whose claim was admitted by the manager but not satisfied, and such cases fall within the terms of S. 12, para. 2, as it now stands after the amendment. The case in 7 Pat 109,[4] though the facts are not fully stated, appears to be a case in which no claim was presented before the manager, and it was held that the bar against the proceedings was not removed by the release of the estate in circumstances to which S. 12, para. 2, did not apply. Now the argument for the appellant is that the decision in *Khairullah Khan* v. *Lachmi Ram*[4] having been overruled, there can be revivor even in cases to which S. 12, para. 2, does not apply. The

1. Kameshwar Prasad v. Bhikhan Narain Singh, (1893) 20 Cal 609.

2. Mathura Prasad Singh v. Jageshwar Prasad Singh, A I R 1926 Pat 260=94 I C 624=5 Pat 404=9 P L T 247.
3. Mahabir Prasad Narayan Deo v. Bhupal Ram, A I R 1929 Pat 694=122 I C 817=9 Pat 385=10 P L T 879 (F B).
4. Khairullah Khan v. Lachmi Ram, A I R 1928 Pat 179=105 I C 643=7 Pat 109=9 P L T 252.

answer is that the law was amended in 1922, and we must now proceed on the assumption that the difficulty of interpretation which was felt regarding the section as it stood previously, was appreciated by the Legislature and that the amendment was designed to remove doubts by expressing what the Act really did mean and had been intending to express all along. Therefore, in applying the Act, as it stands after the amendment, we should be unwilling to apply para. 6 of S. 12 to any case to which para. 2 does not by its terms as now amended apply. We could only be induced to assent to such an interpretation if it could be shown that on any other view the whole scheme and main object of the Act would be frustrated. In the present case it is otherwise. In fact, to stretch the words of S. 12, as Mr. Mazumdar invites us to do, would defeat rather than aid the objects for which the statute was enacted. These objects were explained in 20 Cal 609[1]:

> The Act creates a sort of administration of the immoveable estate of a debtor, in some respects resembling that pursued in an administration suit, but with some material differences. It primarily aims at the preservation of the estate, which cannot be sold without the consent of the holder and his heir. The Act obviously aims at the complete protection of the estate from litigation by barring the remedies creditors would otherwise have in the civil Courts.

The object of the statute is to protect the estate and at the same time do justice to its creditors by administering it in such a manner as to satisfy all claims against it in respect of debts antecedently incurred by the proprietor. For these claims all other remedies are barred except one which is to apply to the manager and get the debt entered on the schedule of debts and paid by the manager; failing recourse to this procedure not only all remedies are barred but the debt itself is barred. The aim of the whole proceedings is to hand back the property to the proprietor unencumbered by any of his old liabilities. These are only revived when the object of the statute itself has failed and the estate has been restored without payment of the notified claims. The wording of S. 12, as it now stands, fully agrees with this view of the intention, and there can be no revivor of any debt or of any proceeding when an estate is handed back under para. 1, S. 12 after satisfaction of all notified debts. The Subordinate Judge was, therefore, justified in allowing the objection on the ground that the debt was barred and had not been revived. The execution was likewise not maintainable on the further ground that the execution proceeding of 1928, according to the finding of the Subordinate Judge in that proceeding was ab initio null and void under S. 3 of the Act. The bar to the execution has never been removed and is still subsisting. With reference to the argument that the execution of 1934 escapes the operation of the Limitation Act as being a continuation of the former execution, it is enough to say that the former execution being null and void no further proceedings can be said to be taken in continuation of it. Therefore, the present application is barred by Art. 182, Limitation Act, as well as by S. 48, Civil P. C.

Mr. Mazumdar has attempted to found an argument on the decision in 61 I C 902[5] in which a party who had obtained a decree for costs in a litigation against the manager of an estate under the Encumbered Estates Act was held entitled to execute that decree. He has contended that the manager having been made a party to the litigation in 1919, the decree-holder became thereby entitled to pursue his remedy by execution against the manager. One answer to this is that this contention was negatived by the decision in the execution of 1928 which is inter partes and operates as res judicata against him. Further in the case cited, the liability sought to be enforced had been incurred by the manager by prosecuting an infructuous litigation; we are dealing here with a debt contracted by the proprietor. And in A I R 1928 Pat 457[6] it was made clear that:

> On a construction of para. (b), S. 3, it should be held that the Court is incompetent to execute a decree in respect of debts or liabilities of the defaulting proprietor except debts due or liabilities incurred to Government.

The arguments adduced before us were on the same lines as those placed before the Courts below where they have been discussed with care and in my judgment effectively answered. I would dismiss the appeals with costs.

Dhavle, J.—I agree. The estate was brought under the Chota Nagpur Encumbered Estates Act, during the pendency of the appeal to the High Court in the suit

5. W. H. Burton v. Midnapur Zamindari Co., (1921) 61 I C 902.
6. Purnendu Narain Singh v. Makhan Lal, A I R 1928 Pat 457=112 I C 236=7 Pat 480=10 P L T 21.

instituted by the present appellants to enforce their mortgage. The manager was brought on the record of that appeal, but the appeal itself which had been preferred by the Trigunaits was dismissed. The preliminary decree thus remained intact; and I am unable to accept the contention that the dismissal operated to make it effective against the manager. Under S. 3 of the Act there could in any case be no execution of such a decree. But it is unnecessary to labour the point, because even if the contrary were to be held, the restoration of the estate under para. 1, S. 12, of the Act, as will be presently seen leaves the decree-holders without any means of executing it. It is true that in the execution case of 1921 the decree-holders succeeded in defeating the manager's objection that execution was barred under the Act. They did so by inducing the Court to hold that the Act had no application on the ground that the mortgaged property had ceased to be a part of the estate before it was brought under the Act. It appears however that the Trigunaits had not taken possession of the property and that the manager came into possession of this property along with the rest of the estate. And in the execution case of 1928 it was held against our appellants that the property was a part of the estate and could therefore not be sold under para. (b), S. 3, of the Act. There was no appeal against that decision, and the matter is now res judicata.

It has been argued for the appellants that the estate having since been restored to the heir of the late holder, and the debt being still unpaid, it should be held that there is no bar to execution. But in the first place the final decree of which execution is sought was passed more than 12 years before the application out of which this appeal arises, and the present execution is more than three years later than the attempted execution of 1928 which moreover was 'null and void' under para. 1, S. 3 of the Act. Upon this it has been argued that since the appellants' debt has not been paid, the case should be treated as governed by the principles followed in 5 Pat 404.[2] This decision was criticised in 7 Pat 109[4] which was itself however not approved by the majority of the Full Bench in 9 Pat 385.[3] It may be observed at once that the present case differs from the cases in 5 Pat 404[2] and 9 Pat 385[3] in a most important respect in that it is a case of restoration under para. 1, S. 12 of the Act. The drafting of the Act has frequently led to difficulty in interpretation with the result that the rulings have not always been uniform and the Act has had to be often amended. The point raised before us is nevertheless perfectly clear both on the letter and on the spirit of the law. The first consequence that ensues under S. 3 of the Act on the publication of a vesting order is described in the margin as 'bar of suits', and reads:

> First, all proceedings which may then be pending in any civil Court in British India, or in any revenue Court in Bengal in respect to such debts or liabilities shall be barred; and all processes, executions and attachments for or in respect of such debts and liabilities shall become null and void.

The other consequences given in the section, freedom from arrest (and attachment of moveable property) for prior debts and cessation of power to alienate, &c.— are qualified by the phrase 'so long as such management continues'. It is significant that there is no such qualification in Cl. 1. The inference is plain that the bar of suits mentioned in this clause is not limited to the duration of the management. A similar position is created by S. 12. The first three paragraphs of this section describe the three contingencies in which an estate is restored to the holder or his heir, and which may be summarized respectfully as (i) discharge of the debts and liabilities in accordance with the approved scheme, (ii) a decision by the Commissioner before approval of a scheme under S. 11-A, that the Act should not continue to apply to the estate, or after such approval, that under S. 11-B the management of the estate should be relinquished, and (iii) a composition with the creditors approved by the Commissioner. Para. 6 provides for the 'revival of barred proceedings and debts' in these words:

> Where the holder of the property or his heir is so restored under the circumstances mentioned in Cl. 2 of this section, such restoration shall be notified in the Calcutta Gazette, and thereupon the proceedings, processes, executions and attachments mentioned in S. 3 (so far as they relate to debts and liabilities which the manager has not paid off or compromised), and the debts and liabilities barred by S. 7, shall be revived. . . .

The revival being expressly confined to the case dealt with in Cl. 2, the plain implication is that there is to be no revival of barred proceedings and debts if the restoration should be under Cl. 1 (as in the present case) or under Cl. 3 of the sec-

tion. In arguing against the concurrent implication of this clause and Cl. 1, S. 3, the learned advocate for the appellants has relied on the observation of Adami, J., in *Mathura Prasad's case*[2] that when the order under S. 2 is cancelled by a subsequent notification

the effect of Cl. 1, S. 3 disappears. It could never have been in the contemplation of the Legislature that the mere approval by the Commissioner of a scheme should for ever deprive all creditors of redress.

But, as I have already pointed out, that was not a case of release under Cl. 1, S. 12. It is true that it was not a case strictly within Cl. 2 either, as it stood at the relevant time, for the estate had been released after the Commissioner's approval of a scheme and the clause had yet to be amended to include relinquishment of management after such apparently came to an end because the Board of Revenue had exercised the power conferred by S. 21-A (which was added to the Act by the Amending Act of 1909) to reverse the Commissioner's proceedings. That is how the vesting order appears to have been "cancelled by a subsequent notification." After such cancellation, the position was as if the Act had never been validly applied to the estate; and as to the interval between the vesting order and the final order of the Board cancelling it, the creditor had in his favour the manager's acknowledgment of the debt, taken with the circumstance that during the management (invalid as it turned out afterwards to have been) it was not open to him to sue. This was partly recognized in *Khairullah's case*,[4] and fully in the judgment of my learned brother (with whom James, J. concurred) in *Mahabir Prasad's case*.[3] As was pointed out in *Khairullah's case*[4] it was not decided in *Mathura Prasad's case*[2] that Cl. 6, S. 12 was applicable; Adami, J.'s reference to S. 3 of the Act and to the intention of the Legislature suggests that in his view the Act had not in effect been applied to the estate. No such consideration can arise when an estate is released under Cl. 1 or Cl. 3, S. 12, for these clauses imply not the mere approval of a scheme but the discharge of the debts in accordance with the approved scheme or the satisfaction of the creditors in accordance with the approved composition, and the restoration of the estate to the holder does not involve any "cancellation" of the vesting order. Unlike the creditor in *Mathura Prasad's case*,[2] the appellants did not notify their claim to the manager in accordance with the Act, and S. 7 of the Act provides that every debt which is not so notified "shall be barred". Reading this section with S. 3 and in the light of the whole scope of the Act, Pigot, J. held in 20 Cal 609,[1] that :

The only remedy enjoyed by creditors is by claim before the manager and by a payment, if he does pay, under the powers given to him.

The suits in that decision were no doubt brought during the continuance of the management; but the drafting of the Act (which has had to be commented upon in many cases) led the learned Judge to examine the whole scope of the Act. If his view of S. 3 as barring the institution of suits by creditors was disapproved in *Khairullah's case*,[4] it was accepted by the majority of the Full Bench in *Mahabir Prasad's case*.[3] And no case has been brought to our notice in which the view the learned Judge took of S. 7 was dissented from. The section does not merely, like Cl. 1, S. 3, create a bar not restricted to the continuance of the management, but takes away the very foundation for any proceedings by the creditors after the release of the estate. The Act has been amended several times since Pigot, J.'s decision of 1893, and it seems clearer than ever before that on restoration under Cl. 1 or Cl. 3, S. 12 the holder or his heir takes the estate free from any liability for prior debts. The Act is headed "An Act to relieve certain landholders in Chutia Nagpur", and was described by Pigot, J. in the decision already referred to as

a law of privilege for the protection of the 'holders of land in Chota Nagpur' enacted perhaps for reasons of State, applying to that non-regulation district, the state of society in which differs a good deal from that in Bengal.

The mode of relief is administration by a manager armed with exceptional powers; the management is vested in him on the application, not of any creditor, but of the holder, or the person who would be his heir in case of intestacy, or the Deputy Commissioner if any part of the estate be attached or advertised for sale in execution or (since the amendment of 1909) if the holder should have "entered upon a course of wasteful extravagance likely to dissipate his property". This read with such provision as para. 5, S. 12, and S. 12-A makes it clear that the object is to preserve the estate not for the holder alone but for his heir as well. S. 23 expressly

saves the jurisdiction of the civil Court in respect of suits relating to succession or maintenance; and it appears from this and other provisions that the manager is intended to work without any interference from the civil Courts and subject only to statutory rules and the control or sanction of the Deputy Commissioner and the Commissioner, whose proceedings were in 1909 made subject to the supervision and control of the Board of Revenue. In the exercise of these powers the manager can, on the one hand, cancel leases or rent-free or maintenance grants made by the proprietor for insufficient consideration within three years preceding the vesting order (S. 9), and also remove mortgagees and conditional vendees from possession : S. 16. On the other hand the manager is empowered to determine the amount of all principal debts "justly due to the several creditors of the holder of the property" and the interest on them (S. 8)—a power which under the statutory rules and the instructions of the Board enables him to go behind decrees already obtained by creditors in the ordinary Courts and "except where otherwise fixed by statute" to cut down the interest to as little as 4 per cent. simple, "in order to make the estate solvent". Creditors aggrieved by the exercise of such a power may appeal to the Deputy Commissioner and the Commissioner, but cannot obtain any relief from the civil Court: *see* 4 P L J 321.[7]

After determining the amounts due the manager prepares a schedule of debts and a scheme for their settlement; and the scheme is to be carried into effect as approved by the Commissioner. Since the amendment of S. 18 in 1884 the manager has been empowered, in the execution of the scheme, to sell such part of the estate as may appear expedient, without the consent or concurrence of the holder or his heir. When the scheme is carried out—the debts "justly due" discharged—or if an arrangement is made for the satisfaction of the debts which is accepted by the creditors and approved by the Commissioner, the estate is restored to the holder or his heir "subject to the leases and mortgages (if any) granted and made by the manager" — a qualification which like Ss. 3 and 7 (besides the wording of the sixth paragraph of S. 12) suggests an intention that in such cases the estate should on restoration be free from prior debts. Further light is thrown on this aspect of the matter by the provisions regarding debts contracted by the holder or his heir during the management and also subsequent to the restoration. As regards the former, the third clause of S. 3 places the holder and his heir under an incapacity to charge or alienate the estate or enter into any contract which may involve either or both of them in pecuniary liability. S. 12-A, which was added to the Act in 1909, completes the protection in respect of debts contracted by the holder during the management under the Act by enacting in Cl. 6 that no suit shall be brought to charge the holder, in cases of restoration under Cl. 1 or Cl. 3, S. 12, upon any promise, made after such restoration, to pay the debt, or upon any ratification, made after such restoration of any promise made during the management. Cls. 1 to 3, S. 12-A render void any alienation of the estate made by the holder after restoration under Cl. 1 or Cl. 3, to S. 12, or any charge extending beyond his lifetime, without the previous sanction of the Commissioner, a provision which has been interpreted to extend to involuntary alienations through Court sales: *see* 10 Pat 582.[8] Should the holder make or attempt to make any such alienation (or charge), the estate may under Cl. 5 of this section of 1909 be brought again under the Act, in which case it will only be restored to his heir "in due course"—see the proviso added to S. 12 before para. 6 in 1909.

In view of these provisions regarding debts contracted by the holder or his heir during the period of management and alienations or charges made or attempted by the holder after restoration under Cl. 1 or Cl. 3, S. 12, it is impossible to conceive that the Legislature could have intended to leave the restored holder unprotected from such prior debts as the creditors may not have chosen to notify to the manager under the Act. The Act was passed at a time when there was "a germ, but only the germ, of an insolvent law" in the Civil Procedure Code of 1859 applicable to the mofussil, and it was only in 1920 that the Provincial Insolvency Act released the insolvent on his

7. Thakur Prasad Aurora v. Manager, Barabhum Encumbered Estate, Purulia, A I R 1919 Pat 578=51 I C 69=4 Pat L J 321.

8. Khitnarain v. Sarju Seth, A I R 1931 Pat 364=132 I C 868=10 Pat 582=12 PLT 508.

discharge from all debts provable in the insolvency proceedings. But the protection given to the landholder of Chota Nagpur by the Act of 1876 was based on other considerations than those that arise in ordinary insolvencies and was much more thorough.

The appellant's contention, that para. 6, S. 12 of the Act was by a beneficial construction applied in *Mathura Prasad's case*[2] to a case not strictly coming within that paragraph is, in my opinion, untenable. But even if it were otherwise, the intention of the Act does not seem to be different from its letter in the matter of debts not notified to the manager of an estate released under Cl. 1 or Cl. 3, S. 12.

K.B./A.L. *Appeal dismissed.*

A. I. R. 1937 Patna 493

FAZL ALI AND MADAN, JJ.

Tarni Prasad Singh and *others* — Petitioners.

v.

Chandreshwar Prasad Narayan Singh — Opposite Party.

Civil Revn. No. 418 of 1936, Decided on 4th February 1937, from order of Dist. Judge, Gaya, D/- 31st October 1936.

(a) Civil P. C. (1908), O. 21, R. 90—Notice under R. 66 served—Judgment-debtor failing to appear—Objection to undervaluation is not maintainable—Yet he can plead inadequacy of price and consequential loss.

Although the judgment-debtor who being served with notice under O. 21, R. 66, Civil P. C., fails to appear is no longer entitled to object to the under-valuation as an irregularity in the procedure, yet it is still open to him to plead that as a result of the under-valuation the property had been sold for an inadequate price and he has thereby suffered material injury. [P 493 C 2]

(b) Practice—Appellate Court—Execution sale—Karpardaz in charge of decree-holder's cases agreeing to accept payment by judgment-debtor if deposited within certain days—On money being deposited Court setting aside sale, decree being fully satisfied—On appeal appellate Court restoring sale doubting authority of karpardaz to accept deposit—Held appellate Court should have ordered further inquiry instead of restoring sale.

A karpardaz who was in charge of the decree-holder's cases agreed on behalf of the decree-holder that he would accept the payment by the judgment-debtor in satisfaction of the decree if made within a certain number of days. The payment being so made the executing Court set aside the sale in execution as the decree was fully satisfied. On appeal the District Judge restored the sale doubting the authority of the karpardaz to accept the deposit :

Held: that the appellate Court ought not to have restored the sale assuming that the karpardaz had no authority to accept the deposit. If the appellate Court was not satisfied on this point its proper course was to have ordered a further inquiry on the basis of which a final order could have been passed. [P 494 C 1]

Sultan Ahmad and *B. N. Rai* — for Petitioners.

Baldeo Sahay and *Gaindhari Prasad Singh* — for Opposite Party.

Madan, J.—These two civil revisions arise out of an execution case filed by the opposite party against the petitioners in the Court of the Second Munsif of Gaya. Certain properties were sold for the sum of Rs, 1,950, being the decretal amount, and the petitioners applied under O. 21, R. 90 for setting aside the sale. Their case is that there was then a talk of compromise and that at the hearing of the miscellaneous case the decree-holder through his karpardaz agreed to accept the decretal amount if paid within two or three days. Two days later the decretal dues were deposited and the Munsif set aside the sale on full satisfaction. On appeal to the District Judge this order was set aside and the case was remanded for disposal of the application for setting aside the sale on its merits. The Munsif then proceeded to set aside the sale, but on appeal the District Judge restored the sale. The petitioners have applied to this Court against both these orders of the District Judge.

It was pointed out for the petitioners that there are errors in the order of the learned District Judge restoring the sale, for instance, the learned District Judge was under the impression that as the judgment-debtors did not appear on service of the notice under O. 21, R. 66 they were no longer entitled to dispute the valuation of the property sold which was their main objection to the sale. It is true that the judgment-debtors were no longer entitled to object to the under-valuation as an irregularity in the procedure; but it was still open to them to plead that as a result of the under-valuation the property had been sold for an inadequate price and they had thereby suffered material injury. These matters however need not be gone into further if it is found that the petitioners did satisfy the decree by depositing the decretal dues in the executing Court. On this point the learned Munsif's order shows that he relied on the statement of the

decree-holder's own karpardaz to the effect that the decree-holder would accept the payment if made within two or three days. The witness went on to say that if the judgment-debtors required one month's time for payment he would then have to consult his master. He had already stated that he himself was in charge of the decree-holder's cases. The decree-holder then examined another witness and on the same day, being 23rd February 1935, the judgment-debtor applied for three days' time for making the deposit, and the order sheet shows that the Munsif postponed judgment on that account till the 27th. On the 25th the deposit was made and on the 27th the Munsif set aside the sale on full satisfaction. When dealing with this matter the learned District Judge appears to have acted with material irregularity in assuming that the decree-holder's karpardaz had no authority to accept the deposit. If the District Judge was not satisfied on this point his proper course was to have ordered a further inquiry on the basis of which a final order could have been passed, and for this reason I am unable to uphold his order. I do not however think it necessary further to prolong these proceedings, which have already been much delayed, as I consider that the circumstances justify the the conclusion that the karpardaz had authority to accept the deposit. The karpardaz did accept the offer on the decree-holder's behalf, and no objection was raised for the decree-holder even when the Munsif granted an adjournment for enabling the judgment-debtors to satisfy the decree. It is noticeable that the judgment-debtors' own witness was asked in cross-examination whether or not the judgment-debtors were able to make immediate payment. It was not till the 26th March that an appeal was filed to the District Judge challenging the authority of the karpardaz. We are informed that the petitioners are still anxious to satisfy the decree, and I would direct that if the amount deposited in the lower Court be re-deposited in this Court within the course of the day, the sale will be set aside on full satisfaction of the decree. The parties will bear their own costs in this Court.

Fazl Ali, J.—I agree. These applications are directed against two orders of the learned District Judge which were passed on 31st October 1935 and 11th August 1936 respectively. The second order is attacked on behalf of the petitioners on the ground that the learned District Judge has committed mistakes of law as well as of facts. The mistakes of law said to have been committed by him are: (1) that he has misinterpreted certain decisions of this Court and held that because the petitioners did not appear to object to the valuation of the property in question in answer to the notice under O. 21, R. 66, they are not entitled to raise the question of valuation now, and (2) that he has proceeded on the view that the reports of the peon as to the service of the execution processes are public documents and prove themselves without the examination of the peons. The mistake of fact is said to constitute in this that the learned District Judge has confused the cess re-valuation which is made by a Revenue Officer with the cess-return which is submitted by the landlord and he has decided the case on the basis that the figures furnished by the appellants in order to enable the Court to determine the value of the property were based on cess return. These criticisms are not without substance and if it had been open to us to go into the facts of the case, it would have been difficult to uphold the order of the learned District Judge. The matter however need not be pursued, because, as my learned brother has pointed out, the first order passed by the learned District Judge cannot be upheld, and if that order is to be vacated the proceedings which followed in the Courts below upon the basis of that order must be ignored. Now the point which requires attention in connexion with the first order of the learned District Judge has been stated to us as follows:

If as a matter of fact there was an agreement between the parties that the sale was to be vacated upon the judgment-debtor's depositing a certain amount of money within a certain time, the learned Munsif was justified in vacating the sale and the learned District Judge had no jurisdiction to set aside an order which was virtually based upon a compromise. Jagdish Prasad who is admittedly a karpardaz of the decree-holder and was looking after this case in the Court of the Munsif stated on oath before him that his master was prepared to accept the decretal amount, if it was paid by the judgment-debtors within two or three days. The learned District Judge

in dealing with the matter observed as follows : "There is nothing to show that he was authorized to compromise cases on behalf of his employer". The point which ought to have been considered by him was not whether the witness was authorized to compromise cases generally but whether he was authorized to compromise the present case on the terms referred to in his statement. As my learned brother has pointed out, the witness was admittedly looking after the case as a karpardaz of the decree-holder, and although he had made a categorical statement on oath to the effect that his master was prepared to take the money, it was never suggested to the Munsif on behalf of the decree-holder that the witness was not authorized to make the above statement.

In the affidavit filed in this Court it has been stated that talk of compromise was going on between the parties and if the statement made by Jagdish Prasad is considered along with that fact which stands uncontroverted, it lends support to the view put forward on behalf of the petitioner that Jagdish was only the mouthpiece of the decree-holder and the agreement between the parties had been complete. In any case all that the learned Judge should have done in the circumstances was either to have enquired himself or to have directed the Court below to enquire as to whether Jagdish had been authorized by the decree-holder to settle the matter with the judgment-debtor. Instead of taking this course which was the proper course open to him, he assumed that the witness had no authority to compromise and set aside the order of the Munsif. I am therefore inclined to agree with my learned brother and hold that the facts stated above are sufficient to attract the jurisdiction of this Court under S. 115, Civil P. C., and the order of the learned Judge ought to be vacated. As in our opinion there can be no doubt that the statement made by the karpardaz was in the special circumstances of the case tantamount to a statement by his master, it is unnecessary to direct any further enquiry into the matter and agree with my learned brother that the order of the Munsif should be upheld and that of the District Judge should be set aside. It may be stated here that we are informed that the petitioners are ready with the money which they had deposited in the Court of the Munsif but which they had to withdraw after the order of the District Judge.

B.D./D.S. *Order accordingly.*

A. I. R. 1937 Patna 495

FAZL ALI AND MADAN, JJ.

Firm Jiwan Ram Ramchandra — Appellant.

v.

Jagernath Sahu and *another* — Respondents.

Appeal No. 419 of 1934, Decided on 13th January 1937, from appellate decree of Dist. Judge, Bhagalpur, D/- 11th December 1933.

Limitation Act (1908), S. 14 — Defect of jurisdiction—Presentation in wrong Court—Plaintiff filing suit on last day of limitation does so at his own risk — Suit presented in wrong Court on last day of limitation—Court returning plaint for presentation to proper Court within certain time—O. 7, R. 10, Civil P. C., does not authorize Court returning plaint to grant such time — Plaintiffs not entitled to exclude time granted by Court for re-presentation — Rule of equity cannot help plaintiff, not being diligent in filing suit.

A plaintiff who files a suit on the very last date available to him under the law of limitation does so at his own risk, especially as the law does not make any provision for extension of time except in cases coming under Cl. 2, S. 14, Lim. Act. Where the Court has no jurisdiction to try a case, it has also no jurisdiction to pass an order to the prejudice of one of the parties. Besides, the rule of equity can be invoked only in aid of a party who has been diligent in pursuing his remedy and not of a person who having postponed the institution of his suit until the last date of limitation institutes it in a Court which has no jurisdiction to try it. [P 496 C 2]

Where therefore the plaintiff files a suit on the last day of limitation in a wrong Court and the Court later on returns the plaint for presentation to the proper Court directing the plaintiff to present it on or before a certain date, the Court returning the plaint is not authorized under O. 7, R. 10, Civil P. C., to grant the plaintiff any time for presenting it to the proper Court. The Court having no jurisdiction to entertain the suit, the plaintiff cannot take advantage of an order passed by the Court granting him time and he is not therefore entitled to exclude the period intervening between the date of return of the plaint and the date on or before which he is asked to file the plaint to the proper Court. The only period that plaintiff is entitled to exclude while computing the period of limitation is the period during which the plaint was pending in the Court returning the plaint : *17 C W N 515* ; *A I R 1917 Cal 794* and *A I R 1919 Cal 4, Rel. on* ; *6 I C 637, Dissent.* [P 496 C 1, 2]

A. B. Mukherjee and *K. P. Sukul* — for Appellant.

Hareshwar Prasad Sinha and *Rati Kant Choudhury* — for Respondents.

Fazl Ali, J. — This is an appeal by the plaintiff in a suit under O. 21, R. 63, which has been dismissed on the ground of limitation. It appears that the plaintiff filed his plaint before a Munsif at Bhagalpur on the last day of limitation which was 22nd May 1929. Subsequently it being discovered that the plaint should have been filed before the Munsif at Madhepura and the Munsif before whom it had been filed had no jurisdiction to entertain it, the latter, on 26th September 1931, ordered that plaint to be returned to the plaintiff for being presented to the proper Court on or before 9th October 1931. On 9th October 1931, the plaintiff presented the plaint not in the Court of the Munsif at Madhepura but in the Court of the Subordinate Judge of Bhagalpur valuing the suit at Rs. 3,062-10-0 instead of Rs. 300 at which it had been originally valued. The reason for changing the valuation was set out in a petition for the amendment of the plaint which was filed along with the plaint, it being stated therein that the valuation of Rs. 300 had been wrongly stated in the original plaint owing to a mistake on the part of the typist.

Both the Courts below held that in computing the period of limitation the plaintiff was entitled to exclude only the period during which the plaint was pending in the Court of the Munsif of Bhagalpur and that he was not entitled to exclude the period between 26th September 1931 and 9th October 1931. This view seems to me to be correct and is supported by several decisions of the Calcutta High Court : *see* 17 C W N 515,[1] 24 C L J 355[2] and 30 C L J 522.[3] As it is not disputed that the plaint had been filed before a Court which had no jurisdiction to entertain it, the plaintiff cannot take advantage of the order passed by that Court directing him to present the plaint on or before 9th October 1931. Besides, O. 7, R. 10, under which the Munsif purported to act when returning the plaint, did not authorize him to grant any time to the plaintiff for presenting it to the proper Court. As was pointed out in 24 C L J 355,[2] a plaintiff who files a suit on the very last date available to him under the law of limitation does so at his own risk, especially as the law does not make any provision for extension of time except in cases coming under Cl. (2), S. 14, Lim. Act.

The learned advocate for the appellant has, in support of his contention that the appellant was entitled to exclude the period between 26th September 1931 and 9th October 1931, referred us to the decision of the Calcutta High Court in 6 I C 637.[4] In that case it was held that when returning a plaint to be filed in the proper Court, the Court returning the plaint has a discretion to grant a reasonable time for the purpose, and if the plaintiff presents it to the proper Court within that time, his suit will not be barred by limitation, even though he may have filed the plaint in the wrong Court on the last day for limitation. This view was supported on the ground that the Code does not affect the power and duty of the Court in cases where no special rule exists, to act according to equity, justice and good conscience and the Court returning the plaint therefore ought not only to give reasonable time to the plaintiff for presenting the plaint to the proper Court but also decide what reasonable time is in each particular case. After much consideration however I am inclined to adopt the view set out in the other cases of the same High Court to which reference has already been made. It is to be remembered that where the Court has no jurisdiction to try a case, it has also no jurisdiction to pass an order to the prejudice of one of the parties. Besides, the rule of equity can be invoked only in aid of a party who has been diligent in pursuing his remedy and not of a person who having postponed the institution of his suit until the last date of limitation institutes it in a Court which has no jurisdiction to try it.

In my opinion the decision of the Courts below should be affirmed and the appeal must be dismissed with costs.

Madan, J.—I agree.

V.B.B./A.L. *Appeal dismissed.*

1. Hari Das Roy v. Sarat Chandra Dey, (1913) 17 C W N 515=18 I C 121.
2. Ganga Charan v. Akhil Chandra, A I R 1917 Cal 794=35 I C 595=24 C L J 355.
3. Ram Gopal Mandal v. Kamala Ranjan Roy, A I R 1919 Cal 4 = 53 I C 955 = 30 C L J 522.
4. Nibaran Chandra Banerjee v. S. C. Mukherjee, (1910) 6 I C 637.

A. I. R. 1937 Patna 497

MOHAMAD NOOR AND MADAN, JJ.

Kuar Koeri and *others* — Appellants.

v.

Emperor.

Criminal Appeal No. 29 of 1937, Decided on 14th April 1937, from decision of Addl. Sess. Judge, Shahabad, D/- 18th January 1937.

(a) Criminal Trial—Sentence—Extent of—Accused convicted under S. 302/149, Penal Code — Sentence should not be less than transportation for life.

Where an accused is convicted of an offence under S. 302/149, Penal Code, the Judge is bound under the law to sentence him to not less than transportation for life. [P 498 C 1]

(b) Criminal Trial — Identification — First informant himself need not identify all accused—It is sufficient if other witnesses identify accused sent up for trial.

It is not necessary that the first informant himself must have identified all the accused sent up for trial ; it is sufficient if they are identified by other witnesses as being present. [P 498 C 2]

(c) Criminal Trial—Sentence — Conviction of five persons under S. 302, Penal Code, for murder of two persons—Reasoning that five persons should not be sentenced to death for murder of two is illegal.

Where five persons were convicted under S. 302, Penal Code, for the murder of two men and the Judge did not sentence them to death on the ground that five persons should not be sentenced to death for the murder of two :

Held : that the reasoning was illegal.

[P 499 C 1]

S. Naqui Imam — for Appellants.

Asst. Govt. Advocate — for the Crown.

Madan, J.—The twenty-one appellants, who are Koeris and related to one another have been convicted under Ss. 302, 302/149, 148 and 324, Penal Code, and have been sentenced to various terms of imprisonment. Two other persons Muklal Koeri and Ramnandan Koeri were also put on trial but were acquitted.

The occurrence is said to have taken place at about 6 P. M. on 28th August last in village Andaur of the Shahabad District, when about 25 cattle belonging to the appellant Kuar Koeri and others grazed a part of plot 1 of the village which is a large plot recorded in survey as gair mazrua land of the landlords. Four bighas out of this plot are said to have been settled on bhaoli terms with Inder Singh, and this portion of the plot is said to have been grazed. On the western boundary of these four bighas is plot 2 which is the kasht land of the appellant Kuar Koeri. When the grazing began Inder and his cousin Raghubir are said to have interfered, and one of the cowherds in charge ran away to the village. Then a mob, including all the appellants, came to the spot, armed with lathis and spears and attacked Inder Singh and his companions. The result was that Inder Singh is said to have been killed by Kuar, Sukar and Parma, appellants, and his cousin Raghubir is said to have been killed by Birodhi and Kishun. All these persons have been convicted under S. 302, Penal Code, for committing these murders. Four other persons, Ganga Dayal Singh, Ram Sarup Lohar, Shankar Lohar and Peyar Lohar are also said to have been attacked and injured, and charges were framed against seven of the appellants under S. 324, Penal Code, in connexion with these assaults. All the appellants were also charged under S. 302/149 and S. 148, Penal Code, as being members of the mob, which after the assaults rescued the cattle and took them back to the village. Inder is said to have died immediately on being assaulted, while Raghubir was taken to the thana, four miles away where, he lodged a first information that evening. He, however, died that night in the hospital.

The prosecution examined 12 eye-witnesses who are said to have been present at the occurrence as well as one other person who is said to have arrived just afterwards. After the occurrence, the appellant Kuar Koeri was found to have been injured and to have gone to Sasaram hospital where he was examined on the day following the occurrence and lodged a counter-information. This information was to the effect that Inder, Asis Lohar and Peyar Lohar were cutting grass in his plot 2. He then remonstrated and was assaulted by Inder and others and fell unconscious. The other appellants were arrested or surrendered on various dates up to 24th September, and it was found that Sukar, Bilas and Sakaldip had also received injuries. The story of these persons is that they also came to the spot and were assaulted, while the other appellants said that they were not there. The appellants examined no witnesses in support of their version of the occurrence.

In sentencing the appellants the learned Sessions Judge divided them into three groups. The first group consists of five persons found to have taken part in the

two murders, and these persons have been convicted under Ss. 302 read with S. 34, I. P. C., and sentenced to transportation for life. The next group consists of seven persons who are not said to have taken part in the murders but to have joined in the assaults on the other four injured persons. These persons have been convicted under S. 324 in that connection, but have not been separately sentenced under that section. They have also been convicted under Ss. 302/149, I. P. C., but the learned Judge holding that their responsibility was less than that of the first group sentenced them to ten years' rigorous imprisonment.

The third group consists of nine persons not charged with any individual assault. Two of these persons are said to have been armed with spears and the rest with lathis. These persons have also been convicted under Ss. 302/149, I. P. C., but have been sentenced to only four years' rigorous imprisonment. The sentences on these two groups are obviously illegal as, if the learned Judge decided to convict them under Ss. 302/149 of the Code, he was bound under the law to sentence them to not less than transportation for life. For this reason the learned advocate for the appellants was informed that, if we thought it necessary we should at the time of the hearing issue, notice of enhancement of sentence on these two groups. The first question, therefore, that arises is whether or not the conviction of these persons under Ss. 302/149 was justified, as merely because two persons were killed in the riot it does not follow that murders were committed in pursuance of the common object of the unlawful assembly or that the members of the assembly must have known that they were likely to be committed in pursuance of their common object.

Now it is a grave feature of this case that during the occurrence two persons were killed and four others received no less than 26 injuries between them, several of them caused by sharp weapons and one of them being an injury to the neck which was described as dangerous at the time although in the end it turned out to be simple. It is also on the record that in the years 1920 and 1924 there were previous murderous occurrences between the same parties in the village. At the same time the attack on the two murdered men was confined to five persons who are said to have attacked them on the order of another member of the mob, inflicting a single incised wound each. Both men are said to have fallen down immediately, and it is not said that they were further assaulted after they had fallen. In the case of the two groups which we are now considering the injuries inflicted by them were on the whole of a simple nature, and I do not think that we are bound to conclude that all these persons when they joined the mob knew it to be likely that persons would be murdered. Taking the circumstances as a whole I think that the proper section to apply to the case of these persons is Ss. 326/149. In that case the sentences passed by the learned Judge cease to be illegal, and the question of enhancement will no longer arise.

In the circumstances the learned advocate for the appellants conceded that it would be difficult for him to contest that the account given of the occurrence by the prosecution witnesses, namely as having followed upon the grazing of cattle in the field, was a substantially true account, and the argument before us mainly confined to the question of identification. In considering this portion of the case we have been assisted by a chart to be found in the judgment of the learned Judge, which chart includes only names of persons identified by the various witnesses both before the police and at the Sessions trial. As proof of the presence of the individual appellants in the mob we find that thirteen of them are named in the first information, and that all these persons are identified by five or more persons with the exception of Sheopujan Koeri and Radha Koeri who have been identified by three witnesses only. The case of these persons appears to be identical with that of Mukhlal who has been acquitted, and as no reason has been suggested for the differentiation that has been made in their case, I would give them the benefit of the doubt. The remaining eight appellants are not named in the first information, but they have been identified as present by not less than six witnesses each. It does not follow that the first informant himself must have identified all the persons who were sent up for trial, and it must be remembered that in this case the first informant was gravely injured and died the same night. I am satisfied that in the case of all the appellants except Sheopujan

and Radha their presence in the mob has been sufficiently proved.

Turning to the individual assaults, I find that all the members of the first group, namely Kuar Koeri, Parma Koeri, Sukar Koeri, Birodhi Koeri and Kishun Koeri, have been identified by six or more witnesses as being the persons who caused the fatal injuries to Inder and Raghubir, as the result of a combined assault. The medical evidence shows that Inder received a piercing wound in the abdomen, four inches deep, which was the fatal injury, besides two other piercing injuries, one inch deep, in the neck and back, which were obviously of a dangerous character. Raghubir died as a result of two piercing injuries in the abdomen. The evidence against these five appellants is overwhelming and there can be no doubt that they intended to cause injuries such as they knew to be likely to cause death. I would therefore uphold the convictions of these persons under S. 302 read with S. 34, I. P. C. The reason given by the learned Sessions Judge for not passing the sentence of death, namely that five persons should not be sentenced to death for the murder of two persons, is not in accordance with law nor one that can be accepted by us. But the part taken by these five persons is said to have been limited to a single blow in each case, and it is not said that they continued the assault after the injured persons had fallen. Moreover two of these persons were themselves injured, one of them receiving no less than eight slight injuries, and the prosecution has not explained how these persons came to be injured. On the whole, therefore, I do not find it necessary to hold that the learned Judge exercised a wrong discretion in sentencing these five persons to the lesser penalty, namely transportation for life.

Out of the second group of the appellants five have been charged under S. 324, I. P. C., with the assault on Peyar Lohar. All these five persons have been identified by only one witness, but for some reason which has not been explained Doman only has been convicted for this assault and the other four have been acquitted. Again we see no reason for this differentiation and are not disposed to uphold the conviction of Doman for this assault on the evidence of one witness only. Three persons, Balli, Salik and Rama, have been similarly charged with the assault on Shankar Lohar. Rama has been acquitted as having been identified by only one witness, but Balli and Salik have been convicted on the evidence of two witnesses. In the case of these persons also we feel doubt as to the sufficiency of the identification and would acquit them under this charge. Five persons have been charged with the assault on Sarup, out of whom Doman has been identified by only one witness and has been acquitted. Three others, Dudhnath, Sarju and Rama, have been identified by not less than four witnesses each, and Bilas has been identified by three witnesses and his assault is also mentioned in the first information. I would uphold the convictions of these persons under S. 324, I. P. C. All the members of this group have been sentenced to ten years' rigorous imprisonment under Ss. 302/149, I. P. C., but in the case of Bilas, Dudhnath, Sarju and Rama I would reduce this sentence to seven years' rigorous imprisonment under Ss. 326/149 of the Code. The remaining members of this group, namely Doman, Balli and Salik, are found to have taken part in the riot armed with deadly weapons, and in their case I would reduce the sentence to five years' rigorous imprisonment under Sections 326/149, I. P. C.

The sentences of the third group, Ramjanam, Baliraj, Dukhit, Sheopati, Sakaldip, Beyas and Kumar, namely four years' rigorous imprisonment are upheld, but the section is altered to Ss. 326/149. Two of these persons, Ramjanam and Baliraj, have been proved to have been carrying spears, and their conviction under S. 148, I. P. C., is therefore justified, but the remaining persons of this group are said to have been armed with lathis, and their convictions must therefore be changed to S. 147, I. P. C. The result is that two of the appellants, Sheopujan Koeri and Radha Koeri are acquitted. The convictions and sentences of the appellants, Kuar, Parma, Sukar, Birodhi and Kishun, under Ss. 302/34 are upheld as well as their convictions under S. 148, I. P. C. The convictions of Bilas, Dudhnath, Sarju and Rama under Ss. 302/149 of the Code are altered to S. 326/149, and their sentences are reduced to seven years' rigorous imprisonment. Their convictions under Ss. 148 and 324 are upheld. The convictions of Doman, Balli and Salik are also changed from Ss. 302/149 to Ss. 326/149.

and their sentences are reduced to five years' rigorous imprisonment. The convictions of these persons under S. 148, I. P. C., are upheld, but their convictions under S. 324 are set aside. The appeals of the remaining appellants, Ramjanam, Baliraj, Dukhit, Sheopati, Sakaldip, Beyas and Kumar are dismissed with the exception that the convictions of all these persons, except Ramjanam and Baliraj, under S. 148 are altered to S. 147, I. P. C.

Mohamad Noor, J.—I agree.

S.C./D.S. *Order accordingly.*

A. I. R. 1937 Patna 500

MOHAMAD NOOR AND MADAN, JJ.

Emperor

v.

Jugal Kishore Teberawalla —

Respondent.

Government Appeal No. 2 of 1937, Decided on 3rd May 1937, against order of Magistrate, First Class, Dhanbad, D/- 3rd November 1936.

Boilers Act (1923), Ss. 2 and 23 — Word 'owner' includes agent or persons mentioned in S. 2—Absentee owner of boiler which was being used for his work comes within purview of S. 23.

The word 'owner' in S. 23, Boilers Act has been used in its dictionary meaning and also includes an agent or other persons mentioned in S. 2. The question whether an owner who is absent should or should not be prosecuted and if prosecuted how he should be dealt with is one which depends upon the facts and circumstances of each particular case. As a mere proposition of law an absentee owner of a boiler, which is being used for his work comes within the purview of S. 23 of Boilers Act. [P 501 C 2]

Assist. Govt. Advocate — for the Crown.

S. N. Sahay — for Respondent.

Mohamad Noor, J.—This is an appeal by the Government under S. 417, Criminal P. C., against an order of acquittal passed by the Magistrate of Dhanbad in a case under S. 23, Boilers Act (Act 5 of 1923). The case of the prosecution was that a boiler owned by the accused was being used on 20th June 1936, in a colliery belonging to him without the boiler having been certified under the provisions of the Act. The Inspector found it under steam on that day. The registration period of it had expired on 28th January 1935. The fact that the boiler was used on the day in question seems to have been denied on behalf of the accused inasmuch as a witness was examined to prove that the boiler was unfit for use from some time before that date. The accused when examined under S. 342, Criminal P. C., denied any knowledge of the affair and said that he was living in Calcutta. A witness was also examined to prove that the accused never lived in his Gareria colliery. The learned Magistrate without deciding the question whether or not the boiler was under steam on the day in question has acquitted the accused, holding that he did not come within the term "owner" as used in S. 23, Boilers Act. He has relied upon the definition of the word "owner" in S. 2 of the Act. S. 23 makes the owner of a boiler liable for its use without certificate. The definition of "owner" in S. 2 of the Act is inclusive, that is to say, it extends the dictionary meaning of the word and does not restrict it. It says that :

> Owner includes any person using a boiler as agent of the owner thereof and any person using a boiler which he has hired or obtained on loan from the owner thereof.

The definition does not mean that an owner of a boiler who uses it through his agent is not its owner for the purposes of the Act. The only effect of this inclusive definition is that an agent who uses a boiler owned by his principal and who under the ordinary meaning of the term is not its owner, comes under the Act. The learned Magistrate seems to have been of the opinion that because an agent is liable to be prosecuted for breach of the provisions of the Act, inasmuch as he comes within the term "owner" the owner to whom the boiler belongs is absolved from responsibility. This view is not supported by the definition. The learned advocate who appears on behalf of the respondent accused has contended that the word "owner" used in S. 23 means the owner who actually uses the boiler. I am unable to accept this contention. If it be given effect to, it will lead us to hold that the word "owner" in the section means the man who actually uses the boiler, either as owner, agent or hirer or the one who uses it having taken loan of it from the owner. In other words, the "owner" will mean the one who uses the boiler. If the Legislature had meant what the learned advocate contends for, there was no need of using the word "owner". It would have been enough to say that the one who uses the boiler without a certificate will be liable. Therefore I must

take it that the word "owner" in the section has been used in its dictionary meaning and also includes an agent or other persons mentioned in S. 2. The question whether an owner who is absent should or should not be prosecuted and if prosecuted how he should be dealt with is one which depends upon the facts and circumstances of each particular case. As a mere proposition of law I am clearly of opinion that an absentee owner of a boiler, which is being used for his work comes within the purview of S. 23, Boilers Act.

The next question is whether the accused should be convicted. The learned Magistrate has not come to any conclusion in respect of the conflicting version of the fact. As I have said, according to the only witness of the prosecution the boiler was under steam on the day in question, but according to the manager of the colliery (D. W. 1) it was unfit for use. The learned advocate for the appellant has contended that there is no evidence that the accused was the owner of the colliery of the boiler on that particular day. The boiler was registered in the name of a firm Baijnath Jugal Kishore and as is generally the case, it bears two names, those of the father and the son. Baijnath was the name of the father of the accused Jugal Kishore. It appears that the prosecution was first started against Baijnath, but later on it was discovered that he was dead and the prosecution proceeded in the name of the present accused. It does not appear on what date actually the father died. No doubt from the manner in which the case was defended, it does not appear that the accused denied the ownership of the colliery or the boiler on the date in question. But the point has not been made clear. Unfortunately the learned Magistrate did not strictly follow the procedure laid down in S. 242, Criminal P. C., for the trial of summons cases in spite of the fact that the attention of the Magistrates has been drawn to this more than once by this Court. When the Legislature has provided a particular procedure to be followed in a particular class of cases, it it incumbent that, that procedure should be strictly followed. The order-sheet shows that when the accused appeared on the first day he pleaded not guilty. But it does not appear whether the particulars of the offence were explained to him. Had this been done the answer would have made it clear whether the accused admitted or denied the ownership of the boiler and the colliery on the day in question. Then, when examined under S. 342, Criminal P. C., the accused was not asked about the ownership of the boiler and the colliery on that day. Strictly speaking, therefore, the necessary facts to justify a conviction are not on record.

The next question is whether we should order a re-trial. Now, assuming that the accused was the owner of the colliery and the boiler on the date in question and that the boiler was being used on his behalf, the responsibility of the accused is somewhat technical. It appears from the evidence of the defence witness 1, who is a mechanical and mining engineer and holds a first class certificate in mining, that he was in charge of the colliery since the previous May. Therefore, the accused if he was the owner of the colliery and the boiler, had placed a competent man in charge of them. The prosecution would have been well advised had they proceeded against the manager who has also been made liable under the Act. The learned Magistrate has pointed out that the acquittal of the accused would not in any way interfere with the prosecution of the manager. This being so, I think we should not order a re-trial. The object of this appeal was to have the points of law cleared up and that has been done. I would, therefore, dismiss this appeal.

Madan, J.—I agree.

T.M./D.S. *Appeal dismissed.*

A. I. R. 1937 Patna 501

MOHAMAD NOOR, J.

Chander Prasad — Petitioner.

v.

Emperor.

Criminal Revn. No. 57 of 1937, Decided on 12th March 1937, from order of Magistrate, Monghyr, D/- 19th January 1937.

(a) Bihar and Orissa Excise Act (2 of 1915), S. 74—Search can be made during day or night.

The search under S. 74, Bihar and Orissa Excise Act, can be made during day or night.

[P 502 C 1]

(b) Penal Code (1860), S. 353—Excise Sub-Inspector proceeding to search house of accused without recording reasons — Assault by accused—Sub-Inspector held could not be acting in exercise of his powers—Accused could not be convicted under S. 353.

The recording of reason before search is provided for both under the Criminal Procedure Code and under the Excise Act and is intended to protect the liberty of citizens and avoid useless and unjustified searches. If an officer before proceeding to search has to record his reason, he will have to apply his mind to the facts and the sufficiency of the information on the basis of which he wants to search. [P 502 C 2]

Where an Excise Sub-Inspector proceeded to search the house of the accused without recording reasons to do so as required by S. 74, Bihar and Orissa Excise Act and the accussd assaulted him :

Held : that the Sub-Inspector could not be said to be acting in the exercise of his powers and therefore the accused could not be convicted under S. 353, Penal Code : *A I R 1932 Pat 66, Rel. on.* [P 502 C 1, 2]

L. K. Chaudhuri — for Petitioner.

S. M. Gupta for *Asst. Govt. Advocate* — for the Crown.

Order.—The petitioner has been convicted under Ss. 353 and 379, I. P. C. Under the former he has been sentenced to two months' rigorous imprisonment and under the latter to one month's rigorous imprisonment. The sentences are to run consecutively. The convictions and sentences have been upheld in appeal. The prosecution case is that the petitioner was suspected by the Excise Sub-Inspector of selling illicit ganja. In order to detect this the Sub-Inspector sent two kahars with six marked pice and instructed them to buy illicit ganja from the petitioner. They did so and brought the ganja to the Sub-Inspector who was keeping a watch at some distance. Thereupon the Sub-Inspector came to the petitioner and wanted to search his house. The petitioner is then said to have snatched away the ganja and a torch from the Sub-Inspector and to have given him a push. It appears from the judgment of the learned appellate Court that it was argued before it that the search under the Excise Act could only be made in day and not at night and perhaps S. 74, Excise Act was referred to for that purpose. I do not find any such restriction in the section itself and there is no difference between day and night in this respect.

The conviction under S. 353, I. P. C., however, cannot be upheld, Under S. 74, Excise Act when an officer has reason to believe that an offence under certain sections of the Act has been committed and he wants to search, he has to record his reason for doing so. In this case it is admitted that no reason was recorded before an attempt to search was made. In the circumstances the Sub-Inspector could not be said to be acting in the exercise of his powers. S. 99 is also not applicable as the Sub-Inspector did not act with due care and caution. The recording of reason before search is provided for both under the Criminal Procedure and under the Excise Act and is intended to protect the liberty of citizens and avoid useless and unjustified searches. If an officer before proceeding to search has to record his reason he will have to apply his mind to the facts and the sufficiency of the information on the basis of which he wants to search. This was the view taken by Dhavle, J. in 10 Patna 821[1] and though Macpherson, J. left the question open he did not dissent from it. I, therefore, set aside the conviction and sentence passed under S. 353, I. P. C. The conviction under S. 379, I. P. C., is upheld, but in lieu of the imprisonment of one month I sentence the petitioner to the term of imprisonment already undergone by him and in addition sentence him to pay a fine of Rs. 75; and in default of payment of the fine to suffer two weeks' rigorous imprisonment.

P.R./D.S. *Order accordingly.*

1. Gopi Mahto v. Emperor, A I R 1932 Pat 66=136 I C 60=1932 Cr C 99=10 Pat 821=33 Cr L J 233=13 P L T 62.

A. I. R. 1937 Patna 502

MOHAMAD NOOR AND MADAN, JJ.

Lakhan Sahu and *others* — Defendants — Appellants.

v.

Shyam Sundar Chakraverti and *another*, Plaintiffs and *others*, Defendants — Respondents.

Appeal No. 1391 of 1932, Decided on 14th April 1937, from appellate decree of Dist. Judge, Muzaffarpur, D/- 17th August 1932.

Hindu Law—Widow—Difference between money taken for necessities of widow and money taken for permissible expenses—In former case each transaction must be dealt separately—Creditor has only to prove necessity or a bona fide enquiry as to its existence in former case, in latter, subsequent conduct and expenditure of limited owner are to be considered.

There is always a distinction between the money taken for the necessities of a widow, which are more or less of a compulsory nature and money taken for permissible expenses. In the former case each transaction must be dealt with separately. The creditor has only to prove necessity or a bona fide enquiry about its existence.

But in the latter, the subsequent conduct and expenditure of the limited owner may also have to be taken into consideration. The entire position of the estate must come under review. Each transaction cannot be dealt with separately. No doubt, this is hard upon the creditor, but it cannot be helped. He enters into transactions with a limited owner and advances money for limited permissible purpose and must take the risk of it.
[P 505 C 1]

Dr. P. K. Sen and *S. K. Mitra* — for Appellants.

K. P. Jayaswal, *S. N. Dutt*, *G. P. Das*, *G. Mohammad* and *D. Lal* — for Respondents.

Mohamad Noor, J.—This is an appeal against a decree of the District Judge of Muzaffarpur, confirming that of the Subordinate Judge of that place and has arisen out of a suit instituted by the plaintiff-respondents for setting aside certain alienations by a Hindu widow. The plaintiffs are the reversionary heirs of one Ganga Prasad Chaudhri who as it now appears, died some time in 1871, though the date of his death was represented by the parties in the trial Court as 1891. The alienation impugned by the plaintiffs is principally an usufructuary mortgage executed by the widow of Ganga Prasad in 1903 in favour of the predecessor-in-interest of the defendants first party for a sum of Rs. 2,000 which, as mentioned in the deed, was raised for building a temple for the benefit of the soul of her husband. According to the plaintiffs the money was not used for building the temple which according to them had already been completed long before the mortgage. The deed was also characterised as invalid for various reasons. It further appears that after executing this usufructuary mortgage the lady sold the right of redemption in the year 1910. The purchaser Dasrath Chaudhuri in his turn sold it in 1913 (1916 in the judgment of the learned District Judge is a mistake) to one Narayan Tewary. The plaintiffs characterised these transactions also as fraudulent and ineffective and wanted to avoid them as well making the heirs of Dasrath Chaudhuri and Narayan Tewary, defendants in the suit. The sales by the lady in favour of Dasrath Chaudhuri in the year 1910 and by the latter in favour of Narayan Tewary in the year 1913 were held to be invalid by the trial Court, and their representatives did not prefer any appeal. So far as that matter is concerned, the decree of the trial Court is final.

We are, therefore, concerned with the defence of the defendants first party who are the representatives of the mortgagee. Their defence was that the money was in fact spent on the temple which was built in compliance with the wish of the lady's husband Ganga Prasad Chaudhury and that the transaction was valid. Three questions arose for the determination of the Court: (1) whether the mortgage was genuine and whether the money raised by it was in fact spent on construction of the temple; (2) whether the alienation was reasonable under the circumstances of the case; and (3) was the temple constructed for the benefit of the soul of the deceased Ganga Prasad Chaudhuri or was it a device to deprive the reversioners of their inheritance.

The trial Court decided practically all the three points in favour of the plaintiffs. It came to the conclusion that the temple had been built long before the mortgage in question and that it was not a real and genuine pious act. It, therefore, gave the plaintiffs a decree with mesne profits. The mortgagee defendants appealed and though the learned District Judge has disagreed with the trial Court on some points and has come to the conclusion that the money was in fact spent for building the temple which was not completed before the time of the transaction, he has dismissed the appeal as he held that in building the temple the lady was not actuated by a pious desire to benefit the soul of her husband but that it a was device to make provision for her sister's son, Mahabir Chaudhuri, and taking into consideration the properties which about a year later (in September 1904) she dedicated for the purpose of the temple and of which this Mahabir Chaudhuri was appointed a shebait, he has held that the alienation for the temple was not reasonable. The mortgagees have preferred this second appeal.

When this appeal was first heard by us it was pointed out on behalf of the respondents that certain conclusions of the learned District Judge were based upon his misreading of the evidence. For instance, while dealing with the fact whether or not the temple was under construction in the year 1903 when the mortgage in question was executed, the learned Judge relied upon the evidence of the P. W. 2, Bansi Chaudhury which according to him was to the effect that the

Pran Pratishtha (installation of the idol in the temple) was performed in the year 1312 (1905). The learned advocate for the respondents urged that the learned District Judge had misquoted the evidence of the witness and that in fact the witness had stated 1302 (1895). Then the deed by which the lady dedicated properties to the temple was not on the record though the Courts below relied upon the dedication. We, therefore, decided to look into the evidence ourselves and directed the preparation of a paper book and also ordered the plaintiff-respondents to produce the original or an authenticated copy of the Samarpannama whereby the lady dedicated some property for the use of the temple. Now we have gone through the whole evidence carefully and have looked into the Samarpannama. One important discovery made by us is that the parties in order to serve their own purposes put down the date of the death of Ganga Prasad Chaudhuri as 1891. The Samarpannama makes it absolutely clear that he died in the year 1871, twenty years before the date given by the parties.

Now the question of law which really arises in this case is simple and is not disputed by the plaintiffs. They concede that it is permissible for a Hindu widow in possession of her husband's estate to alienate a small portion of his property for the benefit of his soul and such a transaction is binding upon his heirs. The alienation should not, however, be a device for transferring property and thereby depriving the heirs of their legal rights. As I have said the learned District Judge has held that as a matter of fact the transaction in question did not come within the limits which the Hindu law has imposed upon the right of alienation of a Hindu widow for purposes which are not essential.

Now the Samarpannama recites that Ganga Prasad Chaudhuri had a desire to build a temple and dedicate properties for its use, as he had no male issue but he died without carrying out his object. On account of the fact that he was largely indebted, the lady was unable to raise funds for the construction of the temple and was unable to fulfil the desire of her husband for a period of about 33 years, but as the debts were paid up by the sale of properties and money could be raised, she started to build the temple, finished it and proceeded to dedicate the properties for the use of the temple. It has been urged by the respondents with some amount of force that the story in the Samarpannama about the desire of the husband to build a temple and dedicate property to it is not correct. It appears from this deed that Ganga Prasad Chaudhuri had two daughters who survived him and it is highly unlikely that he would think of making over his properties to a temple and thus deprive his daughters from inheriting them. The learned District Judge has disbelieved the story that the temple was built according to the direction of Ganga Prasad Chaudhuri, because he thought that it was constructed long after his death. Before him, the date of his death was stated to be 1891 and he considered 12 to 13 years as too long a period to elapse, but as a matter of fact it was not only 13 years but 33 years, and for the reason given by the learned District Judge and that urged by the respondents, I am also of opinion that the story about the deceased having asked his wife to construct a temple does not seem to be correct.

The next point which arose in the case was whether in fact the money raised by this mortgage was spent for building the temple. I have said that in this matter the two Courts below have come to two different conclusions. The learned Subordinate Judge held that the money was not spent on the temple, but the learned District Judge has come to a contrary conclusion. No doubt, one of the grounds on which he came to this conclusion was based on mistake in reading the date of the Pran Pratishtha mentioned by P. W. 2 as 1312. We have read the evidence ourselves and it is clear from the context and also from the figure as written in the original deposition that the year is really 1302. However, this is the evidence of the plaintiffs' witness and we are not prepared to differ from the findings of the learned District Judge in this respect. We accept his finding that the money was in fact spent for the construction of the temple. The temple had cost Rs. 8,000 and a portion of the costs was met from an earlier sale of another village Gouspur Hijra. Now the question is whether this expenditure is such as the Hindu law allows and is binding upon the reversioners. I have said that the learned District Judge in deciding the bona fides of the lady and the reasonableness of the

expenditure has taken into consideration the total expenditure on the temple, that is to say what was spent upon it before this particular mortgage and what was spent on it after the mortgage. Dr. Sen, the learned advocate for the appellants, has contended that the mortgage should be considered on its own merits and that the learned Judge has erred in taking into consideration the subsequent dedication of the property by the widow which the mortgagee could not have anticipated. He further contended that at any rate under the circumstances of the case the plaintiff should not be allowed to question the mortgage as he ratified the dedication and became a shebait of the temple. I am unable to accept this contention. There is always a distinction between the money taken for the necessities of a widow, which are more or less of a compulsory nature and money taken for permissible expenses. In the former case each transaction must be dealt with separately. The creditor has only to prove necessity or a bona fide inquiry about its existence. But in the latter, the subsequent conduct and expenditure of the limited owner may also have to be taken into consideration. The entire position of the estate must come under review. Each transaction cannot be dealt with separately. No doubt, this is hard upon the creditor, but it cannot be helped. He enters into transactions with a limited owner and adances money for limited permissible purpose and must take the risk of it. In this particular case, the defendant advanced money for the purpose of the temple. He had not only to see that the money was going to be used for the temple but had to see how much money had already been spent upon it and how much more was still required for not only for the completion of the temple but also for making provisions for its maintenance. Then when the intention of the lady in erecting the temple is an important factor it cannot be said that her subsequent conduct should be ignored.

The learned District Judge has used the subsequent dedication of the property not only to show that the expenditure upon the temple was disproportionate but also in order to decide what was the governing idea which prompted the lady to construct the temple. A man's intention can only be judged by surrounding circumstances. The earlier and the subsequent transactions cannot therefore be ignored. Taking all the circumstances into consideration the learned District Judge has come to a finding of fact that in building this temple the lady was not actuated by a desire to benefit the soul of her husband but wanted to make provision for her nephew. He has not erred in law and the finding is binding on us.

The learned advocate for the appellant has however contended that the plaintiff is debarred from questioning the bona fides of the lady in constructing the temple as subsequent to her death he ratified the dedication and in fact joined with Mahabir Chaudhuri and became a co-shebait with him. What really happened is this. It is clear from the various documents which have been placed before us that when the lady died, her entire property and all her affairs were in possession of Mahabir Chaudhuri, her nephew. The plaintiff's evidence is, and I see no reason to disbelieve him, that he was not allowed to take possession of even that portion of the property which was left undisposed of by her. On the Ekadasi day, that is the day on which her sradh was to be performed, two documents came into existence. One was a Samarpannama by which the plaintiff made over a portion of the property which came to him by inheritance to the deity in return of which Mahabir Chaudhuri made him a co-shebait. By the second deed he made over certain properties independently to Mahabir Chaudhuri and his relations. These transactions obviously show that the plaintiff was in a helpless condition and had no option but to enter into these transactions, otherwise there seems to be no reason why he should have transferred a portion of the property inherited by him to the relations of the lady. There is not one word in the documents (namely Exs. A and B) which have been relied upon by the defendant to show that the plaintiff ever admitted that the expenditure on the temple was legal or binding upon him. He found himself faced with the position that a temple had been built and property dedicated. He could not touch the temple.

The only option which he had was to take steps to have the dedication set aside. That was expensive. He wanted to make a good use of a bad bargain and thought that if by transferring a small property he could make himself a co-shebait he would be benefiting himself. In fact he also ratified an earlier transaction,

that is the sale of Gouspur Hijra to one Baldeo Prasad. His evidence is that he got Rs. 4,000 cash from him in order to ratify that transaction. Because a portion of the alienation for the purpose of the temple has under certain circumstances been accepted by the plaintiff, it does not follow that the expenditure was either legal or justified or in any way binding upon him. On the whole, the suit has been rightly decreed. As however, we do not find that the plaintiffs asked for surrender of possession and the defendants refused it, we think that the plaintiffs should not be allowed mesne profits for the period prior to the institution of the suit. The decree of the trial Court will be modified accordingly, and with this modification the appeal is dismissed with costs.

Madan, J.—I agree.

P.R./D.S. *Appeal dismissed.*

A. I. R. 1937 Patna 506

FAZL ALI AND DHAVLE, JJ.

Miss G. B. Solano and *others* —
Defendants — Appellants.

v.

Maharaja Kumari Umeshwari Koer —
Plaintiff — Respondent.

Appeals Nos. 102 and 103 of 1934, Decided on 4th May 1937, from original decrees of Sub.Judge, Gaya, D/- 8th May 1933.

(a) Bihar Tenancy Act (8 of 1934), S. 26-N —S. 26-N has retrospective effect—It applies even to suits pending at commencement of Act.

The language of S. 26-N, Bihar Tenancy Act, is plain and it was intended to be retrospective in operation, the object of the Legislature being to quiet titles which are more than ten years old. This provision applies even to holdings which at the date of the commencement of the Act are in question in a pending suit : *A I R 1936 P C 49, Foll.* [P 507 C 2]

(b) Bihar Tenancy Act (8 of 1934), S. 22 (2) —Section applies to occupancy holdings transferable by custom—It also applies to non-transferable holdings if other co-sharers consent to such transfer or waive their right to object.

Section 22 (2), Bihar Tenancy Act, refers only to an occupancy holding which is transferable by custom and it does not apply to a non-transferable holding. It would however apply to a non-transferable holding also if the co-sharer landlord or permanent tenure-holder to whom the holding is transferred, can prove that the holding has been transferred to him with the consent of the other co-sharers or that the latter have waived their right to object to the transfer either expressly or by doing something which may amount to a recognition of the transfer. [P 508 C 1, 2]

(c) Bihar Tenancy Act (8 of 1934), Ss. 22 (2) and 26-A—S. 26-A and other sections connected with it apply to cases under S. 22 (2) —Act does not intend to make position of co-sharer landlord acquiring raiyati holding worse than third person acquiring such holding.

The fact that in cases covered by S. 22 (2), Bihar Tenancy Act the occupancy right ceases to exist upon transfer by operation of law or by virtue of some specific provision in the Act will not prevent S. 26-A of the Act and the other sections connected with it from being applicable to such a case, because the tenant who sells the holding purports to transfer it together with the occupancy right in it. Besides there is nothing in the Act to suggest that the Legislature could have intended that the position of the co-sharer landlord when he acquires a raiyati holding should be worse than that of a third person acquiring such a holding. [P 509 C 1]

(d) Bihar Tenancy Act (8 of 1934), S. 22 (2) —Word 'rent' means rent of original occupancy holding and not rent payable in respect of tenancies created by purchasing co-sharer —Purchasing co-sharer realizing higher rent than that paid by original tenant—Other co-sharers are not entitled to realize their share of such rent.

The word 'rent' used in sub-s. (2), S. 22, Bihar Tenancy Act means the rent which was payable in respect of the holding when it was transferred. The words "in respect of the holding" do not occur in sub-s. (2) but they do occur immediately after the words "payable to them" in the illustration and this indicates clearly that the rent referred to is the rent of the original occupancy holding and not the rent payable in respect of the tenancies that might be created afterwards by the purchasing co-sharer. If the purchasing co-sharer sublets the land to a third person and realizes from him him a higher rent than that paid by the original tenant the other co-sharers are not entitled under this section to realize from the purchasing co-sharer their share of such rent. [P 510 C 2 ; P 511 C 2]

Sultan Ahmed and *D. N. Varma* —
for Appellants.

P. C. Manuk, *A. K. Mitra* and *S. N. Ray* — for Respondent.

Fazl Ali, J.—These appeals are directed against the decrees passed by the Subordinate Judge of Gaya in Suits Nos. 46 and 47 of 1929. Suit No. 46 relates to 1752 bighas of land in mahal Balkhara Tauzi No. 299 in the district of Gaya which were formerly the occupancy kasht of one Mr. G. L. Solano but were transferred by the latter to the defendants by a registered sale deed dated 28th February 1909. Suit No. 47 relates to 819 acres (or about 1300 bighas) of kasht lands which are situated in the same mahal and were purchased by the defendants between 1893 and 1921 at various auction sales held in execution of either rent or money decrees obtained by them against certain tenants

who held them in occupancy right. The plaintiff who holds a six annas interest in mokarrari right in mahal Belkhara claims that she is entitled to joint possession of these lands with the defendants who hold the remaining ten annas in mokarrari right. The plaintiff further claims to be entitled to recover from the defendants her share of the profits made by the latter from the aforesaid lands from the beginning of the year 1333 Fs. to 1336 Fs. and in the alternative to recover fair and equitable rent for the period. For the purpose of estimating the amount of profits or rent chargeable in respect of the disputed lands, the plaintiff has attached to the plaint a statement showing in detail the rents which are actually received by the defendants from a number of tenants who have been inducted on the lands by them after their purchase and her case is that she is entitled to a six annas share in the total sum collected by the defendants during the period in suit.

The defendants' case in the Court below was that the disputed lands were transferable by custom; that even if they were not transferable, their transfer had been acquiesced in and recognized in various ways by the plaintiff's predecessor-in-interest or his representative and that accordingly they were entitled to hold the lands under S. 22 (2), Ben. Ten. Act. They also pleaded limitation and estoppel and contended that the plaintiff was entitled only to a share of the original rent which used to be paid by the occupancy tenants before the lands were transferred to them (the defendants). It may be noted here that apart from being mokarraridars of a ten annas interest in mahal Balkhara the defendants were also in possession of the six annas interest of the plaintiff from 1887 to 1925 by virtue of several thika leases granted to them successively by the plaintiff's predecessor-in-interest. The defendants had also in their turn granted a sub-lease of the whole 16-annas interest to various persons from time to time and one of the points which was raised on their behalf in the Court below was that their right to hold the land under S. 22 (2), Ben. Ten. Act, had been recognized by these sub-lessees. This plea, however, as well as almost all the other principal pleas raised on behalf of the defendants have been rejected by the Subordinate Judge, who has held that on payment of six-sixteenths of the present value of the disputed lands to the defendants the plaintiff is entitled to joint possession of those lands with them and also to recover her share of the rents on which those lands have been settled with the present tenants. As to mesne profits, he has held that the plaintiff's claim for the year 1333 is barred but she is entitled to recover her share in the profits for the years 1334-1336 calculated at the rates mentioned in the schedule attached to the plaint.

The defendants now challenge the decrees passed by the Subordinate Judge by means of these appeals and the plaintiff has filed cross-objections. The main points taken in the memorandum of cross-objections are (1) that the claim for mesne profits for the year 1333 is not barred and (2) that the learned Subordinate Judge was wrong in passing a conditional decree under which the plaintiff cannot recover joint possession, unless she pays to the defendants 6/16ths of the present value of the disputed lands. It may be mentioned here that since the decision of these suits by the learned Subordinate Judge the provincial legislature has passed a new Tenancy Act, and it has not been disputed before us that if the interpretation put by the appellants on S. 26-N of that Act is correct, it will not be necessary to deal with most of the points which were raised before the Subordinate Judge and which have been discussed by him at great length in his elaborate judgment. This section provides that :

> Every person claiming an interest as landlord in any holding or portion thereof shall be deemed to have given his consent to every transfer of such holding or portion by sale, exchange, gift or will made before 21st day of January 1923.

The language of this section is plain, and there can be no doubt that it was intended to be retrospective in operation, the object of the Legislature being to quiet titles which are more than 10 years old. It is also now beyond controversy that this provision applies even to holdings which at the date of the commencement of the Act are in question in a pending suit. This view has been expressed in the clearest possible terms by the Judicial Committee of the Privy Council in 17 P L T 25[1] where their Lordships observe as follows :

1. K. C. Mukerjee v. Mt. Ramratan Kuer, A I R 1936 P C 49=160 I C 105=15 Pat 263=63 I A 47=17 P L T 25 (P C).

The Act contains no saving clause modifying the effect of Ss. 26-N and 26-O. In these circumstances it appears to their Lordships that unless some saving can be implied as regards occupancy holdings which at the date of the commencement of the Act are in question in a pending suit, S. 26-N must be applied to the present case and the plaintiff's appeal must fail in limine. Their Lordships are of opinion that no such saving can be implied. S. 26-N is not a provision to the effect that no action shall lie in certain circumstances, nor has it any reference directly to litigation . . . The object of this section can only be to quiet titles which are more than 10 years old and to ensure that if during those 10 years the transferee has not been ejected he shall have the right to remain on the land. Within this class the legislature has not thought fit to discriminate against tenants whose right is under challenge in a suit, a course which it may well have regarded as invidious or unnecessary. As substantive rights of landlords and their accrued causes of action were to be abrogated, respect for pending suits over old transfers cannot be assumed.

Now, the principal questions raised before us on behalf of the respondents were these: (1) whether S. 26-N was intended to apply to transfers made by an occupancy tenant to a co-sharer landlord and (2) whether the provision made in that section can override certain special clauses in the leases granted by the plaintiff's predecessor to the defendants in respect of their six annas mokarrari interest by which the thikadars were expressly prohibited from permitting any new rights which were not in existence at the date of the lease to be created either directly or indirectly. Before dealing with the first question I wish to refer to S. 22 (2), Ben. Ten. Act, which is applicable to Bihar and which has been reproduced verbatim in the new Bihar Tenancy Act. This sub-section runs as follows :

If the occupancy right in land is transferred to a person jointly interested in the land as proprietor or permanent tenure holder, he shall be entitled to hold the land subject to the payment to his co-proprietors or joint permanent tenure holders of the shares of the rent which may be from time to time payable to them, and if such transferee sublets the land to a third person, such third person shall be deemed to be a tenure holder or a raiyat, as the case may be in respect of the land.

It has been held in a series of cases that this provision refers only to an occupancy holding which is transferable by custom and that it does not apply to a non-transferable holding. There can be no doubt however that it would apply to a non-transferable holding also if the cosharer landlord or permanent tenure holder to whom the holding is transferred can prove that the holding has been transferred to him with the consent of the other co-sharers or that the latter have waived their right to object to the transfer either expressly or by doing something which may amount to a recognition of the transfer.

Now, the words of S. 26-N which I have quoted already are very general and there is nothing in the section to restrict its application to those cases only where the holding is transferred to a stranger and not a co-sharer landlord. As however it has been rather strenuously contended on behalf of the respondent that such a view is opposed to the scheme of the Act, it becomes necessary to examine the contention. The argument which is put forward on behalf of the respondents in this connexion may be summarized thus: The Bihar Legislature in reproducing S. 22 (2) in the new Act must be taken to have known the settled law on the subject and therefore it may be supposed that the position of the co-sharer landlords is the same in the new Act as it was under the Bengal Tenancy Act after the amendments of 1907. Under the latter Act, S. 22 (2) could be of no avail to the co-sharer landlord, if the holding was not transferable and inasmuch as the distinction between transferable and non-transferable holdings is maintained by the new Act and there is no clear provision in S. 22 (2) of the new Act to the effect that it must be read as subject to Ss. 26-A to 26-N, it must be held that these sections were intended to affect only a transfer between tenants inter se or between a tenant and a stranger and not a transfer between a tenant and a co-sharer landlord or mokarraridar. The effect of amending S. 22 in 1907 was that an occupancy right ceased to exist when the occupancy holding was acquired by: (1) the sole landlord or the entire body of landlords; (2) the co-sharer landlord; and (3) the ijaradar. In the first case it merged in the superior right of the landlord and in the third case the acquisition of such a right was expressly prohibited. As to the second case the effect of a series of decisions of this Court as well as of the Calcutta High Court is that upon a co-proprietor purchasing an occupancy holding, the holding does not cease to exist but the right of occupancy does. Thus a person cannot be a co-proprietor as well as an occupancy raiyat and cannot avail himself of the provisions of Ss. 26-A to 26-N which, as the language of S. 26-A shows, can apply only

when an occupancy holding is transferred together with the occupancy right.

This argument may appear to be a plausible one, but it will not bear examination. It is true that S. 26-A provides that S. 26-B and the other connected sections which follow it, shall apply when the occupancy holding is transferred together with the occupancy rights therein. The language of S. 22 (2) however also indicates that it applies only when the occupancy right in the land is transferred to a co-sharer landlord or permanent tenure holder. The fact that in cases covered by S. 22 (2) the occupancy right ceases to exist upon transfer by operation of law or by virtue of some specific provision in the Act will not prevent S. 26-A and the other sections connected with it from being applicable to such a case, because the tenant who sells the holding purports to transfer it together with the occupancy right in it. Besides there is nothing in the Act to suggest that the Legislature could have intended that the position of the co-sharer landlord when he acquires a raiyati holding should be worse than that of a third person acquiring such a holding. In my opinion therefore the defendants are entitled to the benefit of S. 26-N and they must be held to have the right to hold the disputed land on the terms stated in S. 22 (2) of the Tenancy Act. As I have said, the main object of the section was to prevent titles which were acquired long before the passing of the Act from being assailed and it will be contrary to the spirit of the Act to allow the plaintiff to assail the disputed transfers most of which were made as long ago as between 1893 and 1909.

The next point to be considered is whether the provisions of S. 26-N can override the special provisions made in the various leases granted to the defendants in respect of the plaintiff's six-annas mokarrari interest by which they were prohibited from permitting new rights to be created either directly or indirectly. It appears that between 1887 and 1916 no less than five leases were executed by the plaintiff's predecessor-in-interest in favour of the defendants, these leases being Exs. 1, 1-a, 1-b, 4 and 1-c. The first four leases provide in clear terms that the lessee, his heirs, assigns or representatives shall not either directly or indirectly permit any new rights or tenure which were not in existence at the date of the lease to be created against the lessor and that if he or they shall create any new rights or tenures, the same shall be invalid and of no effect against the latter. In the last lease (Ex. 1-c) also which was granted to the defendant in 1916 the above provision is reproduced but it is made subject to the qualification that the lessees might permit new rights to be created with the consent of the lessor, such consent not to be withheld in a proper case. These provisions are clear enough and if the present suits had to be decided with reference to them alone, there was much to be said for the plaintiff's contention. But here again we have to consider the effect of S. 26-N under which the plaintiff must be deemed to have given her consent to all the disputed transfers. It cannot be disputed that even if in spite of there being a provision in the leases to the effect that the defendants shall not permit any new right to be created, the defendants did create any right, those rights could not be questioned by the plaintiff if she had given her consent to their creation. It is equally plain to me that the same result will follow if under the statute she must be deemed to have consented to the creation of the new right. In my opinion, therefore, whatever the position of the parties may have been prior to the new Bihar Tenancy Act, there can be no doubt that by reason of this Act the defendants must be held to have acquired the right to hold the disputed land under S. 22 (2) of the Tenancy Act.

It appears that during the cadastral survey proceedings of the year 1914 a dispute arose between the parties as to the bulk of the lands which are the subject matter of the present litigation. While on the one hand the defendants claimed them as their raiyati jote, the plaintiff's predecessor-in-interest contended, on the other hand, that they were to be treated as bakasht of the 16 annas landlords. The survey authorities ultimately held that the defendants had the right to hold those lands which are the subject matter of Suit No. 46 under S. 22 (2) and prepared a separate khewat in their name. As to the bulk of the lands of Suit No. 47, they held that the defendants had a non-occupancy right in them. So far as the last entry is concerned both parties are agreed that it was wrong in law and that it was probably based upon a misreading of certain decisions of the Calcutta High Court according to which a thikadar might

acquire a non-occupancy right in land purchased by him during the subsistence of his lease. However that may be, it is clear that neither the lands of Suit No. 46 nor those of Suit No. 47 were recorded as bakasht and the plaintiff and her predecessor-in-interest did nothing between 1914 when the Record of Rights was prepared and 1929 when the present suits were brought to assail the entries in the Record of Rights. It is true that the defendants had been in possession of the entire mahal until 1925 but this did not prevent the plaintiff from disputing their claim in 1914. Besides one would have expected that when in 1916 the plaintiff's father granted a fresh lease to the defendants, the parties would have come to some understanding about these lands. In fact the defendants have led evidence to show that the lease was given to them after careful examination of the village papers and on the footing that they had a right to hold the lands according to the entries made in the survey papers; and the plaintiff, though she does not admit this fact has given no positive evidence to prove that the status attributed to the defendants in regard to the disputed land in the survey papers was brought into question on that occasion. I need not, however, pursue the matter as I have already held that S. 26-N is a complete answer to the plaintiff's case.

It was argued before us that the lands of Suit No. 47 stand on a different footing from those which are the subject matter of Suit No. 46. As I have already stated these lands were differently recorded in the Record of Rights and it may also be mentioned that only a small proportion of these lands is proved to have been purchased by the defendants in execution of rent decrees and with regard to the remainder, it is not clear whether they were purchased in execution of rent or money decrees. It seems, however, that as S. 22 (2) applies as well to voluntary transfers as to transfers made in execution sales, we cannot properly discriminate between these lands. The mere fact that the entries in the Record of Rights with regard to the lands of the two suits are not the same is not at all material, because it is both parties' case that description of these lands as non-occupancy raiyati cannot be correct in law. The next important question relates to the amount of rent which the plaintiff is entitled to receive from the defendants. That this is in fact the real question in the present litigation was made clear to us by the learned counsel for the defendants in the course of his argument, it being also stated by him that he did not press his case for the joint possession of the disputed lands. Now, it is common ground that the defendants have, since their purchases, inducted a number of tenants on the lands and are realizing from them in the shape of rent higher sums than used to be paid by the occupancy tenants from whom the purchases were made. The plaintiff's case is that she is entitled to a six annas share in the rent realized by the defendants from the sub-lessees, whereas the defendants' case is that the plaintiff is entitled to a six-sixteenths share of the sum which used to be paid as rent before the disputed lands were purchased from the original tenants.

Now the decision of the question as to which of these contentions is correct depends on the proper construction of the words :

> subject to the payment to his co-proprietors or joint permanent tenure-holders of the sharers of the rent which may be from time to time payable to them,

occurring in S. 22 (2). In my opinion if sub-s. (2) is read along with the illustration which follows it, it will be tolerably clear that the word "rent" used in this sub-section means the rent which was payable in respect of the holding when it was transferred. The words "in respect of the holding" do not occur in the sub-s. (2) but they do occur immediately after the words "payable to them" in the illustration and this seems to me to indicate clearly that the rent referred to is the rent of the original occupancy holding and not the rent payable in respect of the tenancies that might be created afterwards by the purchasing co-sharer. This view is in consonance with the object of the section which was to place the purchasing co-sharer more or less on the same footing as a third person acquiring an occupancy holding by transfer. It is clear that if a third person acquires an occupancy holding by transfer and settles the lands comprised in it with sub-tenants at a higher rent than was payable by the previous tenant to the landlord, the landlord will be entitled to realize only the rent which was formerly payable by the occupancy tenant for the holding and

not the rent which is payable by the sub-tenants to the new transferee of the occupancy holding. If that is so, I do not see why the co-sharer should be in a worse position. It is for the co-sharer landlord who purchases the holding to decide whether he should cultivate it himself or settle it with tenants. The words in the first part of S. 22 (2) are general and there is nothing in the sub-section to suggest that where a co-sharer purchases a holding, the rent which the other co-sharers are entitled to get shall vary according to whether the purchasing co-sharer cultivates the lands himself or lets it out to other tenants. The latter part of the section which deals with the cases where the land is sublet to a third person, merely provides that the status of such third person would be that of a raiyat and does not provide that the other co-sharer landlords would be entitled to share the rent which may be payable by the sub-lessee. The view which I have expressed seems to have been taken also by the settlement authorities in the present case and the defendants have referred to this fact in para. 20 of their written statement. Counsel for the defendants however, lays considerable stress on the words "from time to time payable" which are used with reference to rent in S. 22 (2) and points out that if the contention put forward on behalf of the defendants is accepted these words would become meaningless, inasmuch as the rent of an occupancy holding which is purchased by a co-sharer cannot be enhanced under S. 30, Ben. Ten. Act, firstly, because that section applies only when the holding is held at a money rent by an occupancy raiyat and therefore cannot be applicable when it is held by a co-sharer landlord; and, secondly, because a suit for enhancement cannot be maintained, unless all the landlords join and this is not practicable when one of the landlords has himself purchased the holding concerned. The answer given on behalf of the defendants is that the words "from time to time" may refer to the fact that the rent of the holding is payable periodically, that is to say, either year by year or according to fixed instalments and alternatively that the rent may in some cases (e. g. in the case of diluvion) be liable to abatement not upon any specific provision of the Bengal Tenancy Act but upon the principles of justice, equity and good conscience. I am however not altogether satisfied that the framers of the Act had in view only the contingencies referred to on behalf of the defendants. In my opinion the section has not been happily drafted and probably it never occurred to those who drafted it that there would be any legal difficulty in enhancing the rent of the holding after its transfer to a co-sharer landlord. However that may be, as the question of the enhancement of rent does not arise in the present case, I do not wish to express any definite opinion upon it at this stage. It is enough to say that whatever may be the real significance of the words "payable from time to time" as used in S. 22 (2) and whether or not the co-sharers other than the purchaser of an occupancy holding are entitled to claim enhancement of rent under the provisions of the Bengal Tenancy Act or on general principles, one may safely lay down the negative proposition that if the purchasing co-sharer sublets the land to a third person and realizes from him a higher rent than that paid by the original tenant, the other co-sharers are not entitled under this section to realize from the purchasing co-sharers their share of such rent.

I notice that both in East Bengal and Bengal S. 22 (2) has been re-cast and in the section which is applicable to East Bengal it is clearly provided that if the occupancy right is transferred to a co-sharer landlord or permanent tenure-holder, such a person shall hold it as propreitor or tenure-holder and shall pay to his co-sharers a fair and equitable sum for use and occupation of the same. Even however if I were inclined to hold that the meaning of the section which we are asked to construe in this case implies what has been made explicit in the Act applicable to East Bengal, I would not hold that the fair and equitable sum will necessarily be his quota of the amount which the purchasing co-sharer may realize from his sub-lessees. To take such a view will be to hold that the other co-sharers are entitled to nothing less than joint possession which could not have been intended by the framers of the Act. The plaintiff has also placed before us no adequate materials for the assessment of fair and equitable rent and I think that in the absence of any specific evidence on the point, the plaintiff is entitled only to her share of the rent which used to be paid by the occupancy tenants who previously

held the land. The defendants have included in their written statement a schedule of such rents and as the correctness of the figures mentioned therein has not been challenged a decree will be awarded to the plaintiff for her share of those amounts.

The only other questions which arise in this case are whether the plaintiff's claim for the rent of 1333 is barred by limitation and whether the plaintiff is entitled to interest upon the arrears of rent. The first point is the only point which now arises for consideration in connection with the cross-objection filed by the plaintiff and it being conceded now on behalf of the defendants that the claim for the rent of 1333 is not barred, the cross-objection is allowed. So far as the other point is concerned, the defendants contend that inasmuch as they had tendered rent from time to time to the plaintiff and the latter had not accepted them no interest should be charged. There is no doubt some evidence to show that the tender was made and it is also not disputed that the amounts tendered were generally the amounts which the old tenants of the disputed holding used to pay. In my opinion however the judgment of the Subordinate Judge who has held that the plaintiff is entitled to charge interest on the amount due to her should be upheld for the following reasons: (1) But for the new Bihar Tenancy Act the plaintiff would have been entitled to joint possession of the lands or in the alternative to realize her quota of the rent realized by the defendants from the tenants inducted by them inasmuch as the lands were not transferable and the defendants could not under Act as it stood before 1934 acquire the right to hold them under S. 22 (2). The defendants admittedly tendered the amounts which they allege to have tendered before the passing of the new Act and at that time the tender was not valid and the plaintiff was entitled not to accept the amounts offered to her. Besides as the plaintiff never had the use of the money which the defendants are now liable to pay to her as rent, there seems to be no good reason for dismissing her claim for interest. (2) The defendants have not offered any definite evidence of the amounts actually tendered by them and unfortunately the learned Subordinate Judge has recorded no finding as to the exact amounts so tendered. The defendants have stated in their supplementary written statement of 31st August 1932 that some of the lands of village Amra and Rampur Wyna have diluviated and the plaintiff is not entitled to the rent of the entire holding in these villages. These allegations not having been substantiated it is clear that if the defendants tendered rent according to their present case the plaintiff was entitled not to accept it.

I would therefore allow the appeals and cross-objection in part, set aside the decree of the Court below and direct that a decree for rent be passed in favour of the plaintiff for the years 1333 to 1336, the rent of the disputed land being calculated according to the schedule appended to the written statement and on the basis that no part of the disputed land has diluviated. This will however not apply to the bhaoli lands, viz., khatas Nos. 51 and 52 of mauza Gauhara which are the subject matter of Suit No. 47 as regards which the decree of the trial Court will stand. The interest on the arrears of rent shall be calculated at 12½ per cent. per annum as provided by the learned Subordinate Judge and the plaintiff shall be entitled to proportionate costs in both the Courts. The other reliefs claimed by the plaintiff would be disallowed.

Dhavle, J.—I agree. The new S. 26-N introduced by the Amending Act of 1934 in effect makes transfers of occupancy holdings (with the right of occupancy therein) effected before 1st January 1923 valid against the landlords, for it provides that the landlord shall be deemed to have given his consent to the transfer in such cases. Reading this section with Ss. 26-B and 26-A it is clear that these transfers are not restricted to any particular classes of transferees and may as well be in favour of a co-sharer landlord as of a stranger. S. 22 deals with a rather different matter —"Effect of acquisition of occupancy right by landlord" — a marginal note which gives the scope of the section accurately enough as far as it goes, and which may, I think, be referred to for the reasons given in 51 All 411.[2] The first clause of this section originally provided that if the interest of the raiyat in an occupancy holding is transferred to a (sole) proprietor or permanent tenure-holder, the occupancy right shall cease to exist. As a result, it

2. Ram Saran Das v. Bhagwat Prasad, A I R 1929 All 53=113 I C 442 = 51 All 411=1929 A L J 290 (F B).

was held in several cases that upon such a transfer the tenancy subsisted (in the hands of the proprietor or permanent tenure-holder) divested of the incidents of occupancy ; but the amendment of 1907 provided that the transferee is to have no right to hold the land as a tenant and is to hold it as a proprietor or permanent tenure-holder as the case may be, without prejudice to the rights of any third person.

The position of a co-sharer landlord or permanent tenure-holder dealt with in Cl. (2) was different, as (even if the occupancy right ceased) a tenancy was still possible under the other proprietors or permanent tenure-holders. The section did not purport to be confined to transferable holdings, but it contemplated valid transfers from occupancy raiyats. No question of the landlords' consent could arise in the case of occupancy holdings which were transferable by custom or which were purchased in rent executions, though under the original Cl. (2) the occupancy right ceased to exist as in the case of a transfer to a sole proprietor or permanent tenure-holder. In the case of a non-transferable occupancy holding transferred to a co-sharer landlord with the consent of the other co-sharer proprietors or permanent tenure-holders, the transfer would be equally valid, and I am not aware of any reason why the second clause of S. 22 should not apply to it. In 18 P L T 173,[3] where a part of a non-transferable holding had been transferred in 1908, Wort, J. made similar observations which were endorsed by the learned Chief Justice and James, J. in the appeal under the Letters Patent. The status of a co-sharer transferee under this clause has been discussed in many reported decisions, where it has been described as peculiar: *see* for example 5 Pat 281[4] and 6 Pat 134.[5] Under the amendment of 1907 he holds the land

> subject to the payment to his co-proprietors or joint permanent tenure-holders of the shares of the rent which may be from time to time payable to them.

I can see nothing in this provision or in S. 26-N or in the history of our tenancy legislation to disentitle a co-sharer transferee to the benefit of S. 26-N, merely because the holding is non-transferable though the transfer is supported by the actual or presumed consent of the other co-sharers. Much stress was laid on the fact that Illus. 1 to S. 183, which refers to a usage under which a raiyat may be entitled to sell his holding without the consent of his landlord, is still a part of our Act ; but I am unable to see any reason in this to disentitle the co-sharer transferee to the benefit of S. 26-N or S. 22 (2). If, as is argued, the Legislature must be taken, when it enacted S. 26-N, to have been aware of the view taken in the Courts regarding the scope of S. 22, it was also plainly aware that the transfer of a non-transferable holding is validated as against the landlord by his consent, and the Illustration has no bearing on non-transferable holdings for the transfer of which the new legislation has provided the presumed consent of the landlord on certain conditions. It has also been urged that S. 22 (2) contemplates a rent which may be enhanced under S. 30 or altered in other ways : (15 P L T 784,[6] a decision which must be read with 15 Pat 594[7]).

But it seems to me that in the provision that the co-sharer transferee holds subject to the payment "of the shares of the rent which may be from time to time payable to them," the plural "shares" is used because the payment is to be made to "his co-proprietors or joint permanent tenure-holders." This rather suggests that the adjectival clause "which may be from time to time payable to them" goes not with "the rent" but with "the shares". The whole rent is never "payable" since the transferee is himself a co-sharer. The adverbial expression "from time to time" before "payable" on which the whole argument is based is not unintelligible without any reference to possible variations in the rent, since the "rent" would in any case be payable from time to time, to say nothing of the fact that the shares of the co-proprietors or the joint permanent tenure-holders may quite easily vary from time to time. The co-sharer transferee was clearly not intended to occupy the position of an occupancy raiyat vis-a-vis his co-proprietors or joint permanent tenure-holders, and "the shares of the

3. Naga Rai v. Buchi Rai, (1936) 18 P L T 173.
4. Jhapsi Sao v. Mt. Bibi Aliman, A I R 1926 Pat 263=93 I C 1001=5 Pat 281 = 7 P L T 170.
5. Kirtyanand v. Ram Lal, A I R 1926 Pat 580 =97 I C 68=6 Pat 134=8 P L T 20.
6. Raghunandan v. Lalit, A I R 1934 Pat 542= 152 I C 600=15 P L T 784.
7. Dukha Lal v. Mt. Manabati, A I R 1936 Pat 341=163 I C 1003=15 Pat 594=17 P L T 339 (S B).

rent" payable by him could not, it seems to me, but refer to the rent that before the transfer was payable by the transferor tenant. The liability to enhancement of rent under S. 30 would naturally disappear with the extinction of the occupany right, and if the co-sharer transferee did not settle the land with a third party, "the rent (of which share were to go to the proprietors or joint permanent tenure holders) would be the rent that the occupancy raiyat used to pay before the transfer. I can find nothing in Cl. (2) of S. 22 to give the proprietors or joint permanent tenure-holders varying rights according as the co-sharer transferee keeps the land himself or settles it with third parties. It is therefore impossible to allow the claim of the plaintiff to a share of the rents that were actually realized by the co-sharer transferee.

As regards the clause in the defendants' leases against permitting new rights to be created either directly or indirectly, my learned brother has pointed out that no question can arise if under the law as it now stands the plaintiff is to be deemed to have given his consent to the transfers obtained by the lessee, who moreover happened to be a co-sharer. There is also another consideration relating to the scope of the clause itself. In my opinion, it may well be doubted whether the lessee can be properly said to have permitted new rights to be created either directly or indirectly within the meaning of that clause, merely because he proceeded against the tenants in money executions and purchased their holdings. It is true that as a result of these purchases he in his capacity of co-sharer landlord acquires a peculiar status under the Tenancy Act as it stands at present, but this is entirely due to the operation of the law, and the clause, in spite of the amplitude of its language ("permitting new rights to be created either directly or indirectly") could not have been intended to bar to the lessee the relief that an ordinary creditor may obtain from the Courts together with the consequence following from it under our tenancy legislation. It will be unreasonable to construe the clause in such a way as to prohibit routine zamindari operations, and this was in fact conceded by the learned counsel, who could not suggest what the lessee was to do under the lease to a tenant who fell into arrears and against whom a rent decree or execution could not be obtained for some reason (as does happen sometimes). The lessee was a co-sharer landlord to the lessor's knowledge, and it cannot be contended that the leases disentitled him to obtain or exercise rights accruing to him in the latter capacity under S. 22 (2).

S.C./D.S. *Order accordingly.*

A. I. R. 1937 Patna 514

JAMES, J.

Nand Kishore Kumar — Appellant.

v.

Achambit Kumer and *others* — Respondents.

In re Court-fees in First Appeal No. of 1936, Decided on 26th April 1937.

(a) Court-fee—Practice—Practice of Patna High Court—For ascertainment of proper court-fee payable, Court should not depend exclusively on averments of plaintiff—Correct procedure is to appreciate what plaintiff really seeks.

It has not ordinarily been the practice in the Patna High Court, from the time of its foundation, to depend exclusively on the averments of the plaintiff for the ascertainment of what should be the proper court-fee payable, to permit a plaintiff to escape liability by a vague and indefinite statement of facts in the plaint or to penalize him because he may possibly ask for a declaration which may be unnecessary. The correct procedure is to determine the proper court-fee payable on an appreciation of what the plaintiff-appellant really sought, not to require payment of ad valorem court-fee merely because a suit for partition was defended by a claim of adverse possession; but to see that plaintiff should not avoid liability to pay court-fee under S. 7 (iv) (c) or S. 7 (v) of the Act merely by omitting to assert a prayer for possession in what was essentially a title suit in the guise of a partition suit. [P 515 C 1,2]

(b) Court-fee—Practice—Patna High Court—Plaintiff-appellant found prima facie liable to pay ad valorem court-fee on portion of his claim—Ad valorem court-fee on memorandum of appeal is to be paid before admission of appeal in High Court.

Where it has been found by Patna High Court that the plaintiff-appellant ought prima facie to pay ad valorem court-fee on a portion of his claim, he has been required to pay the ad valorem court-fee on his memorandum of appeal before admission of the appeal in the High Court.

[P 515 C 2; P 516 C 1]

Janak Kishore and *P. Jha* — for Appellant.

Government Pleader — for Respondents.

Order.—The plaintiff-appellant instituted a suit for partition of a fairly large area of immoveable property, consisting of several estates and certain subordinate tenures, claiming that he was in joint pos-

session with the defendants. Three of these estates, Akbarpur Rani Tauzi No. 1213, Srikishunpur Tauzi No. 9190 and Mathura Sri Ram Tauzi No. 8909 were entered in the Collector's registers in the name of Mt. Sanjho Kuer, defendant 20 in the suit. The plaintiff asserted in his plaint that Mt. Sanjho Kuer had been permitted to obtain entry of her name in respect of these estates on the understanding that she was enjoying possession merely for her maintenance, but that she was putting forward a claim to proprietorship in the tauzis. The Subordinate Judge found that the plaintiff had no joint possession with Mt. Sanjho Kuer in these tauzis, and that she was entitled to occupy in her own right, the plaintiff having no title. The plaintiff has appealed, inter alia from that part of the Subordinate Judge's decision. The Stamp Reporter objected that ad valorem court-fee should be payable on the value of the share claimed by the plaintiff in these estates. The Taxing Officer has made a reference under S. 5, Court-fees Act, on this matter on grounds different from those of the Stamp Reporter. The Taxing Officer thinks that ad valorem court-fee should be payable on the memorandum of appeal on the additions which the plaintiff seeks to obtain for his share by his appeal in this Court. Mr. Janak Kishore on behalf of the appellant suggests that since the plaintiff had not in his plaint averred that he had title to the tauzis which were in the possession of Mt. Sanjho Kuer and since he did not specifically pray for possession of those shares, he should not be held liable to pay ad valorem court-fee on the value of that property. The plaintiff was careful to avoid stating in his plaint that Mt. Sanjho Kuer was adversely in possession of these tauzis; and he cast his claims for relief in such a form that the matter might well have escaped the notice of the trial Court until the time came for the framing of issues, though the plaintiff took care to add what might be termed a residuary prayer for relief, which would cover any kind of relief which could be granted by the Court. The Taxing Officer thought that because the plaint was so drawn up that it would not appear on the face of it that this was really a title suit in the guise of a partition suit, ad valorem court-fee could not properly be demanded from the plaintiff. It has not ordinarily been the practice in this High Court, from the time of its foundation, to depend exclusively on the averments of the plaintiff for the ascertainment of what should be the proper court-fee payable, to permit a plaintiff to escape liability by a vague and indefinite statement of facts in the plaint, or to penalize him because he may possibly ask for a declaration which may be unnecessary. From the institution of the Patna High Court, the Stamp Reporter and the Taxing Officer, acting under the directions from time to time given by the Taxing Judge, have followed what is, in my judgment, the correct procedure in this matter; determining the proper court-fee payable on an appreciation of what the plaintiff-appellant really sought, not requiring payment of ad valorem court-fee merely because a suit for partition was defended by a claim of adverse possession; but astute to see that plaintiff should not avoid liability to pay court-fee under S. 7 (iv) (c) or S. 7 (v) of the Act merely by omitting to assert a prayer for possession in what was essentially a title suit in the guise of a partition suit.

The Taxing Officer has suggested that ad valorem court-fee should be payable on the memorandum of appeal on the value of the plaintiff's share on every item of property of which he has been found to be out of possession by the trial Court. The learned Government Pleader cites the decision in A I R 1935 Lah 14[1] and 142 I C 829.[2] In each of those cases the appellant claimed that a higher valuation should have been placed on a particular property so as to increase the cash equivalent of his share in those items of property which is a different matter from that which we have now before us.

Mr. Janak Kishore suggests that it would not be proper to exact ad valorem court-fee before this Court has arrived at a decision on the appeal on the question of fact, relying upon the decision of Sir Carleton King as Taxing Judge of the Allahabad High Court in 52 All 756;[3] but the practice therein described has never been followed in this High Court. Where it has been found by this Court that the plaintiff-appellant ought prima facie to

1. Sukha Nand v. Mt. Shiv Devi, A I R 1935 Lah 14=157 I C 787.
2. Peshauri Lal v. Jai Kishan Das, (1928) 142 I C 829.
3. Jai Pratap Narain v. Rabi Pratap Narain, A I R 1930 All 443=124 I C 708=52 All 756 =1930 A L J 984.

pay ad valorem court-fee on a portion of his claim, he has been required to pay the ad valorem court-fee on his memorandum of appeal before admission of the appeal in the High Court. It is not within my province to say whether the Subordinate Judge ought to have required payment of ad valorem court-fee before the trial of the suit in respect of the estates in possession of Mt. Sanjho Kuer; but it appears clear that ad valorem court-fee is properly payable on the value of these estates before the memorandum can be admitted in this Court, and to that extent I agree with the learned Taxing Officer. Ad valorem court-fee under S. 7 (v), Court-fees Act, is payable on the memorandum of appeal in respect of the share claimed by the plaintiff in Akbarpur Rani Tauzi No. 1213, Srikishunpur Tauzi No. 9190 and Mathura Sri Ram Tauzi No. 8902. The valuation on which court-fee has to be assessed can be ascertained if extracts from register D or land revenue chalans relating to these estates are on the record; otherwise the appellant may be required to demonstrate what is the revenue payable in respect of the each of the three estates, or what may be their market value, if revenue has not been assessed.

T.M./D.S. *Order accordingly.*

A. I. R. 1937 Patna 516

AGARWALA, J.

Municipal Commissioner, Gaya Municipality — Defendant — Appellant.

v.

Mt. Rup Kalia and *another* — Plaintiffs — Respondents.

Appeal No. 315 of 1935, Decided on 30th April 1937, from appellate decree of Sub-Judge, 1st Court, Gaya, D/- 6th February 1935.

Calcutta Survey Act (1 of 1887), S. 22— Boundaries stated in survey correspond with title—Suit for declaration that plaintiff's title exists over area in excess of area included within demarcated boundaries— Such suit being in effect suit to set aside demarcation of boundaries comes under S. 22.

The boundaries stated in the survey are supposed to correspond with the title and therefore any decision affecting the title necessarily affects the boundaries that have been demarcated and when the plaintiff sues for a declaration that his title exists over an area in excess of the area included within the boundaries that have been demarcated, the suit is in effect a suit to set aside the demarcation of the boundaries and hence comes under S. 22 of Calcutta Survey Act.

[P 517 C 1]

B. N. Rai — for Appellant.

S. N. Rai and *G. P. Shahi* — for Respondents.

Judgment.—In the survey of the town of Gaya which was made in 1914 under the Calcutta Survey Act in consequence of a resolution of the Municipality passed under S. 223 (a), Bengal Municipal Act of 1884, the plaintiff was recorded in respect of survey plot 7664. South of this plot there runs a lane which has been recorded as survey plot 7665. On the south side of this lane and opposite the plaintiff's plot is a plot of Mathura Prasad. The plaintiff was prosecuted by the Municipality in 1932 in respect of an encroachment on the lane, plot 7665, and was convicted. The present suit was instituted in 1934 for a declaration of the plaintiff's title to and confirmation of possession over that portion of the lane, plot 7665, as is contiguous to her plot. The first Court dismissed the suit, but this decision was reversed by the appellate Court which decreed it. On appeal, the defendant-appellant relies on S. 22, Calcutta Survey Act, as a bar to the suit. S. 20, Survey Act, provides for objections to the survey being lodged with the Superintendent and for the decision of any objections so lodged. S. 21 provides that after the objections have been decided, the Local Government, if it approves of the survey, shall signify its approval by a notification in the Gazette. The survey of the town of Gaya was approved by Notification No. 3653 M, dated the 12th March 1917. S. 22 is in the following terms :

> No suit shall lie to set aside any demarcation or boundaries made under the provisions of this Act, unless brought within one year from the date of the notification mentioned in the last preceding section.

It is on this section that the appellant relies as a bar to the plaintiff's suit. On behalf of the respondents it is contended that an entry made in the survey proceedings has not the effect of destroying or creating title and reference was made to the decisions relating to entries in the Record of Rights under the Tenancy Acts and to suits for the correction of such entries. It was contended that although the period of limitation prescribed for a suit for correction in the Record of Rights is only six years from the date of the record, yet a declaratory suit may be

brought by a person aggrieved by an entry within twelve years from the date when any attempt is made to interfere with his possession. On the analogy of cases of that class it is argued that S. 22 does not bar a declaratory suit of the present nature and that a declaratory suit is not a suit to set aside any demarcation or boundaries. Reference to the cases relating to the entry in the Record of Rights is, in my opinion, beside the point. An entry in the Record of Rights merely provides a piece of evidence to which a statutory presumption attaches. No statutory consequence follows from neglecting to institute a suit to challenge an entry in the Record of Rights except that in any litigation in which that entry is put in evidence, it must be presumed to be correct until the contrary is proved by evidence. The scope of S. 22, Survey Act is, in my opinion, quite different. It definitely bars any suit not brought within a year from the date of the notification approving the survey, if the object of the suit is to set aside any demarcation or boundaries made under the Act. It is fallacious to contend that a mere declaratory suit has not the effect of setting aside any demarcation or boundaries. The boundaries stated in the survey are supposed to correspond with the title and, therefore, any decision affecting the title necessarily affects the boundaries that have been demarcated and when the plaintiff sues for a declaration that her title exists over an area in excess of the area included within the boundaries that have been demarcated, the suit is in effect a suit to set aside the demarcation of the boundaries. The reason for a provision of this nature in an Act such as the Calcutta Survey Act is, I think, quite plain. In order to prevent municipal undertakings, such as drainage, water-works and road schemes being held up, the claims of persons, who dispute the Municipality's title to land affected by these schemes, it is desirable that the disputes should be settled once and for all as soon as possible and the Act provides a period of one year in which such disputes must be settled. In my view, therefore, the present suit was barred by the provisions of S. 22 of the Act with the result that this second appeal must succeed and the plaintiff's suit be dismissed with costs throughout. Leave to appeal under Letters Patent is refused.

T.M./D.S. *Appeal allowed.*

A. I. R. 1937 Patna 517

COURTNEY-TERRELL, C. J. AND JAMES, J.

Mahadeo Ram Kasarwani — Defendant — Appellant.

v.

Ganesh Prasad and *others*, Plaintiffs and *others*, Defendants—Respondents.

Appeal No. 25 of 1934, Decided on 16th April 1937, from original decree of Sub-Judge, Arrah, D-/ 13th September 1933.

(a) Hindu Law—Debts — Father — Father can sell family property to discharge debts incurred by him — Sons cannot object — Decree against father—Sale in execution—Purchaser acquires all rights which father possesses by reason of his fathership.

A father by incurring a debt binds the property of the sons so long as the debt is not for immoral purpose and lays the estate open to execution proceedings based upon a decree for the payment of that debt. Where the decree is against the father, it is necessary in every case to ascertain what the rights and interests of the father are. In his individual capacity and apart from his fathership, he has a right to partition and to take such share as might be allotted to him on partition; but in respect of his fathership he has the further right to sell the family property to discharge debts incurred by him and the sons are not in a position to object being bound by the pious obligation to pay the father's debts in any case. Therefore what has to be taken into execution and what passes to purchaser in sale is the right and interest of the father including not only his individual rights but the rights which he possesses by reason of his fathership : *A I R 1924 P C 50, Ref.* [P 518 C 1]

(b) Bihar and Orissa Public Demands Recovery Act (4 of 1914), S. 26 — Effect of sale under—Effect is same as that under Civil P. C.

The provisions of the Public Demands Recovery Act clearly show that the effect of a sale under that Act is the same as the effect of a sale under the Civil Procedure Code and consequently all that passes to the purchaser is the right, title and interest of the persons named as the judgment-debtors : *13 C W N 750, Foll.* [P 518 C 2]

S. M. Mullick and *B. P. Sinha* — for Appellant.

Mahabir Prasad, *D. N. Varma*, *T. N. Sahai* and *Phulan Prasad Varma* — for Respondents.

Courtney-Terrell, C. J.—This is an appeal by defendant 1 from a decision of the Subordinate Judge of Arrah in a case which arose in the following circumstances : Defendant 2 was a borrower of a sum of money from the Dumraon Co-operative Society. He borrowed this money for the purpose of carrying on the ancestral trade of his family. The plaintiff, who is the respondent in this appeal, is his son. The Co-operative Society went

into liquidation and the liquidators took the certificate procedure for the purpose of recovering the borrowed money, and in execution they put up for sale the interest of defendant 2 in certain property and the property in question was sold and purchased by defendant 1. Now the plaintiff, the son of defendant 2, sues defendant 1 the purchaser, and defendant 2, his own father, to recover possession of the property alleging that it being the family property which had been purchased by defendant 1, it is not liable for the debt incurred by the father, defendant 2, because the debt was incurred for immoral purposes. There is a finding of fact by the learned Subordinate Judge that the debt, far from being for immoral purposes, was for the benefit of the family and that finding is not questioned in appeal. The learned Subordinate Judge, however, has decreed the suit on the ground that all that passed under the certificate sale was such right as defendant 2 might have on a partition of the family property, that is to say the mere rights which defendant 2 had as an individual in relation to the family property which has been sold.

It has long been laid down that a father by incurring a debt binds the property of the sons so long as the debt is not for immoral purpose and lays the estate open to execution proceedings based upon a decree for the payment of that debt: *see* 5 P L T 1.[1] The decree being against the father, it is necessary in every case to ascertain what the rights and interests of the father are. In his individual capacity and apart from his fathership, it is true he has a right to partition and to take such share as might be allotted to him on partition; but in respect of his fathership he has the further right to sell the family property to discharge debts incurred by him and the sons are not in a position to object, being bound by the pious obligation to pay the father's debts in any case. Therefore what has to be taken into execution is the right and interest of defendant 2, the father, including not only his individual rights but the rights which he possessed by reason of his fathership, and in S. 26, sub-s. (1) of the Bihar and Orissa Public Demands Recovery Act, it is enacted that:

> Where property is sold in execution of a certificate, there shall vest in the purchaser merely the right, title and interest of the certificate-debtor at the time of the sale;

and under that heading there is the right to dispose of the family property for the discharge of the debt. If the judgment-debtor can sell the property to satisfy the debt so can the purchaser who steps into his shoes. The learned Subordinate Judge seems to have been under the impression that there is a difference between the position of a purchaser in an execution sale conducted under the Civil Procedure Code and a purchaser in an execution sale conducted under the Public Demands Recovery Act and that the rights acquired by the purchaser under the latter enactment are less extensive than those obtained under the former. This argument is, in my opinion, entirely ill-founded and it is to be noticed that in 13 C W N 750[2] at p. 752, the High Court of Bengal said:

> The provisions of the Public Demands Recovery Act clearly show that the effect of a sale under that act is the same as the effect of a sale under the Civil Procedure Code, and consequently all that passed to the purchaser in this case is the right, title and interest of the persons named as the judgment-debtors.

Applying that principle to the facts of this case, what has passed to the purchaser is the right, title and interest of the judgment-debtor and that included the rights which he had by virtue of his position as the father, that is to say the right to sell the family property and a sale of that family property has in fact taken place and it has vested in the purchaser. The plaintiff having failed entirely to establish his case that there was anything of an immoral nature in the original debt, has no right to attack the sale any more than he would have had the right to attack a sale conducted by his father as a private individual and without the intervention of the Court. All the other findings are in favour of the defendant-appellant and this is the only point with respect to which the learned Subordinate Judge was in his (the plaintiff's) favour. In my opinion, therefore, the appeal must be allowed and the suit of the plaintiff dismissed. The plaintiff must pay the costs throughout.

James, J.—I agree.

P.R./D.S. *Appeal allowed.*

1. Brij Narain Rai v. Mangla Prasad Rai, A I R 1924 P C 50=77 I C 689=46 All 95=51 I A 129=5 P L T 1 (P C).

2. Mt. Raja Koer v. Ganga Singh, (1909) 13 C W N 750=1 I C 197=10 C L J 201.

* A. I. R. 1937 Patna 519

AGARWALA AND MADAN, JJ.

Mahant Ramdhan Puri — Plaintiff — Appellant.

v.

Mt. Parbati Kuar and *others* — Defendants — Respondents.

Appeal No. 611 of 1934, Decided on 14th April 1937, from appellate decree of Addl. Dist. Judge, Patna, D/- 5th May 1934.

*** Hindu Law — Religious endowment — Alienation—Legal necessity — Alienation of Math property for debts without legal necessity agreed to be valid in compromise in suit by previous Mahant—Such alienation being contrary to Hindu law compromise is not binding on succeeding Mahant—Succeeding Mahant is entitled to recover property alienated—Such compromise cannot be bar to investigation into original transaction of debts in suit brought by succeeding Mahant.**

The previous Mahant agreed to hold certain alienation of Math property as valid in a suit, though the debts for which alienation was made were proved to be without legal necessity:

Held: that the alienation agreed to by the previous Mahant by means of such compromise was contrary to Hindu law. The compromise therefore was not binding on the succeeding Mahant and he was entitled to recover the Math property conveyed by means of such compromise: *A I R 1926 P C 112* and *2 I A 145 (P C)*, *Expl.* and *Disting.*; *9 P L T 214*, *Rel. on*; *A I R 1916 Cal 816*; *A I R 1922 P C 123* and *A I R 1917 P C 33*, *Ref.*; [P 520 C 2; P 521 C 1]

Held further: that the compromise could not operate to prevent the ultimate investigation into the nature of the original transaction, which issue could be raised in a suit brought by the succeeding Mahant within 12 years of his succession to the Math. [P 521 C 2]

Manohar Lal, *N. K. Prasad II* and *Chaudhury Mathura Prasad* — for Appellant.

P. K. Sen and *B. C. Sinha* — for Respondents.

Madan, J.—This second appeal is concerned with the indebtedness of a math known as the Islampur Math, situated in the Bihar Sub-division of the Patna District. The original debt amounting to the sum of Rs. 3,000 was contracted by Mahant Madho Puri who died in the year 1912. His successor Mahant Mahabir Puri brought the total indebtedness up to the sum of Rs. 12,000. In 1917 this Mahant for the satisfaction of this debt executed a permanent mokarrari of village Chak Barai, being one of the Math properties, for a premium of Rs. 12,000 and an annual rental of Rs. 5. Eight annas of the mokarrari was in favour of defendants 1 to 4 or their predecessors-in-interest, four annas in favour of defendants 5 to 7 and the remaining four annas was in favour of certain Mahtos. Mahant Mahabir Puri abdicated in 1919, and on 1st April 1920 his successor Mahant Bed Narain Puri brought Title Suit No. 87 of 1920 in the Court of the Second Subordinate Judge of Patna for cancellation of the mokarrari and recovery of possession over the property.

On 12th May 1921 this suit ended in a compromise whereby Bed Narain recovered an eight annas share and left the remaining eight annas in possession of the three sets of mokarraridars on a rental of Rupees 2-8-0. Out of the debt of Rs. 12,000 the sum of Rs. 569 had been paid in cash and Rs. 580 had been paid as Government revenue, while the balance of Rs. 10,851, which appears to have been mostly covered by usufructuary mortgages, had not been paid. Out of this balance Bed Narain contracted to pay the sum of Rs. 3,551 and the mokarraridars were to pay the balance of Rs. 7,301. There is some dispute as to whether the mokarraridars did pay this balance or whether Bed Narain paid it, but this matter was not put in issue between the parties and has not been decided by the lower Courts. In the year 1926 Bed Narain abdicated and was succeeded by the present plaintiff Mahant Ramdhan Puri. The plaintiff's case is that he approached the mokarraridars and represented that their mokarrari was illegal with the result that the Mahtos gave up the two annas share which had been left to them after the compromise.

In the year 1929 he brought the present suit against defendants 1 to 7 in respect of the remaining six annas share on the ground that the loans if really taken by the Mahants were not for justifiable necessity and were not binding on the Math properties. Defendants 1 to 7 contested the suit on the ground that the loans were for legal necessity and for the benefit of the math. The Subordinate Judge who tried the case held that only Rs. 1,200 out of the debts contracted by Mahabir and the sum of Rs. 580 paid as Government revenue had been proved to be for legal necessity. The Additional Distict Judge on appeal held that the sum of Rs. 3,000 borrowed by Madho and the sum of Rs. 580, Government revenue, were for legal necessity, but not the balance of

the debt. Both Courts however dismissed the suit on the ground that the plaintiff was bound by the compromise entered into by Bed Narain. The plaintiff has therefore appealed to this Court.

In 44 Mad 831,[1] the Privy Council has dealt with the legal position of a Mahant in regard to the Math property. Their Lordships while reviewing the various authorities on the point observed that under Hindu law a Mahant is in no sense a trustee in the English sense of the term, but that he is a manager or custodian of the Math property on behalf of the deity who is a juristic entity vested with the capacity of receiving gifts and holding property. The property is not vested in the Mahant who is in the position of a life tenant. In these circumstances the power of a Mahant to create an interest in Math property so as to enure beyond his own lifetime or, to be more accurate, his own term of office, is limited to cases of unavoidable necessity. The Mahant's personal enjoyment of the property is limited to such portion of the usufruct as accrues to him according to the custom and usage of the Math. Even if a lease created by a Mahant and valid for his lifetime is adopted by his successor, the effect will be the creation of a new lease valid only during the successor's term of office. In that case the suit which was brought by the transferees for recovery of possession over Math property conveyed to them under a permanent lease was dismissed.

In 40 Mad 709[2] their Lordships had observed that it was a breach of duty by a Mahant, unless constrained by an unavoidable necessity, to grant a lease in perpetuity of debuttar lands even at a rental which was adequate at the time. Their Lordships while declining to give a precise definition, had given as instances of such necessity, the preservation of the estate from extinction by sequestration, and its defence against hostile litigation or from injury or deterioration by inundation. In the present case both Courts have held that the alienation was not for legal necessity or for the benefit of the Math, and the only question that arises before us is what was the effect of the compromise entered into in 1921 by Mahant Bed Narain, the predecessor of the present plaintiff. Now this compromise which was recorded in the decree states that the plaintiff had filed the suit on the ground that the lease was without consideration and illegal, and that the defendants had claimed that the lease was valid and for consideration and had also denied that the property leased was debuttar land. Some witnesses had been examined for the plaintiff, and then owing to the uncertainty as to the result of the suit and the loss and harassment involved in the litigation, and after consultation with a local Mahant, the parties had decided to compromise. It was accordingly agreed that the alienation should be held to be valid and that each side should take one half of the property and satisfy an agreed proportion of the debt. The compromise does not recite that the plaintiff had satisfied himself that the debts were in fact incurred for legal necessity nor does it recite the necessities for the debts, and in this litigation both Courts have found that the debts were not for legal necessity. It would appear therefore that the alienation agreed to by Bed Narain by means of this compromise was contrary to Hindu law. Mr. Manohar Lal for the plaintiff referred to the case in 19 C W N 1228[3] where it is observed with reference to a compromise decree that it is well settled that a contract between parties is none the less a contract because there is superadded to it a command of a Judge. Again in 9 P L T 214[4] it was held that the Court was right in refusing to record a compromise whereby a Mahant agreed to alienate Math property without legal and justifying necessity. In my opinion the principle of this ruling applies to the present case; and the compromise is not binding on the present plaintiff. The defendants also in that suit must be taken to have known that Math property could not be permanently transferred except for unavoidable necessity to be proved by them, and by entering into the compromise without such proof they took the risk that the debt might not be satisfied during the tenure of the office by Bed Narain or that

1. Vidya Varuthi Thirtha v. Balusami Ayyar, A I R 1922 P C 123=65 I C 161=48 I A 302 =44 Mad 831 (P C).
2. Palaniappa Chetty v. Devasikamony Pandara Sannadhi, A I R 1917 P C 33=39 I C 722= 44 I A 147=40 Mad 709 (P C).
3. Kusadhaj Bhakta v. Broja Mohan Bhakta. A I R 1916 Cal 816=31 I C 13=43 Cal 217= 19 C W N 1228.
4. Anandi Lal v. Jagarnath Das, (1928) 9 P L T 214=106 I C 645.

the arrangement might not be accepted by his successor. The present plaintiff has now sued for recovery of possession over the property conveyed, and in my opinion he was entitled to do so.

Dr. Sen for the defendants referred us to 6 Pat 139.[5] In that case a Mahant had borrowed from various sources at a high rate of interest, namely 24 per cent, with the result that an original debt of about Rs. 9,000 had increased to Rs. 25,000. In these circumstances, in order to relieve the pressure on the resources of the Math, he had re-borrowed Rs. 250,00 from the plaintiff at 12 per cent. interest. The High Court dismissed the suit on the ground that the debts were not incurred for legal necessity, but the Privy Council held that even if the borrowing was unjustified, which it did not consider in that case to have been proved, still the immediate cause for the borrowing from the plaintiff was the Math's necessity for obtaining relief from the burden which the heavy rate of interest had imposed. In this view of the case the plaintiff was held to be entitled to decree.

It is noticeable, however, that the order passed by their Lordships in that case was that a personal decree should be passed against the Mahant and that in default enquiry should be held as to the amount legitimately attributable to the endowment under Hindu law and that a receiver should be appointed to manage the estate and make over the Mahant's share to the plaintiff after payment of a maintenance allowance to the Mahant. The decree was therefore a personal decree against the Mahant, and no question of alienating the Math properties appears to have arisen. In that case their Lordships referred to the earlier decision in 23 W R 253,[6] in which case two decrees had been passed against a former Mahant in respect of a debt held to have been legitimately incurred, and those decrees were held to be binding on his successor. In that case also the Privy Council pointed out that decree had been passed, and in their opinion had rightly been passed against the rents and profits of the debuttar lands, and that the question had not been raised whether the lands could be sold under the decrees. Neither of these cases gives support to the proposition that a Mahant can by compromise alienate lands for debts not incurred for legal necessity, and merely to avoid the expense and trouble of proceeding with a suit which had been brought for setting aside the alienation. It is not recited in the compromise that in fact the Mahant was unable to raise the funds necessary for carrying on a suit brought for recovery of a valuable property of the Math. The compromise may have had the effect of postponing the issue so far as the parties to the compromise were concerned, but it could not operate to prevent the ultimate investigation into the nature of the original transaction, which issue has now been raised in a suit brought by the succeeding Mahant within 12 years of his succession to the Math. I must hold that the compromise entered into by Bed Narain is no bar to such a suit.

Another circumstance adverse to the defendants is that a large proportion of the debt payable under the compromise was the debt of the defendants themselves or their predecessors-in-interest. In *Prosunno Kumari Debya* v. *Golab Chand Baboo*,[6] cited above, the Privy Council, while observing that actual pressure on the estate at the time of the loan is the matter to be considered, excluded the case where the danger arises from misconduct to which the lender himself has been a party. On this ground also, the defendants in my opinion are unable to take advantage from the compromise and the plaintiff's suit must succeed. As has already been observed, the learned Additional District Judge held that legal necessity had been proved for the sums of Rs. 3,000 and Rs. 580 only out of the total debt. In the case of Rs. 3,000 he held that necessity had been proved merely because the debt had been ratified by two succeeding Mahants and on no other evidence. However this may be, it is reasonable to hold that these debts have been satisfied from the usufruct enjoyed by the defendants up to the year 1926, and no case arises for granting them an equitable relief in respect of these amounts. The result is that this appeal must be allowed and the plaintiff's suit must be decreed. The mokarrari is set aside, and the plaintiff is

5. Niladri Sahu v. Chaturbhuj Das, A I R 1926 P C 112=98 I C 576=53 I A 253=6 Pat 139 (P C).

6. Prosunno Kumari Debya v. Golab Chand Baboo, (1875) 2 I A 145=23 W R 253=4 Beng L R 450=3 Suther 102=3 Sar 449 (P C).

entitled to recover possession of the property in suit with costs throughout.

Agarwala, J.—I agree.

W.D./A.L. *Appeal allowed.*

A. I. R. 1937 Patna 522

FAZL ALI AND DHAVLE, JJ.

Firm Johar Mal-Paran Ram — Appellant.

v.

Bindeswari Prasad Singh and *others*— Respondents.

Appeal No. 105 of 1936, Decided on 13th April 1937, from original order of Sub-Judge, Muzaffarpur, D/- 4th February 1936.

Limitation Act (1908), Art. 182 (5)—Interpretation — Words "in accordance with law" in Art. 182 (5) do not mean only in accordance with Civil Procedure Code—They mean applying to Court to do something in execution which by law that Court is competent to do.

The words "in accordance with law" in Art. 182 (5), Lim. Act, are general and cannot be construed to mean only in accordance with the Civil Procedure Code. The expression applying in accordance with law in Art. 182 (5) means applying to the Court to do something in execution which by law that Court is competent to do and that it does not mean applying to the Court to do something which either to the decree-holder's direct knowledge in fact or from his presumed knowledge of the law he must have known the Court was incompetent to do.

[P 522 C 2 ; P 523 C 1]

Where therefore the decree is only against the father and it provides that the loan incurred by the father is not binding on the sons, and in spite of this the decree-holder applies for execution of the decree by the arrest of the sons, the application so made for execution is not one in accordance with law inasmuch as the Court is not competent to grant the relief prayed for by virtue of the decree : *A I R 1934 P C 14* and *A I R 1926 Pat 160, Ref.* ; *12 All 64* ; *28 All 387* and *A I R 1922 Pat 188, Rel. on.* [P 523 C 2]

B. C. De — for Appellant.

Baldeo Sahay and *Phulan Prasad Varma* — for Respondents.

Fazl Ali, J.—The only serious question to be decided in this appeal is one of limitation and it arises upon the following facts: The appellant firm obtained a decree for money against the father of the respondents and realized part of the decretal amount by putting the decree into execution on 22nd December 1930. The decree was again executed on 18th November 1931 and a third petition for execution was filed on 29th March 1934. The present application being filed in 1935 it was contended on behalf of the respondents that it was barred under Art. 182, Cl. (5), inasmuch as the previous application which had been made on 18th November 1931 was not in accordance with law.

It is necessary to state here that in the decree which is sought to be executed, it was clearly provided that the loan incurred by the father of the respondents was not binding either on them or their uncles. Notwithstanding this provision, when the appellants made the third application for execution on 29th March 1934, the only prayer which they made in that application was that the decree be realized by the arrest of the respondents. Now it has not been seriously disputed before us that the relief prayed for in this application was one which the Court was not competent to grant, but Mr. Bankim Chandra De on behalf of the appellant contended that an application for execution must be deemed to be made in accordance with law, if it complies with the requirements of O. 21, R. 14. Mr. De tries to support his contention by referring us to the decision of the Judicial Committee in 15 P L T 221,[1] and of this Court in 7 P L T 330,[2] but neither of these cases purports to decide directly whether an application which asks for a relief which the Court is not competent under the law to grant can be treated as an application made in accordance with law. On the other hand that very question appears to have been dealt with in 12 All 64[3] and 28 All 387.[4]

In these cases it was held that the expression applying in accordance with law means applying to the Court to do something in execution which by law that Court is competent to do and that it does not mean applying to the Court to do something which either to the decree-holder's direct knowledge in fact or from his presumed knowledge of the law he must have known the Court was incompetent to do. This is the view which was accepted by a Division Bench of this Court

1. Khalilur Rahman Khan v. Collector of Etah, A I R 1934 P C 14=147 I C 323=61 I A 62=55 All 993=15 P L T 221 (P C).
2. Jogendra Prasad Narayan Singh v. Mangal Prasad Sahu, A I R 1926 Pat 160 = 90 I C 847=7 P L T 330.
3. Chattar v. Newal Singh, (1889) 12 All 64 = 1889 A W N 200.
4. Langtu Pande v. Baijnath Saran Pande, (1906) 28 All 387 = 3 A L J 143 = 1906 A W N 54.

also in 3 P L T 422[5] and as at present advised I am not prepared to dissent from it. The words "in accordance with law" which occur in Art. 182 (5) are general and cannot be construed to mean only "in accordance with the Civil Procedure Code". In my opinion therefore the present application was not in accordance with law whether treated as an application for execution or an application for taking a step-in-aid of execution. I would therefore affirm the judgment of the Court below and dismiss the appeal. There will be no order as to costs.

Dhavle, J.—I agree. If an application for execution does not comply with the requirements of Rr. 11 to 14, O. 21, Civil P. C., R. 17 of the same Order, as it now stands, empowers the Court to allow the defect to be remedied within a given time, and if the decree-holder fails to remedy the defect within the time fixed, to reject the application. Where this power is not exercised and the application is entertained, it may from one point of view be said that the application is in accordance with the law. This, however, would be too narrow and technical an interpretation of the expression "in accordance with law" in Art. 182 (5), Lim. Act. A similar contention was negatived by Straight and Tyrrell, JJ. in 12 All 64[3] where the learned Judges held that the expression "in accordance with law" must mean an application to do something in execution which by law that Court is competent to do, plainly referring not merely to the law of execution to be found in the Code of Civil Procedure and the Limitation Act, but to law in general and the learned Judges held that the expression excluded applications to the Court to do something which either to the decree-holder's direct knowledge in fact or from his presumed knowledge of the law he must have known that the Court was incompetent to do.

In the present case the sons may have been liable to the extent of the father's assets in their hands in view of their pious obligation, though that point has been actually contested before us on behalf of the respondents on the authority of 48 All 245[6] in view of the fact that the joint family included members other than the father and his sons. That decision, however, was overruled by a Full Bench of the Allahabad High Court in 57 All 176.[7] It is not necessary on the present occasion to consider how exactly the position of the sons was affected by the fact that they were impleaded in the suit but no decree was passed against them in the view that the liability was their father's personal liability. Whatever may be the nature of the liability of the sons, it is not pretended that they were liable to be arrested in execution of the decree. The prayer for their arrest in execution could not, on any possible view of the law, be said to have been in accordance with law. It is therefore impossible to treat that application as saving limitation from any point of view.

K.B./A.L. *Appeal dismissed.*

5. Amrit Lal v. Murlidhar, A I R 1922 Pat 188 =67 I C 598=3 P L T 422=1 Pat 651.

6. Binda Prasad v. Raj Ballabh Sahai, A I R 1926 All 220=91 I C 785 = 48 All 245 = 24 A L J 273.

7. Chhotey Lal v. Ganpat Rai, A I R 1934 All 590=150 I C 411=57 All 176 = 1934 A L J 483 (F B).

A. I. R. 1937 Patna 523

WORT, J.

Humayaun Raza Choudhury and *another* — Petitioners.

v.

Surendra Nath Bose — Opposite Party.

Civil Revn. No. 629 of 1936, Decided on 24th February 1937, from order of Sub-Judge, Bhagalpur, D/- 22nd August 1936.

Receiver—Suit against—Court has jurisdiction to make leave conditional where leave is necessary to sue Receiver.

In certain cases leave to sue a Receiver is necessary on the assumption that the Receiver being the Officer of the Court the action would interfere with the possession granted to the Receiver by the Court and therefore the plaintiff in such an action would be guilty of contempt. [P 523 C 2 ; P 524 C 1]

Where in a case it is necessary to apply for leave, the Court has jurisdiction to make that leave conditional. [P 524 C 1]

B. C. De — for Petitioners.

S. C. Mazumdar — for Opposite Party.

Order.—Mr. De's argument is based on the contention that the Judge has deprived the petitioners of something which in law they were entitled to. It is quite clear that in certain cases at any rate application for leave to sue a Receiver is necessary on the assumption that the Receiver being the Officer of the Court, the action would interfere with the possession granted to the Receiver by the Court and therefore the plaintiff in such an

action would be guilty of contempt. That is true in those actions the result of which would tend to displace the possession of the Receiver. It is not seriously argued, although perhaps a suggestion made by the Court and taken up by Mr. De, that no leave to sue is necessary if the petitioner is advised that that is the position in law, then there is nothing to prevent his bringing an action and risking it being stayed if the advice received is wrong. But the case, as I have indicated, has been argued on the assumption that leave to sue is necessary, although, as I have already stated and repeat, the Judge has restricted that right. Once it is admitted that leave was necessary, then the whole argument falls to the ground because the learned Judge here has given the plaintiff leave to sue which, apart from the order of the Judge, he had no right to do. If the matter is taken from that point of view, what has happened is that the order of the Court has extended the rights of the plaintiff and therefore it cannot be said that his rights have in any way been limited, or to put it in other words, if it is necessary to apply for leave, the petitioner cannot complain if the Judge makes that leave conditional. I have no doubt in my own mind that if it was necessary to apply for leave, the Judge's order was quite within his jurisdiction. For these reasons I think the Rule must be discharged with costs : hearing fee two gold mohurs.

S.C./D.S. *Rule discharged.*

A. I. R. 1937 Patna 524

FAZL ALI, J.

Mohamad Akhtar Hussain — Petitioner.

v.

Chamru Mistry — Opposite Party.

Civil Revn. No. 15 of 1937, Decided on 2nd April 1937, from order of Sm. C. C. Judge, Patna, D/- 4th December 1936.

Provincial Small Cause Courts Act (1887), S. 25—Powers of High Court.

The revisional powers of the High Court even in a case decided under Provincial Small Cause Courts Act are very limited. [P 524 C 2]

Syed Mehdi Imam and *M. Rahman* — for Petitioner.

A. N. Lal — for Opposite party.

Order.—The petitioner was the plaintiff in a Small Cause Court suit which he instituted against the opposite party for the recovery of the price of two trunks of Shishum tree which he alleged to have made over to the defendant (who is a carpenter) for making furniture and an advance of Rs. 10 on account of the wages. The suit has been dismissed by the Court below and hence this petition. It appears that the main defence in the case was that the suit had been instituted by the plaintiff at the instance of his step-brother, Faridul Huq. It is stated in the affidavit which has been filed in this Court that the plaintiff in order to show that he was not on good terms with Farid, tendered in evidence two judgments, dated 7th December 1931 and 16th September 1930 but both these documents were rejected by the learned Judge ; and the learned Judge also rejected a notice which had been sent on 16th April 1936 by the plaintiff to the defendant previous to the institution of the suit. The point urged now is that these documents had an important bearing on the case in view of the opposite party's allegation and that if the learned Judge had taken them in evidence, he might have arrived at a different conclusion. It has also been contended that if the learned Judge had not rejected these documents the plaintiff would have tendered some more recent judgments in evidence which would have borne out his case that he was on bad terms with his step-brother. The allegations made in the affidavit have not been controverted by the opposite party ; but I have not had the advantage of calling for an explanation from the learned Judge as to the statements made in the affidavit. The revisional powers of this Court, even in a case decided under the Provincial Small Cause Courts Act, are very limited, and it is clearly provided in S. 167, Evidence Act, that the improper rejection of evidence shall not be ground itself for a new trial or reversal of any decision in any case, if it shall appear to the Court that if the rejected evidence had been received, it ought not to have varied the decision. Now, on reading the judgment of the Small Cause Court Judge, it appears that he proceeded on the assumption that the two brothers had been on bad terms ; but he accepted the evidence of the witness for the defendant that at present good relations existed between them. The judgments which were tendered in evidence were delivered in 1930 and 1931

respectively, and the present suit was instituted in 1936. The learned Subordinate Judge has also dealt with the case on the footing that the plaintiff's allegations as to the existing hostility between him and his step-brother were correct, because after having referred to the evidence of the defence witness, he states :

At any rate, I am not satisfied that the plaintiff's claim is true. The plaintiff has examined some witnesses but I have not been impressed by their testimony.

The learned Judge had the advantage of hearing the evidence, and if he was not impressed by the evidence of the plaintiff's witness, he was justified in not basing any conclusion upon it. The notice of 16th April 1936 has no important bearing upon the case. In my opinion, though another Court to which the facts of the case might have been open might have come to a different conclusion, yet there being no right of appeal in this case and the conclusion of the Court below not being necessarily perverse, the present application cannot succeed. I would therefore dismiss this application; but I would pass no order as to costs.

K.B./A.L. *Application dismissed.*

A. I. R. 1937 Patna 525

COURTNEY-TERRELL, C. J. AND JAMES, J.

Jatan Thakur and *others*—Defendants — Appellants.

v.

Ali Jan Mia — Plaintiff — Respondent.

Letters Patent Appeal No. 8 of 1936, Decided on 17th February 1937, from decision of Wort, J., D/- 18th February 1936, reported in *A. I. R. 1936 Pat. 422.*

Vendor and Purchaser—Partition—Suit by purchaser for partition and separate possession of share sold to him by vendor, alleging that he was in joint possession with others—Vendor found never in possession of share sold by him—Purchaser held not entitled to partition unless he recovered actual possession of share sold to him : *161 I C 943=A I R 1936 Pat 422, Reversed.*

Three branches of a joint family and represented by *A*, *B* and *C* separated from each other and divided the joint family property amongst them. *A's* share was sold in execution of a money decree against him. *B* died and *A's* son became entitled to his share by reversion. *B* enjoyed his share in common with the members of *C* branch as tenant-in-common. *A's* son however never obtained possession of the share that devolved on him. *A's* son sold his share. The purchaser then brought a suit for partition and separate possession of the same, alleging that he was in joint possession with the members of the third branch since his purchase. It was found that his allegation was untrue :

Held : that the purchaser could not succeed : *161 I C 943=A I R 1936 Pat 422*, Reversed. [P 526 C 1]

B. N. Mitter and *Santa Prasad* — for Appellant.

S. S. Bose and *Saiyid Hasan* — for Respondent.

James, J. — This is an appeal under Cl. 10, Letters Patent, from the decision of a single Judge of this Court in a partition suit. The plaintiff is the purchaser of a share in certain property from one Raghu Thakur, the son of Adya Thakur. He instituted the suit for partition on the allegation that he was in joint possession of the property, alleging that joint cultivation was found difficult and that this led to disputes. It appears from the findings of the Courts below that neither the plaintiff nor his vendor were ever in possession of the share of which partition is claimed. Many years ago Adya Thakur and his brother Bir Thakur were entitled to a share of one-third in their joint family estate part of which constitutes the property of which partition is claimed while the remaining share was held by other members of the family. The three branches represented by Adya Thakur, Bir Thakur and the third branch all separated from one another. Adya Thakur's share was sold in execution of a decree and he left the village, while Adya's brother, Bir Thakur, continued to enjoy the property as tenant-in-common with Jatan and other members of the third branch. Bir Thakur died more than 12 years before the institution of the suit. He was not joint with his nephew Jatan, but merely holding as tenant-in-common with him, so that his interest would have devolved on his reversioners, the sons of his brother Adya, one of whom is the plaintiff's vendor; but these reversioners obtained no possession over the property : and the trial Court found that the plaintiff's claim to possession would be barred by limitation. The District Judge, accepting the findings of fact of the trial Court held that as the plaintiff was not in possession of the share which he claimed, he could not succeed in a suit for partition; and he therefore confirmed the decree of the trial Court and dismissed the appeal.

The learned Judge of this Court thought that it had been found that the family

was joint, being apparently under the mistaken impression that this was the finding of the Courts below. If Raghu Thakur, the son of Adya Thakur, had been joint with Bir Thakur and Jatan, then after the death of Bir Thakur possession by the co-sharer Jatan would have been possession on behalf of other co-sharers, and adverse possession of the defendants could not have been proved unless there had been some definite act of ouster. But the findings of the Courts below are that all three branches of the family were separate so that Jatan, although he was tenant-in-common with Bir Thakur, has at no time been tenant-in-common with Raghu who had never enjoyed any possession from which he could have been ousted. Apart from the question of whether he might have been entitled to recover possession, we have the fact that his allegation in the plaint that he was in actual possession has been found to be false, and that he could not succeed in a suit for partition unless he first recovered possession of the share which he claimed. I would set aside the decree of the Judge of this Court and allow this appeal dismissing the plaintiff's suit, with costs throughout to the defendants' first party.

Courtney-Terrell, C. J.—I agree.

W.D./A.L. *Appeal allowed.*

A. I. R. 1937 Patna 526

ROWLAND, J.

Mt. Suga Kuer — Defendant — Petitioner.

v.

Firm Brijraj Ramniwas and *others* — Defendants — Opposite Parties.

Civil Revn. No. 428 of 1936, Decided on 3rd December 1936, from decision of Munsif, Madhubani, D/- 29th June 1936.

(a) Partnership — Suit instituted wrongly in name of firm by mistake — Provisions of Partnership Act should not be too rigidly enforced — Amendment of plaint should be allowed even at late stage.

Where the suit is instituted in the name of firm, the proprietor cannot go behind the description in the plaint unless and until he gets the plaint amended. The Partnership Act has been fn force for a very limited time and the Bar as well as business people in outlying Districts may not be yet so familiar with its provisions that it would be appropriate to enforce them too rigidly in cases where the institution of the suit under the wrong name may have been due to mistake. Hence amendment of the plaint should be allowed even at a late stage as the amendment in such case does not amount to an addition of parties but merely the substitution of the name in order to correct a misdescription : *Misc. Appeal No. 366 of 1935* and *A I R 1933 Bom 304, Rel. on.* [P 527 C 1, 2]

(b) Principal and Agent — Suit for price of goods supplied on credit for principal through his servant — Plaintiff must show practice whereby goods were supplied to principal through servants in course of their employment — Once this is shown, principal cannot say that particular item of goods did not reach him.

The person claiming against the principal must show that the act done was within the scope of the authority or ostensible authority held or exercised by the agent and this can be shown by practice as well as by a written instrument. [P 527 C 2]

Where a suit is brought against principal for price of goods supplied on credit for him through his servant, the plaintiff must show a course of dealing by which it was a practice for goods to be supplied to him through these servants in the course of their employment. If he shows such a practice, it will be no answer for the principal to say that the particular item of goods did not reach him once the plaintiff has established that they were supplied to his servants for his use : *Lloyd* v. *Grace Smith & Co., (1912) A C 716, Rel. on.* [P 527 C 2; P 528 C 1]

Brahmdeo Narain — for Petitioner.

B. C. De and *Jagadish Jha* — for Opposite Parties.

Order. — The applicant here is defendant 1, a pardanashin lady, against whom a Small Cause Court suit was brought for the price with the interest of goods supplied on credit for her through her servants, defendants 2 and 3, said to be gumasta and cook, respectively. The suit was instituted in the name of the Firm Brijraj Ramniwas and was defended on the grounds that an unregistered firm was incapable of maintaining a suit under S. 69, Partnership Act; secondly, that the fact of supply of the goods was denied ; and thirdly, that this defendant had never authorized those servants to obtain goods for her on credit and was not liable for any transactions that they might have entered in her name without her authority. Now on the first point S. 69, Partnership Act, 1932, is perfectly clear. The suit instituted in the name of a firm not being a registered firm is not properly constituted and cannot proceed in that form. But Mr. De for the opposite party contends that the so-called firm is not in fact a partnership but is a business carried on by Ramniwas who has chosen the style of Firm Brijraj Ramniwas for carrying on business. Such a business is not a partnership and is not

properly described as a firm for the purposes of Ss. 4, 5 and 6, Partnership Act, 1932. That is so; but the present suit was instituted in the name Firm Brijraj Ramniwas and the proprietor cannot go behind the description in the plaint unless and until he gets the plaint amended. It was contended for the petitioner that as the suit was prosecuted to its conclusion without amending the plaint, no further opportunity should be given at this late stage for its amendment and the suit ought now to be dismissed. On the other hand, the Partnership Act has been in force for a very limited time and the Bar as well as business people in outlying Districts may not be yet so familiar with its provisions that it would be appropriate to enforce them too rigidly at present in cases where the institution of the suit under the wrong name may have been due to mistake. A similar state of affairs was considered in Misc. Appeal No. 366 of 1935 decided by Sir Stewart Macpherson and Khaja Mohammad Noor, JJ., on 8th April 1936, where the lower Appellate Court had given a remand in order to allow the plaintiff an opportunity to amend his plaint and to have the suit tried on the merits. The order was on second appeal upheld. A similar procedure was followed in A I R 1933 Bom 304,[1] where leave to amend was allowed but it was emphasized that the plaintiff whose mistake in framing his suit had led to trouble must bear all the costs incurred up to the date of the amendment.

It was then suggested for the opposite party that to allow an amendment at this stage may work hardship to his client because some of the items of the claim may by now have become time-barred and therefore the plaintiff should not be allowed to carry on the suit already instituted. I do not think that, that is a matter which should weigh with the Court either way. The question really is whether the defect in the plaint is of the nature of a misdescription of the plaintiff or a case of bringing the suit in the name of a non-existent person, so that the amendment involves bringing in a new plaintiff on the record so as to import the provisions of S. 22, Limitation Act. The distinction is discussed in the Bombay case just cited and in the earlier decision—A I R 1925 Bom 527[2]—in which it was held that the amendment did not amount to an addition of parties but merely the substitution of the name in order to correct a misdescription. Therefore, I propose, while pointing out that the suit in its present form was improperly constituted and could not properly be decreed, to allow the plaintiff an opportunity of obtaining a decision on the merits after amending the plaint in the Court of first instance subject to conditions. Before stating those conditions, I shall refer to the other point raised as to the lack of authority in the servants to order goods on credit for the petitioner's use. Express written authority has not been set up. The Court of first instance has not come to any very definite finding on the question whether the servants had authority or no and if the plaintiff amends his plaint and the case is re-heard, it will be necessary to come to a finding. I may, therefore, set out the principles in the light of which the Small Cause Court Judge will have to decide this point.

Section 187, Contract Act, refers to an authority as implied when it is to be inferred from the circumstances of the case, and we all know that the classic instance of an implied authority being presumed is that of husband and wife. As regards master and servant, the authority has been presumed in such cases as 'when a master frequently sent a servant to market without ready money so that the servant is trusted upon the master's account.' A detailed examination of the question of liability of the principal for an act of his agent was made in (1912) A C 716.[3] The person claiming against the principal must show that the act done was within the scope of the authority or ostensible authority held or exercised by the agent and this can be shown by practice as well as by a written instrument. Lord Shaw said :

> When the authority does ostensibly include within its scope transactions of a particular chracter, then, *quoad* a third party dealing in good faith with such an agent, the apparent authority is, as is well settled, equivalent to the real authority and binds the principal.

The plaintiff therefore must show a a course of dealing by which it was a practice for goods to be supplied to her through

1. Amulakchand v. Babulal, A I R 1933 Bom 304=147 I C 786=35 Bom L R 569.

2. Ram Prasad Shivlal v. Shirinivas Balmukund, A I R 1925 Bom 527=90 I C 685=27 Bom L R 1122.

3. Lloyd v. Grace Smith & Co., (1912) A C 716 =81 L J K B 1140=107 L T 531=56 S J 729 =28 T L R 547.

these servants in the course of their employment. If he shows such a practice, it will be no answer for the defendant to say that the particular items of goods did not reach her once the plaintiff has established that they were supplied to her servants for her use. The conditions on which the plaint will be permitted to be amended will be that an application be made to the Small Cause Court Judge within six weeks from this date and that the defendant shall get from the plaintiff her costs of the suit incurred to date in the Court below, costs of this Court in revision will be borne by the parties. If within six weeks of this date, no application for amendment of the plaint is made in the first Court, the suit will be dismissed and the petitioner will get her costs throughout.

P.R./D.S. *Order accordingly.*

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* A. I. R. 1937 Patna 528

AGARWALA, J.

Thakur Singh — Petitioner.

v.

Dinanath Sah — Opposite Party.

Civil Revn. No. 59 of 1937, Decided on 27th April 1937, against order of Sub-Judge, Motihari, D/- 13th January 1937.

*** (a) Civil P. C. (1908), O. 47, R. 1—Appeal withdrawn must be treated as not preferred.**

An appeal which has been withdrawn must be treated as if it had never been preferred within the meaning of O. 47, R. 1, Civil P. C. : *A I R 1921 All 197, Foll.*; *A I R 1931 Bom 232, Expl.*; *A I R 1923 P C 128, Disting.* [P 529 C 2]

(b) Limitation Act (1908), S. 5—Discretion even if wrongly exercised cannot be interfered in revision.

It is not the practice of Patna High Court to interfere in revision in the exercise of discretion by the Court below under S. 5, Lim. Act, even when the exercise of that discretion is founded on a mistaken view of the law. [P 530 C 1]

S. M. Mullick, *Baldeo Sahay* and *A. C. Sinha* — for Petitioner.

A. B. Mukharji, *K. Hasnain* and *K. P. Upadhya* — for Opposite Party.

Order. — The opposite party obtained against the petitioner and his father in the Court of the Munsif of Motihari a money decree for Rs. 1,497. The decree directed that this amount was realizable from the joint family property. The Munsif who passed the decree had jurisdiction up to Rs. 2,000. By the time the decree-holder applied for execution, the pecuniary jurisdiction of the Munsif, to whom it was made, was Rs. 1,000 only. The execution case was therefore transferred to the Subordinate Judge who, on the application of the decree-holder, attached certain property. The petitioner raised an objection that the property attached was not a joint family property but had come to him from his maternal grand-father by inheritance and was therefore his exclusive property. The Subordinate Judge upheld this objection by his order dated 26th January 1933.

Thereafter the decree-holder instituted Title Suit No. 78 of 1933 for a declaration that the disputed property was a joint family property and was liable in execution of his decree. In this suit, the present petitioner filed certain documents which had not been available to him at the hearing of his objection under R. 58 but on which he now relied in the suit for the purpose of proving his assertion that the property was his exclusive property. The suit was decreed on 11th June 1934, but was dismissed on appeal by the defendant on 18th March 1935. A second appeal to this Court was preferred by the plaintiff decree-holder. It was dismissed summarily under O. 41, R. 11 on 12th August 1935. The learned Judge who dismissed the second appeal pointed out that as the objection which had been filed by the present petitioner raised a question between the decree-holder and one of the judgment-debtors, it fell within S. 47, Civil P. C., and not under O. 21, R. 58, and therefore that the remedy of the plaintiff-decree-holder against the order upholding the objection was by way of appeal and not by way of suit. Thereafter on 5th September 1935, the decree-holder filed Miscellaneous Appeal No. 101 of 1935 under S. 47 of the Code against the order of 26th January 1933 upholding the present petitioner's objection. As the appeal was obviously time-barred, an application was also made to the Court under S. 5, Lim. Act, to condone the delay in filing the appeal.

An application was made to the appellate Court by the present petitioner to take into consideration the additional documents on which he had relied in the suit but which had not been available to him at the hearing of the objection. The appellate Court condoned the delay but declined to receive the additional evidence. The

appellant thereupon applied for leave to withdraw the appeal and pursue his remedy by way of review. The Appellate Court permitted the appeal to be withdrawn. An application was then made by the decree holder on 3rd February 1936, for review of the order of 26th January 1933. This was made to the Munsif of Motihari and not to the Subordinate Judge who had passed the order. It was dismissed on 6th June 1936, and an application in revision against the order of dismissal was dismissed by this Court on 21st September 1936. The learned Judge who disposed of the application held that the Munsif to whom the application was made had no jurisdiction to entertain it. Thereafter, on 9th October 1936, the decree-holder applied to the Subordinate Judge of Motihari for review of the order of 26th January 1933. As this application was time barred, an application was made to the Court to condone the delay in view of the circumstances narrated above. The Court condoned the delay by its order dated 13th January 1937 and now proposes to consider the application for review of its order of 26th January 1933. Against that order the judgment-debtor has moved this Court. The learned advocate who has appeared for him has challenged the order on the ground that the Subordinate Judge had no jurisdiction to entertain the application for review and on the further ground that the application was barred by limitation. With regard to the point of jurisdiction, the learned advocate for the petitioner referred to O. 47, R. 1, which is in these terms :

> Any person considering himself aggrieved (a) by a decree or order from which an appeal is allowed but from which no appeal has been preferred, and who, from the discovery of new and important matter or evidence which .... was not within his knowledge .... at the time when the decree was passed or order made..... may apply for a review of judgment to the Court which passed the decree or made the order.

The learned advocate argues that as in fact Misc. Appeal No. 101 of 1935 was preferred against the order of 26th January 1933, Cl. (a), R. (1), O. 47 is a complete bar to the maintainability of the application for review. That contention raises the question as to what is meant by the clause, "but from which no appeal has been preferred". On behalf of the opposite party it is contended that when an appeal is withdrawn, it must be taken that it is as if an appeal has not been preferred. Reliance was placed on a decision of the Allahabad High Court in 43 All 288[1] where a Division Bench held that an appeal which has been withdrawn must be treated as if it had never been preferred within the meaning of O. 47, R. 1. For the petitioner reference was made to the decision of a Division Bench of the Bombay High Court in 33 Bom L R 378,[2] in which it was held that where a party presents an application for review of judgment after he has preferred an appeal from the same, the review application is incompetent though the appeal is subsequently withdrawn. The learned Judges, however, pointed out that if a litigant who has filed an appeal wishes to apply for a review he may do so if he first withdraws his appeal. In the Bombay case the application for review was filed pending the hearing of the appeal itself. In the present case that difficulty does not arise for the application for review was not filed until after the appeal had been withdrawn. The learned advocate for the petitioner also referred to certain observations of the Privy Council in 2 Pat 676[3] at p. 674 where their Lordships say :

> In the present case an appeal had been preferred and a review, therefore, was out of question; and the defendants took the only and proper course, namely, to apply to the High Court, which was in possession of the case, to admit the additional evidence either under the general principles of law or under the specific provisions of R. 27 of O. 41.

The learned advocate contends that this is an authority for the proposition that the proper course being to apply to the Appellate Court for the admission of additional evidence and that having been done, the application for review is barred. The observations of their Lordships, however, must be taken with reference to the facts of the case in which they were made, that is to say a case in which the appeal was not withdrawn but was disposed of in the ordinary course on its merits. In the same case and at the same page their Lordships went on to observe that "rules of procedure are not made for the purpose of hindering justice". It is on that principle that the Allahabad High Court held

1. Ram Prasad v. Asa Ram, A I R 1921 All 197=61 I C 334=43 All 288=19 A L J 24.
2. Balling Vithaling v. Shri Devasthan Fund, Gondhale, A I R 1931 Bom 232=132 I C 446=33 Bom L R 378.
3. Indrajit Pratap Sahi v. Amar Singh, A I R 1923 P C 128=74 I C 747=50 I A 183=2 Pat 676 (P C).

that cases which were followed in *Ram Prasad* v. *Asa Ram*[1] had been decided. In the last mentioned case their Lordships observed :

> The Courts have evidently felt that some remedy in law must be open to a litigant who has in good faith filed an appeal against the decree of a Subordinate Court and then discovers that materials have come to his knowledge sufficient to afford good ground for an application for review of the adverse decision.

In my view, therefore, the learned advocate's contention that the Court had no jurisdiction to entertain the application for review fails. With regard to the question of limitation it was contended that the decree-holder was not entitled to exclude the period during which he was prosecuting Miscellaneous Appeal No. 101 of 1935. Reference was made to sub-s. 2, of S. 14, Lim. Act, which provides that :

> In computing the period of limitation prescribed for any application, the time during which the applicant has been prosecuting with due diligence another civil proceeding, whether in a Court of first instance or in a Court of appeal, against the same party for the same relief, shall be excluded, where such proceeding is prosecuted in good faith in a Court which from defect of jurisdiction or other cause of like nature, is unable to entertain it.

It is argued that the Court in which Miscellaneous Appeal No. 101 of 1935 was filed was a Court which had jurisdiction and, therefore sub-s. 2, of S. 14 has no application to the facts of the case. The Court below, however, appears to have condoned the delay in filing the present application not with reference to S. 14, Lim. Act, which is a section conferring upon a litigant a right to have certain time excluded in computing the period of limitation, but upon S. 5 which confers upon the Court a discretion to condone delay when in opinion of the Court there are sufficient grounds for doing so. It is under this section that the Court below has acted. The learned advocate for the petitioner, however, referred to certain decisions in which it was held that the pendency of a second appeal was not sufficient cause within the meaning of S. 5 for the filing of an application for review beyond the statutory period of limitation. Those cases, however, were not cases in which an appeal had been withdrawn. Furthermore, in revision, it is not the practice of this Court to interfere in the exercise of discretion by the Court below even when the exercise of that discretion is founded on a mistaken view of the law. The ground of limitation therefore also fails and the application is dismissed. There will be no order for costs.

P.R./D.S. *Application dismissed.*

A. I. R. 1937 Patna 530

WORT, J.

Ram Kishun Ojha — Intervenor — Petitioner.

v.

Ram Dulari Kuer, Intervenor and *another*, Plaintiff — Opposite Party.

Civil Revn. No. 367 of 1936, Decided on 24th February 1937, from order of Munsif, Buxar, D/- 30th July 1936.

(a) Practice—Stay order by High Court—No subsequent order by lower Court in matter is competent, much less order disposing of whole suit.

When the High Court orders proceedings to be stayed, they are to be stayed and no order is to be made on the matter by the Court below, much less an order disposing of the whole suit.

[P 530 C 2]

(b) Civil P. C. (1908), O. 22, R. 5—Mere substitution of one petitioner applying for substitution for another is not sufficient—Proper inquiry is necessary.

It is not sufficient for a Judge acting under O. 22, R. 5, Civil P. C., to merely substitute one petitioner who applies for substitution in preference to another : that order can be made only after proper inquiry having been entered into, the result of which will act as res judicata.

[P 531 C 1]

L. K. Chowdhury — for Petitioner.

D. N. Varma — for Opposite Party.

Order.—This Rule must be made absolute. This Court made an order on 14th August 1936 staying the proceedings, and, in spite of that, the Judge in the Court below disposed of the matter on compromise, the compromise being the payment of full rent and damages and costs by the defendant who had been substituted in place of the original defendant. This proceeding is very irregular and I take a very serious view of the matter. When this Court orders proceedings to be stayed, they are to be stayed, and no order is to be made in the matter by the Court below, much less an order disposing of the whole suit. A chalan had been applied for, it appears, in the early part of August but according to the order-sheet of the Judge this was not received until 18th August 1936 at least four days after the order of Mohamad Noor, J. staying the proceedings. And it is clear also from Order No. 12 dated

15th August that the Judge was aware of the stay order even on that date. He was quite clearly wrong in not going into the matter as to who was the proper person to be substituted for the deceased defendant. This should have been done by reason of O. 22, R. 5, Civil P. C., and it was not sufficient for the Judge to act as he did by merely substituting one petitioner (who applied for substitution) in preference to another. That order could be made only after inquiry having been entered into, the result of which would have acted as res judicata. The Judge will go into the question of substitution and the suit will be tried in the presence of that person whom the Judge holds as the proper legal representative of the deceased. It is perhaps unnecessary to state that, in the event of the Judge deciding that the daughter is the proper person, the matter as it at present stands will remain. This order is without prejudice to any compromise which may be entered into. The Rule is made absolute with costs : hearing fee two gold mohurs.

V.B.B./A.L. *Rule made absolute.*

A. I. R. 1937 Patna 531

ROWLAND, J.

Hajipur Central Co-operative Union, Ltd. — Defendant — Petitioner.

v.

Kamla Prasad — Plaintiff — Opposite Party.

Civil Revn. Petn. No. 446 of 1936, Decided on 8th December 1936.

(a) Bihar and Orissa Co-operative Societies Act (6 of 1935), Ss. 48 and 57—Suit by member against society for interest on deposit made by him—Civil Court's jurisdiction is barred—Dispute must be referred to Registrar.

Where a member of a co-operative society brings a suit to recover arrears of interest on deposit made by him in the co-operative society, the suit cannot be entertained by a civil Court in view of S. 57, Bihar and Orissa Co-operative Societies Act, but the dispute must be referred to Registrar under S. 48 of the Act. [P 532 C 1]

(b) Interpretation of Statutes — Harmonious construction.

Where an expression is defined in an Act, it must be held to have throughout the Act the meaning given to it by the definition. [P 532 C 1]

Hareshwar Prasad Sinha and *Rajeshwari Prasad* — for Petitioner.

Jaleshwar Prasad — for Opposite Party.

Order.—This is an application arising out of a pending suit brought by the opposite party to recover arrears of interest on deposit made by him and members of his family in the Hajipur Central Co-operative Union, Limited, of which the plaintiff himself is a member and has been a director and secretary. The dispute is about the rate of interest. The defendant objected in the Court of the Munsif that cognizance of this dispute by the Civil Court was barred by S. 57, Bihar and Orissa Co-operative Societies Act, 1935, read with S. 48 of the same Act. The relevant words of S. 48 are :

> If any dispute touching the business of a registered society arises between a member and the society, such dispute shall be referred to the Registrar;

and the relevant words in S. 57, are :

> Save in so far as is expressly provided in this Act, no Civil or Revenue Court shall have any jurisdiction in respect of any ....dispute required by S. 48 to be referred to the Registrar.

On the face of the language used, it would appear that all that we have to see is that whether in the first place the dispute is one touching the business of a society ; and in the second place whether it is a dispute between a member and the society. The dispute concerns the payment of interest on money advanced to the society by the plaintiff or his predecessor. I have no doubt that the borrowing of money just as much as the lending of the money is part of the business of the Society. Then as to the second point, one of the parties to the dispute is undoubtedly the Society and the plaintiff has not denied that he is a member. Indeed "member" is defined in S. 2 (f) of the Act "including both a person joining in the application for the registration of a society and a person admitted to membership" afterwards, and it is not contended that this definition does not apply to the plaintiff. But the argument which is advanced before me and is apparently the same as that which found favour with the learned Munsif, is that the dispute must be not only touching the business of a society but a dispute with a member of the society in respect of business which he had with the society in his capacity as a member and which he could not have had with the society in any other capacity. It is pointed out that societies do take loans not only from their members but also from outsiders, and it is pointed out that there is nothing in the Act to debar

an outsider who has advanced money to the society from bringing a suit in the civil Court to recover it ; and it is contended that on this analogy a member who has advanced money to the society in the same way as an outsider could have advanced money, ought to have the same remedy as an outsider has under the law. I can find no justification in any part of the language used in the Act for putting this strained interpretation on S. 48, or in reading into that section words of a restrictive character which are not there. It is a universal principle that where an expression is defined in an Act it must be held to have throughout the Act the meaning given to it by the definition. Therefore, I cannot say that in speaking of a dispute between a member and a Society, S. 48 uses the word "member" in any more restricted sense than that which is used in the section. The suit, therefore, did not lie in the civil Court and the plaint should have been rejected. The plaintiff's remedy was to have the dispute referred to the Registrar. The application is allowed and the petitioner is entitled to his costs, two gold mohurs.

K.B./R.K. *Application allowed.*

A. I. R. 1937 Patna 532

FAZL ALI AND AGARWALA, JJ.

Maharajadhiraj Kameshwar Singh Bahadur—Defendant—Appellant.

v.

Bansidhar Marwari — Plaintiff — Respondent.

Appeal No. 1362 of 1933, Decided on 7th December 1936, from decision of Sub-Judge, Darbhanga, D/- 23rd August 1933.

(a) Civil P. C. (1908), O. 21, Rr. 91 to 93 — Judgment-debtor having no saleable interest in property — Auction-purchaser is not entitled to bring regular suit for realization of purchase money — Proper procedure for him is to apply under O. 21, R. 91 for setting aside sale and under O. 21, R. 93 for refund of purchase money—Sale confirmed—O. 21, R. 92 (3) bars suit to set aside sale.

A purchaser at a sale held in execution of a decree is not entitled to bring a regular suit for realization of the purchase money paid by him on the ground that the judgment-debtor has no saleable interest in the property; and where he has purchased a property in which the judgment-debtor has not a saleable interest, the proper procedure for him to adopt in order to recover the purchase money is to apply under O. 21, R. 91, Civil P. C., to set aside the sale and then, if the sale is set aside, he may apply under R. 93 for an order for refund of the purchase money. If he does not apply under R. 91 or his application is rejected, the sale must be confirmed and Cl. (3) of R. 92 bars a suit to set aside the sale : *A I R 1925 Pat 106, Foll.* [P 533 C 1, 2]

(b) Execution Sale—Rights of auction-purchaser — Auction-purchaser entitled to receive compensation for loss caused through fraud or breach of duty of execution creditor.

Where an auction-purchaser at a Court sale has suffered loss through the fraud of the execution creditor or the breach of any duty which the execution creditor owes to the auction-purchaser, he is entitled to receive compensation for the loss which he has thereby sustained : *A I R 1926 Cal 971*; *A I R 1922 Bom 205*; *A I R 1931 Nag 116*; *A I R 1932 Lah 401* and *A I R 1930 Oudh 148, Rel. on.* [P 533 C 2]

(c) Civil P. C. (1908), O. 21, R. 92 — Strict interpretation necessary — It applies only to matters which can be agitated under O. 21, Rr. 89 to 91.

Order 21, Rule 92, in so far as it bars a suit to set aside a sale, must be strictly construed and can have application only to those cases where the matters which are sought to be agitated by means of a suit could be agitated under O. 21, Rr. 89 to 91. [P 533 C 2]

Murari Pandit and *K. P. Upadhya* — for Appellant.

Pande Nawal Kishore Sahay — for Respondent.

Fazl Ali, J.—This is an appeal from an appellate decree affirming the decree passed by the Munsif of Darbhanga in favour of the plaintiff. It appears that on 6th April 1925 the defendant's father obtained a decree for rent in respect of a holding situated within his zamindari against one Dwarka Chaudhury and certain other persons and the holding being put up for sale in execution of the decree was purchased by the plaintiff for a sum of Rs. 1,100 on 20th March 1928. The plaintiff deposited in due time the entire purchase money and a portion of it was withdrawn by the defendant and the balance by Dwarka Chaudhury and others. As a matter of fact, at the time when the plaintiff instituted the suit, neither Dwarka Chaudhury nor any of the other defendants in the rent suit was in possession of the holding. It is now established beyond doubt that though the holding had been previously mortgaged by the recorded tenant named Ramdhani Kant, the mortgage had been redeemed long before the institution of the rent suit by the latter and he was in possession thereof since 1919. Accordingly when the plaintiff proceeded to take possession of the holding through Court, Ramdhani Kant made

an application under O. 21, R. 100, Civil P. C., complaining that he had been wrongfully dispossessed by the plaintiff. This application succeeded and the possession of the property was restored to him on 5th August 1929. The plaintiff then instituted the present suit for recovery of Rs. 1,397 as damages. His case in the plaint was that the defendant's servants who acted for him had committed a deliberate fraud on him and he was entitled to be compensated.

The case of the plaintiff has been accepted by both the Courts below and the facts which have been found by these Courts may be summarized as follows : (1) That Sri Kant having redeemed the mortgage from Dwarka Chaudhury was in possession of the holding in respect of which the rent suit has been brought by the defendants since 1919; (2) that though this fact was known to the servants of the defendants, they brought the suit not against Sri Kant but against Dwarka Chaudhury; (3) that the defendants' servants had in bringing the suit acted in collusion with Dwarka Chaudhury and others and had thus defrauded the plaintiff. The Courts below have also in their judgment strongly commented upon the conduct of the defendant's *amlas* in not producing the zamindari papers to substantiate the defence that at the time when the rent suit was instituted the name of Dwarka Chaudhury was still recorded in the landlords' papers. They held therefore that the plaintiff was entitled to recover the entire purchase money together with the interest claimed by him by way of damages.

The first point which is raised by the learned advocate appearing on behalf of the defendant-appellant in this second appeal is that in view of the provisions to be found in O. 21, Rr. 91 to 93, the plaintiff's suit is not maintainable and in support of his contention he relies strongly upon the decision of this Court in 3 Pat 947.[1] In that case it was held that a purchaser at a sale held in execution of a decree is not entitled to bring a regular suit for realization of the purchase money paid by him on the ground that the judgment-debtor has no saleable interest in the property and that where he has purchased a property in which the judgment-debtor has not a saleable interest, the proper procedure for him to adopt in order to recover the purchase money is to apply under O. 21, R. 91, Civil P. C., to set aside the sale, and then if the sale is set aside he may apply under R. 93 for an order for refund of the purchase money. If he does not apply under R. 91 or his application is rejected, the sale must be confirmed, and Cl. (3) of R. 92 bars a suit to set aside the sale.

It appears that this is the view which prevails in all the High Courts except the High Court of Lahore and the Chief Court of Oudh and as at present advised I find no justification for holding a contrary view. It is, however, to be remembered that the present suit has not been brought either to set aside the sale or to recover the purchase money on the ground that the sale is not binding upon the plaintiff. The plaintiff's action is one for damages for fraud, and as far as I can see, there is nothing in O. 21, Rr. 91 to 93 to bar such an action. It appears to me that there is now a consensus of opinion that where an auction-purchaser at a Court sale has suffered loss through the fraud of the execution creditor or the breach of any duty which the execution creditor owes to the auction-purchaser, he is entitled to receive compensation for the loss which he has thereby sustained : *see* 53 Cal 758,[2] 46 Bom 833,[3] A I R 1931 Nag 116,[4] 13 Lah 618[5] and 5 Luck 552.[6] That this view is correct appears to me to be beyond question. O. 21, R. 92, in so far as it bars a suit to set aside a sale, must be strictly construed and can have application only to those cases where the matters which are sought to be agitated by means of the suit could be agitated under O. 21, Rr. 89 to 91. It is obvious that even if the plaintiff had become aware in time that the judgment-debtors in the rent suit had no saleable interest in the holding in question, he could not recover any

1. Nagendra Nath Ghose v. Sambhu Nath Pandey, A I R 1925 Pat 106=88 I C 219=3 Pat 947=6 P L T 769.

2. Rishikesh Laha v. Manik Molla, A I R 1926 Cal 971=96 I C 64=53 Cal 758=43 C L J 418.

3. Balwant Ranganath v. Bala Malu, A I R 1922 Bom 205=67 I C 360=46 Bom 833=24 Bom L R 308.

4. Dayal Das v. Shanker, A I R 1931 Nag 116=134 I C 269=27 N L R 318.

5. Mehr Chand v. Milkhi Ram, A I R 1932 Lah 401=138 I C 47=13 Lah 618=33 P L R 649 (F B).

6. Bahadur Singh v. Ramphal, A I R 1930 Oudh 148=124 I C 641=5 Luck 552=7 O W N 232 (F B).

damages for the fraud practised upon him by the decree-holder by instituting a proceeding under O. 21, R. 93; and if he attempted to raise any question of fraud, he would have been met with the answer that such a question was beyond the scope of the enquiry. Besides, the remedy provided under O. 21, R. 91, is available to an auction-purchaser only if he makes his application within thirty days of the sale. There may be cases, however (this case is one of that type) in which an auction-purchaser becomes aware of the judgment-debtor's want of title in the property sold to him after the thirty days have expired and it is inconceivable that in such cases he should be left without a remedy. That being so, it has been held in some cases that where property to which the judgment-debtor has no saleable interest has been purchased in execution of a decree and the circumstances are such that in accordance with the equitable rules obtaining in that behalf it would be against reason and conscience that the person to whom the purchase price has been paid should retain the purchase money as against the auction-purchaser, the auction-purchaser is entitled to recover such money from the decree-holder as money had and received to his use. It is, however, unnecessary to deal with this aspect of the matter because in my opinion it is clear that in the present case an action for damage can be maintained.

The next question which arises for consideration is whether the defendant should be called upon to refund the whole of the purchase money although he withdrew only a part of it, the balance being withdrawn by the defendant in the rent suit. It appears that the plaintiff for some reason or other did not implead Dwarka Chaudhury and others as defendants in the present suit, but that fact cannot in my opinion defeat this action because the defendant and Dwarka Chaudhury having on the finding of the Courts below acted in collusion with each other, their liability for damages was joint and several. The last point which arises in the case is whether a decree can be passed against the present defendant when the tortious act for which damages are claimed appears to have been committed during the lifetime of his father who is now dead. This point, however, was not raised in any of the Courts below or in the grounds of appeal and it cannot be allowed to be raised for the first time in this Court. For aught we know, if this point has been raised in any of the Courts below, it might have been possible for the plaintiff to prove facts which would make even the present defendant liable. I would, in these circumstances, dismiss the appeal with costs.

Agarwala, J.—I agree.

R.W./R.K. *Appeal dismissed.*

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* A. I. R. 1937 Patna 534

ROWLAND, J.

Nand Kumar Sinha — Petitioner.

v.

Emperor.

Criminal Revn. Petn. No. 590 of 1936, Decided on 8th December 1936, from order of Sess. Judge, Monghyr.

(a) Criminal P. C. (1898), S. 476 — Accused suborning evidence before Subdivisional Magistrate in committal proceedings — Trial by Sessions Judge—Subdivisional Magistrate can file complaint.

Where an accused suborned evidence during committal proceedings before a Subdivisional Magistrate and the Sessions Judge tried the case, the Subdivisional Magistrate can file a complaint under S. 476, Criminal P. C. [P 536 C 2]

(b) Criminal P. C. (1898), S. 476 — Preliminary enquiry—No notice to accused is necessary.

The wording of S. 476, Criminal P. C., does not make it incumbent on the Court to hold any preliminary inquiry or to give accused notice, and if an inquiry is held, its nature, method and extent are entirely within the discretion of the Court. [P 536 C 2]

(c) Evidence — Public document — Order sheets are public documents with presumption of genuineness in their favour.

An order sheet in a case is a public document being the record of an act of a public judicial officer and the presumption is that it is genuine. It would require evidence and not mere suggestion that it has been fabricated to justify its rejection. [P 536 C 2]

*** (d) Criminal P. C. (1898), S. 476—Inquiry — Courts of facts should unequivocally express opinion regarding desirability of making enquiry — Otherwise High Court may have to go into facts and form its own opinion.**

It is certainly desirable that Courts of facts should express themselves definitely and unequivocally on the question whether it is expedient in the interest of justice that an inquiry under S. 476 should be made : otherwise the High Court may have to look into the facts for itself and form its own opinion as to whether a prosecution is desirable or not : *A I R 1928 Cal 869, Rel. on.* [P 537 C 1]

Manohar Lal, *Naqui Imam*, *Baldeo Sahay* and *G. P. Sahai* — for Petitioner.

Govt. Advocate and *B. N. Rai* — for the Crown.

Order. — The petitioner is an accused person who is being prosecuted for an alleged offence under S. 193 read with S. 116, I. P. C., that is to say for abetment of an offence which was not in fact committed. The allegation is that during the pendency of commitment proceedings arising out of a dacoity at Rudauli, he instigated two persons, Sitaram Halwai and Ragho Dhanuk, to give false evidence before the Subdivisional Officer in connexion with the identification of the accused persons for whom the present petitioner was acting as pleader. The contentions of the petitioner are that the case against him is false. It is suggested that the Subdivisional Officer who made the complaint under S. 476 was moved by personal animus against the petitioner, that the proceedings were bad for want of preliminary inquiry before directing a complaint, that it is not desirable in the interest of justice that the alleged offence should be tried out, that the proceedings are bad for want of definite findings by the Subdivisional Officer and by the Sessions Judge on appeal, that a prosecution was required in the interest of justice. Mr. Manohar Lal also suggested that if a complaint was to be filed, the proper person to present it was not the Subdivisional Officer who held the commitment proceedings but the Assistant Sessions Judge who held the trial.

Mr. Manohar Lal for the petitioner has presented to me an historical review of the facts on which the suggestions against the Subdivisional Officer are based. It is said that the dacoity took place on 26th July 1935. A test identification was held in September 1935 before a Subdeputy Magistrate. The petitioner who acted for some of the accused as pleader presented a petition to the Subdeputy Magistrate who held the test identification making certain allegations against the Sub-Inspector, Rampirit Pande, and suggesting that he was tutoring witnesses as to the identification. The Subdeputy Magistrate referred the matter to the Subdivisional Magistrate to whom on 6th September 1935 the petitioner presented another petition on behalf of the accused with similar allegations. Other suspects presented another similar petition on 9th September 1935, alleging that by intimidation and coercion the police are fabricating evidence. Other accused persons presented a similar petition on 17th September and two accused persons, Kamli Singh and Ramji Potdar, presented affidavits on 18th September 1935, in support of the above allegations. Another accused, Jadunandan Rai, filed a regular complaint on 20th September 1935, alleging that on 22nd August 1935 he had been assaulted by the Sub-Inspector in order to extort a confession. Again, after submission of the charge-sheet on 4th November 1935, the petitioner, on behalf of the accused persons, presented a petition that a test identification by all the witnesses might be held at one time as the Sub-Inspector was trying to get witnesses tutored to make false identifications.

There is no material before me to judge whether any of these allegations were made in good faith or were not. On 27th November 1935, one of the prosecution witnesses, Sitaram Halwai, swore an affidavit before the Subdivisional Officer of Beguserai that he had been called through Biso Singh to the petitioner at the latter's shoe-shop and had been asked by the petitioner not to identify and to make wrong identifications and to say that he had been beaten by the Sub-Inspector. Ragho Dhanuk is named in this affidavit as having been present with Sitaram Halwai. No immediate action was taken by the Subdivisional Officer on this affidavit. Ragho Dhanuk in the course of his examination in the commitment proceedings made a similar statement. On 2nd December 1935, the commitment proceedings in the Court of the Committing Magistrate ended. Of the 16 accused, 10 were committed to sessions and 6 were discharged. The trial ended on 12th March 1936 in the conviction of the accused by the Assistant Sessions Judge. An appeal to the High Court was disposed of in June 1936.

The record, it is said, was received back by the Subdivisional Officer on 30th June 1936, but it was not till 27th August 1936 that he filed the present complaint. It is suggested that the delay was due to the pendency of certain other proceedings in which the Subdivisional Officer was directly involved. There had been in May 1935 a proceeding under S. 144 in which one Rameshwar Das was concerned. It is said that the Subdivisional Officer made

certain observations in open Court reflecting on the personal character of Rameshwar Das, a client of the petitioner. Rameshwar Das gave notice under S. 80, Civil P. C., of his intention to bring a civil suit against the Subdivisional Officer claiming damages for the defamatory language used, that at an administrative inquiry held by the Collector into the matter the petitioner gave evidence for Rameshwar Das and the latter filed his suit on 6th August 1936. It was however withdrawn on 7th August 1936.

It is suggested that the delay in filing the complaint on 27th August 1936 was due to the Subdivisional Officer not daring to present it earlier because of the proceedings against himself. As to this I have no doubt that if the complaint had been presented immediately on return of the record from the High Court, the petitioner would have contended that it had been done in order to put pressure on himself to stifle the suit brought by Rameshwar Das. I am unable to attach any sinister significance to the delay in presenting the complaint. As for the previous history, it is capable of two interpretations: one may be that the petitioner has throughout been conducting a campaign against the police officers and Subdivisional Officer who were doing their duty. Nothing has been placed before me to show that there was any substance in the allegations contained in the successive petitions filed in September 1935 challenging the bona fides of the test identifications. The fact that Sitaram's first allegation was made in the form of an affidavit and that Sitaram in his evidence in chief in the dacoity case did not refer to that incident is suggested to be an indication that the incident is not true. That is a matter going to the truth or falsity of the charge against the petitioner and it would be out of place for me to express any opinion in the present proceedings in revision as to whether there is another explanation less favourable to the petitioner. I shall turn now from matters which may have been introduced in order to create prejudice to the objections affecting the merits of the order under revision.

As to the first objection that the proper Court to complain was that of the Assistant Sessions Judge, there was an observation in the judgment of that officer dated 12th March 1936 that "it is desirable in the interest of the purity of administration of justice that the allegations be enquired into". The allegations referred to are that the petitioner attempted to suborn evidence. But the alleged attempt was during the commitment inquiry and was with reference to the commitment proceedings. The Subdivisional Officer therefore had jurisdiction to make the complaint. Then it is said that he ought to have held a preliminary inquiry and that the accused should have had notice and opportunity to show cause against his prosecution. The wording of S. 476 does not make it incumbent on the Court to hold any preliminary inquiry or to give accused notice and if an inquiry is held, its nature, method and extent are entirely within the discretion of the Court. I come to the argument that the proceedings are bad because there is no finding by the Subdivisional Officer or the Sessions Judge that an inquiry is expedient in the interests of justice. The complaint itself does not contain an expression of the Subdivisional Officer's opinion that inquiry into the alleged offence was desirable. This was pointed out to the Sessions Judge on appeal and he gave the Public Prosecutor an opportunity of obtaining the order-sheet of the Sub-divisional Officer. Two days later the Public Prosecutor produced the order-sheet dated 27th August 1936. This order-sheet the petitioner suggests is not genuine but was fabricated by the Subdivisional Officer in order to fill up the lacuna in his complaint. Such a suggestion was made before the Sessions Judge in appeal. It is a daring and scandalous suggestion. The order-sheet is a public document being the record of an act of a public judicial officer and the presumption is that it is genuine. I would require evidence and not mere suggestion to justify its rejection.

I may point out that if the order-sheet was a document fabricated by the Subdivisional Officer between the 14th and 16th October in order to fill a gap in the contents of its complaint, it is surprising that the order-sheet itself should not contain a finding in express terms that prosecution was expedient in the interests of justice. The Subdivisional Officer has noted in the order-sheet that the Assistant Sessions Judge directed inquiry into the conduct of the pleader for purity of the administration of justice and expressed his own opinion that any further preliminary

inquiry would not be expedient. He said that the other facts disclosed a prima facie case and directed a complaint to be filed. The order-sheet (and the complaint too) make it sufficiently clear by implication that the Subdivisional Officer was in fact of opinion that a prosecution was expedient, and it is a pity that in neither of these documents has he expressly stated this. In the Sessions Judge's judgment also I look in vain for a definite finding that a prosecution is desirable. It is certainly desirable that Courts of fact should express themselves definitely and unequivocally on the question whether it is expedient in the interest of justice that an inquiry should be made; otherwise as in 55 Cal 1312[1] the High Court may have to look into the facts for itself and form its own opinion as to whether a prosecution is desirable or not. In the present case the allegation is one of a flagrant attempt to scandalise justice by suborning false evidence. There is direct evidence in support of it and it seems to me in the highest degree desirable that the questions at issue be tried out and judicially determined on evidence. If it be proved that the allegations against the petitioner are true, it is certainly undesirable that he should go unpunished. If they are false it is equally undesirable that a stigma of suspicion should attach to his character. I have therefore no doubt that it is expedient in the interest of the administration of justice that the trial of the petitioner should proceed. The application is dismissed and the stay order vacated.

B.D./R.K. *Application dismissed.*

1. Keramat Ali v. Emperor, A I R 1928 Cal 862 =113 I C 842=55 Cal 1312=30 Cr L J 221.

A. I. R. 1937 Patna 537

ROWLAND, J.

Hanuman Singh — Petitioner.

v.

Baba Baijnath Prasad Singh and *others* — Opposite Party.

Civil Revn. No. 111 of 1936, Decided on 22nd December 1936, from order of Munsif, Hajipur, D/- 26th November 1935.

Bengal Tenancy Act (8 of 1885), S. 174 — Sale in execution of rent decree—Transferee from judgment-debtor depositing in Court 5 per cent. for payment to stranger auction-purchaser on last day of limitation — In lieu of depositing in Court under S. 174 (1), transferee filing petition stating that payment was made out of Court—Landlord decree-holder assenting to same — Court held bound to affirm sale unless money actually deposited in Court within limitation — Sale set aside — Case held fit for interference in revision.

Whenever two of the parties to a litigation have come to an agreement, the Court is not bound at their wish to follow a procedure contrary to that directed by the statute. It may or may not be so done when each and every one of the parties before the Court are agreed but where there is no such general agreement, the proper course for the Court to follow is to adhere strictly to what is laid down for its guidance in the statute itself. [P 539 C 1]

A certain holding was sold in execution of a rent decree. The sale however was set aside on the application of a transferee from the judgment-debtor who came to the Court on the twenty-ninth day after the sale and deposited five per cent. of the purchase money for payment to the auction-purchaser and in lieu of depositing in Court under S. 174 (1), Ben. Ten. Act, the amount recoverable under decree with costs for payment to the decree-holder stated by petition that the payment had been made out of Court to the landlord. The landlord decree-holder assented to this statement and to the application to set aside the sale:

Held: that the application of the transferee should have been rejected and the parties should have been asked to deposit, if they chose, the amount required by S. 174, Ben. Ten. Act, within the period of limitation: *18 Cal 481* and *A I R 1925 Pat 525*, *Rel. on.* [P 540 C 2]

Held further: that as the lower Court had set aside the sale on a wrong view of law, the case was fit for interference in revision. [P 540 C 2]

Ghulam Muhammad — for Petitioner.

Chaudhuri Mathura Prasad and *Baldeo Sahay* — for Opposite Party.

Order.—The applicant was the auction-purchaser of a holding put up to sale in execution of a decree for rent of the holding itself. The order objected to is an order setting aside the sale on the application of a transferee from the judgment-debtor who came to the Court on the twenty-ninth day after the sale and deposited five per cent. of the purchase money for payment to the auction-purchaser and, in lieu of depositing in Court under S. 174 (1), Ben. Ten. Act, the amount recoverable under decree with costs for payment to the decree-holder, stated by petition that the payment had been made out of Court to the landlord. The landlord decree-holder assented to this statement and to the application to set aside the sale. The objection of the petitioner auction-purchaser was overruled. The contention on his behalf is

that the Court was bound to affirm the sale unless the money was actually deposited in Court. The points for determination are : first, whether it was contrary to law to set aside the sale without the money being deposited and secondly, whether the error amounts to such an illegal or materially irregular exercise of jurisdiction as would call for the interference of this Court under S. 115, Civil P. C.

It is quite clear that the procedure followed by the Munsif was not that laid down in the Bengal Tenancy Act. S. 174 (2) provides for setting aside the sale "if such deposit is made within the thirty days" and not otherwise. The language of this section is different from that of S. 170 in which the conditions are laid down under which an order for the sale of a holding is vacated and the holding released from attachment. This is done under S. 170 (2) if either the amount of the decree including costs is paid into Court or the decree-holder makes an application for the release of the holding on the ground that the decree has been satisfied out of Court. There is no reference in S. 174 to any such application by the decree-holder on the ground that the decree has been satisfied out of Court and on a plain reading of the words of the statute it seems to me that the intention was that the sale must be confirmed unless the money is paid into Court. This was laid down in 18 Cal 481[1] by Sir Comer Petheram, C. J. as long ago as 1891 and that has been held to be settled law in 6 P L T 795.[2] The earliest case that has been pointed out to me in which the rule was relaxed is 27 I C 601,[3] in which the decree-holder and auction-purchaser were one and the same person and there had been an agreement between him and the judgment-debtor that the sale should be set aside. Jenkins, C. J. said :

> The learned Judge before whom this reasonable application was made seems to have felt that his action was paralyzed, because this particular predicament did not fall within the precise words of the Rules 89 onwards of O. 21. But I venture to think that where a case of that kind arises, it certainly is open to the Court not to confirm the sale and to treat the sale as being of no effect, that being the concurrent wish of the parties and the obvious requirement of the case.

In this case and in 104 I C 753=A I R 1928 Pat 40,[4] similarly decided, the only parties before the Court were the decree-holder who was also the auction-purchaser and the judgment-debtor. I should point out that in the other Calcutta case, 18 Cal 481,[1] as well as 6 P L T 795,[2] the purchaser was a third party. I have been referred to 16 P L T 709,[5] in which it was held that where the auction-purchaser, the judgment-debtor and the decree-holder all concur in a compromise waiving the requirement of law in S. 169, Ben. Ten. Act, for deposit by the auction-purchaser of the balance of the purchase money, the Court may give effect to that compromise although the procedure was not strictly in accordance with S. 169.

Now what a Court may be justified in doing, when all the parties before it are agreed in what they wish to be done is one thing. Courts have in many such cases thought fit not to insist on technicalities but to do what in the words of Jenkins, C. J. was "the concurrent wish of the parties and the obvious requirement of the case." When the Court has a general jurisdiction and the parties to a proceeding have by agreement adopted a procedure different from the ordinary procedure, then if the Court has given effect to such an agreement, one of the parties who has consented to it will not be heard at a later stage to object. This and no more in my opinion is the effect of the decision of the Judicial Committee of the Privy Council in L R 5 P C 516.[6] That was a case in which the Court had permitted an amendment of the plaint in a somewhat irregular manner and had taken the unusual course of determining the rights of the defendants one against another. While their Lordships were quite clear that the party who had consented to this procedure could not turn round afterwards and object to it, they did not by any means express approval of the procedure followed. On the contrary they said :

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1. Kabilaso Koer v. Raghu Nath, (1891) 18 Cal 481.
2. Raghunandan Pandey v. Garju Mandal, A I R 1925 Pat 525 = 91 I C 217 = 4 Pat 718 = 6 P L T 795.
3. Ram Prasad v. Ram Charan Singh, A I R 1916 Cal 64=27 I C 601.
4. Shivram Sand v. Manulal Khemka, A I R 1928 Pat 40=104 I C 753.
5. Inderdeo Tiwari v. Ram Ran Bijay Prasad Singh, A I R 1936 Pat 164=161 I C 714=16 P L T 709.
6. H. P. Pisani v. Attorney-General for Gibraltar, (1874) 5 P C 516 = 30 L T 729 = 22 W R 900.

Their Lordships, in conclusion, cannot but express their regret that, when the title of the Crown failed, the information was not dismissed and the defendants left to establish their rights as against each other in the ordinary way. The irregular procedure introduced by the amendment . . . must have caused great embarrassment.

This decision was applied in 2 I A 219.[7] In this case the question was of the regularity of certain proceedings which resulted in security bonds to enforce the plaintiff's right to mesne profits in the event of his success in the appeal. Here again their Lordships observed :

The Court here had a general jurisdiction over the subject matter though the exercise of that jurisdiction by the particular proceeding may have been irregular;

and they followed *Pisani's case*[6]

in which the parties were held to an agreement that the questions between them should be heard and determined by proceedings quite contrary to the ordinary *cursus curiae*.

This is not to say that whenever two of the parties to a litigation have come to an agreement, the Court is bound at their wish to follow a procedure contrary to that directed by the statute. It may or may not be so done when each and every one of the parties before the Court are agreed, but where there is no such general agreement, I think that the proper course for the Court to follow is to adhere strictly to what is laid down for its guidance in the statute itself. In 58 I A 50[8] their Lordships of the Privy Council considered a case in which the Court below had set aside a sale on the ground that the decree had been discharged since the sale. The Court purported to act under O. 21, R. 89, Civil P. C. and under O. 21, R. 2 which provides for certification of an adjustment out of Court, apparently taking the view that an adjustment between the decree-holder and the judgment-debtor nullified the decree taking away the very foundation of the Court's power to execute the decree, viz. the existence of a decree capable of execution. This reasoning their Lordships rejected, pointing out that for certification of an adjustment under O. 21, R. 2, the proper stage is

when the matter lies only between the judgment-debtor and the decree-holder, and when no other interests have come into being. When once a sale has been effected, a third party's interest intervenes, and there is nothing in this rule to suggest that it is to be disregarded. The only means by which the judgment-debtor can get rid of a sale, which has been duly carried out, are those embodied in R. 89, namely by depositing in Court the amount for the recovery of which the property was sold, together with 5 per cent. on the purchase as statutory compensation, and this remedy can only be pursued within 30 days of the sale.

In that case the adjustment propounded had been arrived at more than 30 days after the date of the sale whose confirmation had been delayed owing to some other proceeding ; but the language of their Lordships is general, and in my opinion it fully supports a decision of this High Court which goes a little further than that in 6 P L T 795.[2] I refer to 7 P L T 25.[9] In this case it was alleged by the judgment-debtor but denied by the decree-holder who was also the auction purchaser that the parties had made a compromise out of Court by which the decree was adjusted and the sale was to be set aside. This application of the judgment-debtor had been rejected by the Subordinate Judge as being not maintainable. He held that the Code of Civil Procedure did not authorize him to entertain any application to set aside the sale by arrangement between the decree-holder and the judgment-debtor and he dismissed the application without entering into the disputed question of fact. His decision was upheld by Mullick and Ross, JJ. as correct. It was said :

The only ground upon which a decree-holder can set aside his own sale is that the judgment-debtor has no saleable interest in the property. There is no provision in the Code for allowing adjustments between the parties after the sale has been held. The sale is a solemn act and the Court is not competent to review it merely at the request of the parties.

To sum up, there is no authority in this High Court for permitting a sale to be set aside otherwise than under S. 174 or R. 89 by consent of some but not all of the parties concerned in the decree, the execution and the sale. There is some authority to the effect that it is permissible for a Court to give effect to a compromise and to allow adjustment outside the scope of S. 174 provided that all the parties who are entitled to be heard in the matter concur, and if that is done, one of those parties will not be heard at a later stage to resile from his agreement and impeach the act of the Court on the ground of its

7. Sadasiva Pillai v. Ramalinga Pillai, (1875) 2 I A 219=15 Beng L R 383=24 W R 193=3 Sar 519 (P C).

8. Seth Nanhelal v. Umrao Singh, A I R 1931 P C 33=130 I C 686=58 I A 50=27 N L R 95 (P C).

9. Sham Narayan Singh v. Basdeo Prasad Singh, A I R 1925 Pat 702=88 I C 537=7 P L T 25.

irregularity. But the correct procedure is to abide what the statute has laid down. Where all the parties concerned are not agreed, the contrary view has never been taken in this Court. Two cases of other Courts have been referred to. One is 55 All 697,[10] which was a case under O. 21, R. 89 and turned on words in that Rule. As pointed out :

> The rule requires the judgment-debtor to deposit in Court 'for payment to the decree-holder the amount specified in the proclamation of sale ..... less any amount which, since the date of such proclamation of sale, have been received by the decree-holder.' The rule entitles the judgment-debtor to deduct the amount which has already been received by the decree-holder after the date of the proclamation.

It was held therefore that R. 89 recognizes and permits the decree-holder and the Court to allow for any payments received by the decree-holder even after the date of the sale. In the result it was held that the deposit of five per cent. together with the admission of the decree-holder that he had received the balance of the decretal amount was a compliance with the requirement of R. 89. This decision is of no avail to the respondent before me, because S. 174 contains no words corresponding to those in R. 89, the effect of which is to authorize the Court to accept an acknowledgment by the decree-holder as a substitute for deposit in Court for the purposes of this rule. The other is A I R 1926 Cal 1236,[11] which is on all fours with the present case. The learned Judges do not cite any authority in support of their view. Even if my personal view were different, which it is not, I should be bound to follow the decisions of this Court in 7 P L T 795 [2] and 7 P L T 25.[9] I have therefore no doubt that the order of the Munsif is erroneous and passed on a wrong view of law. It was his duty to reject the application and to confirm the sale, unless within the period of limitation the decretal money was deposited.

Another objection was taken. It was said that the opposite party was not competent to make the deposit in face of S. 174 (3) which permits it to be made by any person other than one who ought to have paid a transfer fee to the landlord and has not paid it. Undoubtedly the landlord can object that he has not received the transfer fee, but if the landlord admits receipt of it, a third party cannot compel the Court to investigate this question of fact. It was so decided in Civil Revn. No. 560 of 1935 [12] which may be referred to as illustrating a correct procedure. Here the decree holder and a transferee of the holding jointly applied to the Court for setting aside the sale on the ground that the decree had been satisfied. The application was forthwith rejected on the ground that the sum decreed had not been deposited in Court. Fortunately there were still several days remaining before the expiry of the period of 30 days and the deposit of the statutory amount with five per cent. Compensation for the auction-purchaser was in fact made within time and the sale accordingly set aside. It was held in revision that the procedure followed was correct. In the case before me the application was made before the Munsif on the last day but one and the proper order for him to pass was that the application be rejected and that the parties, if they chose, should deposit the amount required by the statute within the period of limitation. I consider this a fit case for the exercise of the revisional jurisdiction of this Court, and I have now to consider the proper order to pass. If the Munsif had rejected the application, the effect would have been to give the applicant still one clear day in which to make the required deposit, and I think he must have that opportunity. If the amount due under the decree is deposited in this Court today (the five per cent. compensation for the purchaser having been already deposited) the sale will be set aside ; failing that, it shall be confirmed. The petitioner shall have his costs of this application: hearing fee two gold mohurs.

V.B.B./R.K. *Petition allowed.*

10. Janki Prasad v. Lekhraj, A I R 1933 All 510 =149 I C 877=55 All 697=1933 A L J 1004.

11. Hemanta Kumari Debi v. Rajendra Kisho-Nath, A I R 1926 Cal 1236=97 I C 306

12. Saukhin Singh v. Jaglal Singh, Civil Revn. No. 560 of 1935, decided on 24th January 1936.

A. I. R. 1937 Patna 541

JAMES, J.

Dwarka Prasad and *others* —

Appellants.

v.

Parmeshwari Rai and *others* —

Respondents.

Second Appeal No. 169 of 1935, Decided on 29th April 1937, from decision of Sub-Judge, First Court, Monghyr, D/- 2nd August 1934.

Bengal Tenancy Act (8 of 1885), Ss. 21 and 29 - Applicability — Usufructuary mortgagee of village making raiyati settlement of portion of land with defendants at annual rent of Rs. 670—Two years after, mortgagor redeeming four annas share of village — Defendants agreeing to pay annual rent of Rs. 433 to mortgagor for his one-fourth share —Such agreement with mortgagor enhancing rent from Rs. 670 to Rs. 985 — Defendants having acquired occupancy rights under S. 21 of the Act, enhancement of rent in contravention of provisions of S. 29 held was illegal.

The usufructuary mortgagee of a village made a raiyati settlement of a portion of land with the defendants at an annual rent of Rs. 670. Two years after the defendants were in occupation of the land as raiyats, the mortgagor redeemed four annas share in the village. Thereupon, the defendants agreed with the mortgagor to pay him an annual rent of Rs. 433 for his one-fourth share. On a suit by the mortgagor for the arrears of rent against the defendants :

Held : that when the mortgagee in possession who was then the de facto landlord of the village gave tenancy to the defendants as settled raiyats of the village, the raiyats acquired occupancy rights by operation of law under S. 21, Ben. Ten. Act. The subsequent agreement with the mortgagor which had the effect of enhancing the rent from Rs. 670 to Rs. 985 was void by virtue of S. 29 of the Act and could not therefore be enforced: *A I R 1929 Pat 568, Disting.* [P 541 C 2 ; P 542 C 1]

Manohar Lal and *N. C. Roy* —

for Appellants.

S. N. Rai — for Respondents.

Judgment.—This second appeal arises out of a suit for arrears of rent. The plaintiffs gave a village in usufructuary mortgage with a stipulation that the mortgagees should have no power to make settlement for a period exceeding the term of the mortgage. The mortgagees made raiyati settlement of 129 bighas of land with the defendants who are a large family of cultivators at an annual rent of Rs. 670. The mortgagors after the raiyats had been in occupation for two years redeemed a four annas share in the village, whereupon they attempted to eject the raiyats from one-fourth of their holding. The raiyats then entered into an agreement to pay for their one-fourth share the annual rent of Rs. 433, and it is for rent at this rate that the suit was instituted. The learned Subordinate Judge found that the defendants who were settled raiyats of the village had acquired occupancy right by the operation of S. 21, Ben. Ten. Act, when settlement was made with them, so that the subsequent agreement with the landlords of the four annas share which had the effect of enhancing their rent from Rs. 670 to Rs. 985 was void by virtue of the provisions of S. 29 of the Act. The plaintiffs come in second appeal from that decision.

Mr. Manohar Lal on behalf of the appellants suggests that as the mortgagees had no power to make settlement for a term exceeding the term of the mortgage, they had no power to confer occupancy rights on the raiyat defendants ; but it appears to be clear that on this point the view taken by the learned Subordinate Judge was correct. There is no suggestion that the settlement was not made in good faith, or that it was collusive, and when the mortgagees in possession, who were then de facto landlords of the village, gave this tenancy to settled raiyats of the village, the raiyats acquired occupancy rights by operation of law : and it would not have been possible for the mortgagees to prevent the accrual of these rights by any contract between themselves and the raiyats. No contract between co-proprietors or between mortgagor and mortgagee can empower the mortgagee to avoid the provisions of S. 178, Ben. Ten. Act, so that if the contract has specifically provided that the raiyats should not acquire occupancy rights, it could not have been enforced. Mr. Manohar Lal suggests that S. 29 should be regarded as having no application in this case, because the higher rent was offered and accepted in settlement of a bona fide dispute as to the legal position of the defendants, citing the decision in 10 P L T 717;[1] but in that case the mortgagor had made a raiyati settlement with his own nephew in anticipation of a mortgage decree and the settlement bore on its face the appearance of a collusive settlement at a iow rate of rent. The nephew faced with an action in ejectment from the purchaser of the mortgaged pro-

1. Askaran Baid v. Deolal Singh, A I R 1929 Pat 568=118 I C 723=9 Pat 527=10 P L T 717 (F B).

perty, agreed to a considerable enhancement of rent, and it was held that the provisions of S. 29 would not apply to render such an agreement illegal. In that case there was a real dispute as to status; and there was ground for doubt whether the basic rent on which the enhancement would be calculated was the real rent of the holding or whether the whole settlement had not been a mere colourable transaction. In the present case it does not appear that any questions of this kind arise. The raiyats appear to have obtained bona fide settlement at a reasonable rate of rent. They acquired occupancy right by operation of law and their rent could not be enhanced by contract by an amount exceeding that permitted by S. 29, Ben. Ten. Act. The decree of the learned Subordinate Judge must therefore be confirmed and the appeal is dismissed with costs.

W.D./A.L. *Appeal dismissed.*

A. I. R. 1937 Patna 542

DHAVLE AND ROWLAND, JJ.

Kissen Gopal Ganwariwala and *others* — Judgment-debtors—Appellants.

v.

Madan Lal — Plaintiff — Respondent.

Appeal No. 295 of 1935, Decided on 15th March 1937, from original order of Sub-Judge, Purulia, D/- 21st September 1935.

Execution—Compromise decree—Powers of executing Court— Equitable relief — Court can relieve against forfeiture occasioned by fraud, accident, surprise or ignorance—Court will not relieve against forfeiture if it is wilful—Decree-holder agreeing to accept part of decretal amount within specified time in full satisfaction of decretal amount and in default decree-holder to proceed with execution of decree—On default by judgment-debtor, decree-holder proceeding with execution of decree—Time held essence of contract—Circumstances, held, such that Court could not relieve against forfeiture, and judgment-debtors held not entitled to pay agreed amount within reasonable time.

The power of Court to relieve against forfeiture is based on the equitable principle that equity only interferes to do complete justice between the parties. No doubt, if forfeiture is occasioned by accident, fraud, surprise, or ignorance, a Court of Equity will interpose and relieve against forfeiture so caused; but it is equally true that a Court of Equity will refuse to aid a defaulter if the forfeiture is wilful or is the result of gross negligence. Where the creditor agrees to accept part of the debt in full satisfaction, if paid within a stated time, equity will not relieve against the provision as to time. [P 544 C 1]

During the pendency of execution of a money decree, the decree-holder agreed to accept a much smaller amount in full satisfaction of the decree if paid within two months. It was further agreed that if such sum was not paid within the stipulated time, the decree-holder was to proceed with the execution without the judgment-debtors being competent to raise any objections. The judgment-debtors failed to pay the amount within two months and therefore the decree-holder proceeded with the execution :

Held : **that the wording of the contract clearly showed that the parties meant that the benefit which was to accrue to the judgment-debtors would be lost to them if the payment was not made within the specified time, or in other words, time was of the essence of the contract and the decree-holder was perfectly justified in levying execution for the whole decree on the failure of the judgment-debtors to pay the agreed amount within the stipulated time. [P 544 C 2; P 546 C 1]**

Held also : **that assuming in favour of the judgment-debtors that the Court might in some cases have jurisdiction to vary a consent order as regards time without the concurrence of all the parties, in the circumstances of the case the judgment-debtors were not entitled to pay the agreed amount within a reasonable time as time was essence of the contract. Even if the judgment-debtors had made a serious attempt to pay according to the compromise into which they had entered and the attempt had failed for no fault of theirs, equity would not have relieved against forfeiture in such case : *A I R 1937 Pat 113*; *Ford* v. *Earl of Chesterfield*, *19 Beav 428* and *6 C L J 176*, *Rel. on* ; *Case law referred.***

[P 545 C 2; P 546 C 1]

Manohar Lal, *Hareshwar Pd. Sinha*, *S. C. Mazumdar* and *K. P. Sukul* — for Appellants.

P. R. Das, *S. M. Mullick* and *G. N. Mukherji* — for Respondent.

Dhavle, J.—This is an appeal by certain judgment-debtors from an order dismissing their objections in an execution proceeding. The decree under execution was passed on the Original Side of the Calcutta High Court against Kishun Gopal and Rameshwar Lal personally, and also against Sitaram and Gigla, two minors, "out of their share or interest in the assets in or to come to their hands of the joint family estate of the defendants," and it was a decree for over Rs. 19,000 besides interest and costs, the minor Sitaram alone being made liable for the difference between the costs of the suit as a defended suit and the costs as of an undefended suit. Execution was started in the Court of the Subordinate Judge of Purulia in October 1934. Two months afterwards the judgment-debtors filed an objection under S. 47, Civil P. C., which was disallowed in the following April. While that objection was pending, the judgment-debtors filed another

objection in February, stating that the decree-holder had been satisfied to the extent of Rs. 12,500 and urging that he was therefore not entitled to proceed in respect of the entire amount decreed. Next month they filed another objection urging among other things, that the decree was a nullity as it was a joint decree and one of the defendants, the minor Gigla, had died before the decree was passed. While these two objections were pending, the parties arrived at a compromise on 29th April 1935 according to which the whole decree was to be treated as satisfied if the judgment-debtors paid Rs. 5,500 to the decree-holder within two months, and the decree-holder was to proceed with the execution if the judgment-debtors did not pay the agreed sum of Rs. 5,500 within the time fixed. This compromise was filed in Court on the following day and the Subordinate Judge stayed the execution proceedings till 29th June 1935. On this day, the decree-holder applied for time to proceed, and on 4th July 1935 he asked for the issue of sale proclamations (certain properties of the judgment-debtors having already been attached) alleging that the judgment-debtors had not paid anything to him and that he was therefore entitled to realize the entire decretal amount. It appears from the order-sheet of the lower Court, which is before us, that on 2nd August 1935 Rameshwar Marwari filed an objection under S. 47, which was allowed on 10th August; we understand that that was an objection regarding valuation. The sale was then fixed for 16th September 1935 on which day an objection was filed by Kishun Gopal urging among other things the old objection that on account of Gigla's death before the passing of the decree, the decree which was joint was null and void. The sale was not actually held on 16th September, but was "kept on hammer" from day to day till 21st September when the judgment-debtors filed another objection urging among other things that as the decree was against a firm, the personal properties of the judgment-debtors were not liable under it. The learned Subordinate Judge heard this objection and the objection of 16th September, together on 21st September, and finding them untenable allowed the sale to proceed.

It is contended for the appellants that under the compromise of 29th April 1935 the decree-holder was not entitled to proceed with the execution. It is not pretended that the decree-holder was paid Rs. 5,500 or any part of it within the stipulated period of two months, but it is urged that time was not of the essence of the contract, that the judgment-debtors were therefore only bound to pay Rs. 5,500 within a reasonable time, that the Court had power to relieve against forfeiture, and that the learned Subordinate Judge should have investigated an allegation made in the judgment-debtors' petition of the 21st September that the decree-holder was not willing to take Rs. 5,500 though the judgment-debtors had been ready to pay it.

According to the terms of the compromise of the 29th April, the judgment-debtors had two months from that day to pay Rs. 5,500 to the decree-holder in full satisfaction of the decree. As I have already stated, the decree-holder moved the Court on the 4th July for the issue of sale proclamations on the ground that the judgment-debtors had not paid anything. It has not been claimed before us that in his objection of the 2nd August, Rameshwar Marwari said anything regarding the readiness of the defendants to pay and the unwillingness of the decree-holder to receive Rs. 5,500. In his objection of the 16th September Kishun Gopal did urge that the decree-holder was not entitled to take out execution for the entire amount as he had contracted to take Rs. 5,500 in full satisfaction of the decree, but even then he did not say anything about the readiness of the judgment-debtors to pay and the unwillness of the decree-holder to receive that amount. The point was only mentioned for the first time in the judgment-debtors' objection of the 21st September, five days after the date fixed for the sale and nearly three months after the expiry of the stipulated period of two months from 29th April. There is no reference to this point in the judgment of the lower Court, nor is it clearly stated in the grounds of appeal that the Subordinate Judge omitted to deal in his judgment with this or any other point that was actually argued before him. It seems to me from all this that the point was not really taken—argued—below. The judgment-debtors had evidently been filing one objection after another without meaning it, and the compromise petition, after empowering the decree-holder to proceed with the execution in case he was not paid Rs. 5,500 within the stipulated time, went on to say :

In regard to the same (that is to say execution for the decretal amount of Rs. 19,700) the judgment-debtors will not be competent to raise any objection. The judgment-debtors withdraw the objections they have raised regarding valuation, etc., in the execution, and they will not be competent to raise those objections in future.

The decree-holder, it is plain, agreed to take the Rs. 5,500 within a limited time in order to avoid the delay to be apprehended from what looked like the habit of the judgment-debtors of raising objections from time to time. The objections actually urged before the learned Subordinate Judge and dealt with by him relate to the death of Gigla as affecting what is claimed to be a joint decree, and the decree being against a firm and not against the individuals constituting the firm. What I have already stated about the details of the decree is sufficient to show how palpably untenable the objections actually urged were. Although it is urged in appeal that the lower Court should have investigated the judgment-debtors' allegation that though they had been ready to pay, the decree-holder was unwilling to receive Rs. 5,500, it does not appear that the Subordinate Judge was asked—moved—to do so, or that any evidence was offered or any adjournment asked for to enable them to produce it. The mere allegation was no proof, and this was probably one of the reasons why the point was not actually urged before the learned Subordinate Judge. I am not prepared in these circumstances to hold that an investigation should have been made by the lower Court. As regards the power of the Court to relieve against forfeiture, it is to be remembered that equity only interferes to do complete justice between the parties :

No doubt, if forfeiture is occasioned by accident, fraud, surprise, or ignorance, a Court of Equity will interpose and relieve against forfeiture so caused; but it is equally clear that a Court of Equity will refuse to aid a defaulter if the forfeiture is wilful or is the result of gross negligence:

as Mookerjee, J. observed in 6 C L J 176.[1]

Nor does this appear to be a case of forfeiture of the kind that equity would have relieved against, even if the judgment-debtors had made a serious attempt to pay according to the compromise into which they have entered and the attempt had failed for no fault of theirs. Where the creditor agrees to accept part of the debt in full satisfaction if paid within a stated time, equity will not relieve against the provision as to time—19 Beav 428,[2] cited and distinguished by Lord Kingsdown in 8 M I A 239.[3] In such a case there is no scope for the application of the doctrine of penalties (16 Ch D 675[4]) or forfeitures. The contention of the appellants that time was not of the essence of the contract is also plainly untenable on the facts of this case. The judgment-debtors had been repeatedly filing objections to the execution, when the decree-holder agreed to accept in full satisfaction Rs. 5,500 if paid in two months, the agreement further being that if not paid within time, he was to proceed with the execution without the judgment-debtors being "competent to raise any objection". This provision in the circumstances makes it clear that the parties intended time to be of the essence of the contract; for it cannot be reasonably supposed that the decree-holder who had a decree for over Rs. 19,700 would agree to be satisfied with a much smaller sum not within the time stipulated, but within such period as the Court may on evidence find to be reasonable.

In this view of the matter it is unnecessary to consider the larger question of the power of the executing Court in such circumstances to extend the time of payment without the consent of the decree-holder. A similar question, we were informed, had arisen in a Full Bench reference which was pending. That reference has since been decided, 17 P L T 940,[5] without pronouncing on the general question. It may be added that the view seems to have been taken in at least two cases in this Court, 2 P L J 164[6] and 9 Pat 332,[7] that time fixed for payment by consent of the parties in execution proceedings cannot be extended by the Court without their consent. These were cases where payment was to be made in order to get an execution sale set aside or nullified. The same

1. Harakh Singh v. Saheb Singh, (1907) 6 C L J 176.

2. Ford v. Earl of Chesterfield, (1854) 19 Beav 428=52 E R 416=2 W R 640.
3. Ram Gopal Mookerjea v. Samud Masseyk, (1859-61) 8 M I A 239=2 W R 43 (P C).
4. *Ex parte* Burden; *In re* Neil, (1881) 16 Ch D 675=44 L T 525=29 W R 879.
5. Bhagwat Narain Singh v. Srinivas, A I R 1937 Pat 113=169 I C 483=16 Pat 202=17 P L T 940 (F B).
6. Rameshwar Misser v. Sureshwar Misser, A I R 1917 Pat 344=39 I C 664=2 Pat L J 164.
7. Jadab Chandra Poddar v. Rameshwar Marwari, A I R 1930 Pat 308=125 I C 516=9 Pat 332=11 P L T 315.

view was taken in 13 Pat 1[8] which was a case where the decree-holder was to proceed to realize the entire decree without any remission in case he was not paid certain instalments punctually. In 2 Pat 906[9] however, Mullick, J. referred to 1891 W N 170[10] and the exhaustive discussion of the question in 33 C L J 244,[11] and took it as settled that

> where the agreement is for the payment of money on a prescribed date and that on default of payment on that date money is to be forfeited, time is not of the essence of the contract,

and that in every case the Court must determine upon the facts of that case whether relief against forfeiture is to be given or not. This would imply that the Court has power to extend time if it should hold that there was a forfeiture involved in the agreement. In formulating his general rule about the forfeiture of money—the rule which was adopted by Mullick, J.—Mookerjee, J. in *Kandarpa's case*[11] proceeded on 8 M I A 239[3] as a case where relief against forfeiture was given to a defendant who was indebted to the plaintiff in a certain sum which the defendant agreed to pay, upon a remission by the plaintiff of part of his claim, in two instalments on specified dates. But, as pointed out by Lord Kingsdown, that was

> not the case of a creditor engaging to remit to his debtor a portion of his demand in consideration of his making payment of smaller sums punctually at fixed periods, in which case the punctuality of the payment is the only consideration which the creditor receives for his indulgence: *Ford* v. *Chesterfield*;[2]

but

> a case in which a third person, being under no liability consents to incur that liability and binds himself in a penalty for the due performance of his engagement.

The general rule about forfeiture of money laid down by Mookerjee, J. in *Kandarpa Nag* v. *Banwari Lal*,[11] on which Mr. Manohar Lal has laid so much stress, and which was applied by Mullick, J. in 2 Pat 906[9] to a case where no debt was established apart from the compromise which terminated the suit, is thus of no help to the appellants, because, as I have already shown, the present case falls within the principle of *Ford* v. *Chesterfield*.[2] In cases of this kind there is hardly any question of penalty or forfeiture or the analogous principle on which equity relieves against mere lapse of time where it is consistent with the substance of justice to do so, if from the contract or from the nature of the case time is not shown to be of the essence of the contract. It is true that if the judgment-debtor does not pay in time, he becomes liable for the entire decretal amount. But the liability arises from the decretal debt and default in the punctual payment of the smaller sum which the decree-holder had agreed to accept in full satisfaction, subject to payment within a fixed period, merely operates to remove an essentially temporary bar to execution. In the analogous case of an agreement under which an execution sale is to be set aside if the judgment-debtor pays a certain amount within a certain time, but is to stand confirmed if he does not, Mookerjee, J. himself held in 9 C L J 251[12] that the executing Court had no jurisdiction to extend the time "except by the assent of each and every one" of the parties to the agreement, not merely because time is of the essence of the contract in such cases but also because any modification of the agreement required the concurrence of all the consenting parties. In that case there was no question of any forfeiture: *see* 6 P L T 511[13]; but in 23 C W N 439[14] Teunon and Newbould, JJ. only extended the time fixed for payment by a compromise decree in a mortgage suit because the mortgagee did not seriously press his objection as regards the jurisdiction of the Court to extend time.

Assuming however in favour of the appellants that the Court may in some cases have jurisdiction to vary a consent order as regards time without the concurrence of all the parties, it is clear that in the present case the contention that time was not of the essence of the contract and that the judgment-debtors were entitled to have the decree satisfied by paying Rs. 5,500 within a reasonable time, is untenable and must be overruled. It follows that the decree-holder was entitled

8. Sheo Prasad Lal v. Tapeshwar Mahto, A I R 1933 Pat 563=145 I C 548=13 Pat 1=15 P L T 298.
9. Mt. Nand Rani Kuer v. Durga Dass Narain, A I R 1924 Pat 387=82 I C 505=2 Pat 906 =5 P L T 401.
10. Australian Automatic Weighing Machine Co. v. Walter, (1891) W N 170.
11. Kandarpa Nag v. Banwari Lal Nag, A I R 1921 Cal 356=60 I C 864=33 C L J 244.
12. Chandanbala v. Probodh, (1909) 36 Cal 422= 2 I C 338=9 C L J 251.
13. Hansraj v. Jogeshar, A I R 1925 Pat 691=88 I C 1020=6 P L T 511.
14. Akkach Mondal v. Aminuddi, A I R 1919 Cal 68=50 I C 937=23 C W N 439.

to proceed with the execution. It was also urged incidentally that the compromise only entitled the decree-holder, in case the judgment-debtors did not pay the Rs. 5,500 within the stipulated time, to levy execution for Rs. 5,500 only. This contention is raised on the words of the compromise :

"*Tabe decreedar tahar decree babat prapya arthat 19700 takar jarite sampatti nilam bikray mate aday karia leite paribe.*"

The translation of this clause in the paper book is entirely against the appellants' contention. The learned Subordinate Judge was a Bengali, and the contention was not raised before him. It is also not raised in the grounds of appeal. Nor is it easy to see any meaning in the interpretation suggested before us, namely that the decree-holder was to realise Rs. 5,500 by levying execution for Rs. 19,700. It was also similarly urged that according to the compromise the decree-holder was entitled to levy execution for Rs. 19,700 only. The decree was for Rs. 19,767-7-3. We do not know for what amount execution was actually levied after the failure of the appellant to pay, nor is the point really raised in the grounds of appeal. It was not raised below. I would therefore decline to entertain it. In my opinion the appeal should be dismissed with costs.

Rowland, J.—I agree. The observation of Khaja Mohammad Noor, J. in 17 P L T 940[5] that

> The wording of the contract clearly shows that the parties meant that the benefit which was to accrue to the judgment-debtors would be lost to them if the payment was not made within the specified time, or in other words time was of the essence of the contract,

applies in its entirety to this case. The question what a Court can or should do, if it thinks time not to be of the essence, hardly seems to arise. The appeal was in my view nothing better than a frivolous device to delay the execution proceedings.

K.B./A.L. *Appeal dismissed.*

A. I. R. 1937 Patna 546

COURTNEY-TERRELL, C. J. AND JAMES, J.

Kharag Narain & another—Appellants.

v.

Janki Rai and *others*, Plaintiffs and *others*, Defendants—Respondents.

Appeal No. 156 of 1933, Decided on 9th October 1936, from original decree of Sub-Judge, Monghyr, D/- 22nd December 1932.

(a) Practice—New plea.

A new point necessitating more evidence than on record must not be raised in appeal for the first time. [P 548 C 2]

(b) Hindu Law—Alienation—Coparcener—Mortgage by member of his undivided share is not void but voidable.

Where a member of a joint Hindu family mortgages his undivided share, the alienation is not void but voidable at the option of the other members of the family or any one of them, but cannot be impeached by the alienor himself or by any transferee who has not acquired by transfer or prescription the interest of the entire joint family : *A I R 1930 All 852, Rel. on.* [P 549 C 1]

(c) Transfer of Property Act (1882), S. 43—Mortgage of undivided share by member of joint Hindu family—Partition of joint property—Mortgage of certain part and sale of other part of his allotted share subsequent to partition—Subsequent transfers are subject to prior mortgagee's lien.

It is an incident of the mortgage of an undivided share in joint property that the mortgagee cannot follow his security into the hands of a co-sharer who may have obtained part of the mortgaged property on partition ; the mortgage lien is transferred to that portion of the joint property which the mortgagor had obtained at the partition. [P 549 C 2]

G, a member of a joint Hindu family, mortgaged his undivided share in favour of J in the joint family property, alleging that he was separate from the rest of the members. Some years later there was a partition giving G certain portion of the property and subsequently the same member (G) mortgaged certain portion of his allotted share and sold other portion of it. J instituted a suit on the basis of his mortgage, claiming to proceed against the property which has fallen to G's share. The subsequent transferees failed to prove want of notice :

***Held* : that as soon as the partition was effected, J's mortgage lien was transferred to property which fell to his share and the subsequent transfers after partition were subject to J's mortgage lien :** *A I R 1920 All 34, Rel. on.* [P 549 C 2]

Khurshed Husnain, B. C. Mitra, B. B. Saran and *J. M. Ghosh* — for Appellants.

B. C. De and *M. K. Mukharji* — for Respondents.

James, J. — Gobardhan Lal and his brother Girwar were members of a joint family, with their father Banarasi Lal, and their two uncles Brij Lal and Dularchand. Gobardhan Lal at an early stage began to quarrel with his family and to do business on his own account with Janki Rai. On 9th February 1918 he executed a bond whereby he purported to mortgage a share of 1/6th in the property specified, part of which was ancestral property of the family, while part had been bequeathed by Nandu Lal, the maternal grandfather of Banarasi Lal, to his three

grandsons Banarasi Lal, Dularchand and Brij Lal. In the mortgage bond there was a recital to the effect that Gobardhan Lal had demanded partition of the family property ; but the members of the family were unwilling to make it : so this mortgage was executed in part for payment of antecedent debt and in part to raise money for the purpose of instituting a suit for partition. The money was not utilised for the institution of the partition suit, but it was utilised for a separate business carried on by Gobardhan Lal. After 1918, the three brothers made further acquisitions of joint family property. They did not mention the name of Gobardhan Lal in any deed ; but as there is no mention of any sons, this fact would not necessarily be of any significance. If Gobardhan Lal had actually separated in 1918, he would not prima facie have been entitled, when partition was ultimately made, to a share in this property, though he might possibly have been entitled if, while he still remained a tenant-in-common, the property was acquired from the joint fund. On 21st May 1927, after the death of Banarasi Lal, Gobardhan Lal's two uncles with his brother executed a mortgage, wherein they recited that Gobardhan Lal had cut himself off from his family in the lifetime of his father and had ceased to have any right to the family property. The mortgagee doubtful on this point obtained another mortgage bond in the following year in the execution of which Gobardhan Lal took part, wherein it was recited that the family was joint. On 25th September 1928 a formal partition of the property was made, wherein a third share went to Gobardhan Lal and his brother Girwar who immediately partitioned this share between themselves. On 7th December 1929 Gobardhan Lal mortgaged part of the property which had fallen to him on partition to Rai Bahadur Kharag Narain. On 12th January 1930 he sold a portion of that property to Mt. Lal Pari who redeemed to that extent the mortgage of Kharag Narain.

On 11th May 1931 Janki Rai instituted a suit on the basis of his mortgage of 1918, claiming to proceed against the property which had fallen to Gobardhan Lal on partition. The suit was instituted almost 12 years after the date of payment fixed by the mortgage bond, but within time. It was contested on various grounds by the sons of Gobardhan Lal, and also by the mortgagee of 7th December 1929 and the purchaser of 12th January 1930, who asserted that the bond was a colourable transaction not executed for consideration; that there was no family necessity for the bond ; and that since the mortgagor was a member of the joint family when the mortgage was made, nothing was conveyed by the transaction. The Subordinate Judge found that the mortgage was for consideration and that so far as the sons of of Gobardhan Lal were concerned it was binding on them because it was executed on account of antecedent debt and for family necessity. He found that the mortgagor was not separate from his father and uncles at the time when the deed was executed but that he represented to the mortgagee that he was separate. The learned Subordinate Judge accordingly applied the provisions of S. 43, T. P. Act, holding that since the mortgagor by actual separation had placed himself in a position to carry out the alienation which in 1918 he had represented himself to be able to do, the mortgage deed must be enforced. The mortgagee of 1929 and the purchaser of 1930 were transferees for value, but the learned Subordinate Judge found that they had failed to prove that they had no notice of the option conferred by the mortgage of 1918 and it could therefore be enforced against them. Immediately after the institution of the present suit, the mortgagee of 1918 instituted a suit on his own mortgage bond which was apparently disposed of more promptly than the suit with which we are here concerned so that he was able to obtain a decree and purchase the property in dispute while this suit was pending. The mortgagee and the transferee of 12th January 1930 have appealed from the decision of the Subordinate Judge.

Mr. Khurshed Husnain on behalf of the appellants attacks in the first place the finding of fact of the learned Subordinate Judge that at the time of the mortgage the mortgagor represented to the mortgagee that he had made a definite announcement of his intention to separate such as would amount to separation in the eye of the law. Mr. B. C. De, supporting the decree on grounds decided against him in the trial Court, argues that the learned Subordinate Judge ought to have found that there was actual separation in 1918. Whatever representation might have been made, Mr. Khurshed Husnain argues

that the mortgage should not be regarded as taking effect upon the share which ultimately fell to Gobardhan Lal on partition, because the mortgagor did not purport to transfer a share of an undivided estate but merely a share in specific property. He argues also that the mortgage of an undivided share is void ab initio and no equity can be created by it such as would call for the application of the provisions of S. 43, T. P. Act, or of any other equitable rule. Finally he argues that the appellants are transferees for value without notice of the option and that they are therefore protected from the operation of S. 43.

Mr. Khurshed Husnain suggests that there is no averment in the plaint that Gobardhan Lal at the time of the mortgage represented that he was separate. In the translation of the plaint which has been prepared for this Court, the expression "*apne khuahish zahir kiya*" has been translated "expressed desire" (for separation and partition) but "announced an intention" would be an equally good translation and it cannot be said that the representation has not been pleaded. Two witnesses, Bihari Lal and Damri Sao, state that Gobardhan Lal actually did make an announcement of the fact that he was separate before the execution of the mortgage and since it appears to be clear that he was at that time and for a long time afterwards on bad terms with his family and he did actually separate from them, there is no reason why this evidence should not be accepted. The recitals in the bond of 21st May 1927 (Ex. 2) indicate what the rest of the family thought on this matter. This deed executed by the surviving members of the joint family, Dularchand, Brij Lal and Girwar Lal, the brother of Gobardhan Lal, recites that Gobardhan Lal, the eldest son of Banarasi, separated during the lifetime of his father and went to his father-in-law's house in Benares on relinquishing his claim, leaving the executants in possession and occupation of all the property of the joint family. But later we find Gobardhan Lal joining with the other members of the family in executing a mortgage deed and at the time of the partition they described themselves as joint.

Mr. Khurshed Husnain argues with some reason that we have not here anywhere a definite unequivocal and irrevocable announcement of intention to separate until the commencement of the actual proceedings for partition. There were attempts to obtain partition ; Gobardhan Lal deserted the family home and went to Benares and the impression which would be conveyed by this evidence is that either of the two parties represented themselves as joint or separate as it suited their convenience. The position of Gobardhan Lal appeares to have been uncertain and equivocal and it cannot be said that there was any unequivocal announcement of separation actually effected. On the other hand, it appears to be clear that Gobardhan did represent in 1918 that he had cut himself off from his family, although it does not appear from the subsequent conduct of the parties that the representation was regarded by them as irrevocable. I would accept both the findings of the Subordinate Judge : that the representation was made at the time of the mortgage and that the mortgagee believed it; and that there was no actual separation until 1928.

The objection that what was mortgaged was not a share in the undivided estate but was a share in specific property was not taken in the written statement and is now raised for the first time. The plaintiff asserted by his plaint that Gobardhan Lal's one sixth-share in the family property mortgaged to him represented the share which was allotted to Gobardhan at the partition. He distinctly stated in para. 8 of his plaint that the property detailed and specified below in Sch. 2 had been allotted to Gobardhan Lal in lieu of the mortgaged one sixth-share. We do not know that at the time of the mortgage the joint family possessed any property other than that specified in the mortgaged bond; nor whether the subsequent acquisitions to the joint family were made from the common fund represented by this property. A new point of this kind must not be raised for the first time in appeal. If the point had been taken in the written statement, parties would have entered into evidence on this question; and it would have been possible to ascertain whether what was mortgaged was part of Gobardhan's share or the whole of it. The learned Subordinate Judge has pointed out that at the time of the mortgage Gobardhan's share would not have been one-sixth but one-ninth; but he appears to have been under the impression that he would be entitled to one-sixth on partition, the share to which

he would become entitled on the death of his father and which he actually obtained when the partition was made. I consider that the learned Subordinate Judge rightly treated the mortgage as a mortgage of the share of Gobardhan Lal in the joint family property together with his share in the property which descended to the family under the will of Nanu Lal.

Mr. Khurshed Husnain argues that since Gobardhan Lal was not separate at the time of the mortgage, his mortgage of an undivided share was void *ab initio*. This question was discussed by the High Court of Allahabad in 53 All 21,[1] where it was pointed out that an alienation made by a member of joint Hindu family is not void but voidable at the option of the other members of the family or of any one of them. It appears that misunderstanding is apt to be caused by declarations that particular alienations are void which have been made after the alienations have been impeached by persons at whose option they were voidable when the Court, finding that the alienation cannot be supported, has declared it to be void. When a viodable contract is successfully impeached by a person entitled to challenge it, it becomes void; but this is not a contract of the kind which is in itself void *ab initio*. The learned Judges in the case quoted pointed out that the alienation cannot be impeached by the alienor himself or by any transferee who has not acquired by transfer or prescription the interest of the entire joint family. They made an exception of the position of an auction purchaser who may have purchased the interest of a coparcener in execution of a decree. From that decision it would appear that neither of the two appellants are entitled to impeach this mortgage of Gobardhan Lal on the ground that his interest in the joint family was not such as to entitle him to make it since they both appeared in the appeal in their capacities of transferees from Gobardhan. For other property in which the appellant, Rai Bahadur Kharag Narain, had acquired the interests of the entire joint family, his claim has been allowed by the Subordinate Judge; to that extent the plaintiff has failed and we are not concerned with that property in this appeal.

Section 43, T. P. Act, provides that where a person erroneously represents that he is authorized to transfer certain immoveable property and professes to transfer such property for consideration, such transfer shall, at the option of the the transferee, operate on any interest which the transferor may acquire in such property at any time during which the contract of transfer subsists. In 1918 Gobardhan Lal erroneously represented that he was entitled by reason of his declaration of separation to mortgage a share of one-sixth in the joint family property; and he mortgaged that share to the plaintiff in 1928. When he did in the partition proceedings finally and unequivocally separate from the rest of the family, he became entitled to dispose of the one-sixth-share. I need only cite the decision in 18 A L J 807,[2] wherein it is pointed out that it is an incident of the mortgage of an undivided share in joint property that the mortgagee cannot follow his security into the hands of a co-sharer who may have obtained part of the mortgaged property on partition : the mortgage lien is transferred to that portion of the joint property which the mortgagor had obtained at the partition. As soon as the partition was effected on 25th September 1928, the mortgage lien was transferred to the property which fell to Gobardhan's share; and the subsequent transfers of 7th December 1929 and 12th January 1930, which were made by Gobardhan Lal, were subject to the mortgage lien.

Neither of the appellants proved want of notice. The plaintiff said that he approached the appellant, Rai Bahadur Kharag Narain, when he was taking the mortgage from Gobardhan and he demanded his dues from him but the appellant declined to satisfy him. His karpardaz Munshi Lal stated in evidence that this appellant had no knowledge of the mortgage; but the Subordinate Judge did not believe him. If he was to avoid being charged with notice, it would have been necessary to demonstrate that there was some irregularity in the registration of the bond of 9th February 1918, in view of the provisions of S. 3, T. P. Act, as amended by S. 4 of Act 20 of 1929; and in the absence of such evidence the appellants must be deemed to have had notice of the existence of a previous mortgage. Neither of the appellants can claim to be in the position of a transferee without notice.

1. Madan Lal v. Chiddu, A I R 1930 All 852=128 I C 829=53 All 21=1930 A L J 1528.

2. Bhup Singh v. Chhedda Singh, A I R 1920 All 34=58 I C 171=42 All 596=18 A L J 807.

The appeal accordingly fails and I would dismiss it with costs.

Courtney-Terrell, C. J.—I agree.

V.B.B./R.K. *Appeal dismissed.*

✻ A I. R. 1937 Patna 550

SPECIAL BENCH

COURTNEY-TERRELL, C. J., MOHAMAD NOOR AND MANOHAR LALL, JJ.

Baijnath Prasad Singh and *others* — Defendants — Appellants.

v.

Umeshwar Singh and *others*, Plaintiffs and *others*, Defendants — Respondents.

Appeal No. 5 of 1934, Decided on 10th August 1937, from original decree of Sub-Judge, Gaya, D/- 26th January 1933.

(a) Practice — Duty of Court — Court has double function — Judicial function to hear and decide cases and as collector in collecting revenue in shape of requisite court-fees— In exercise of latter, Court is given discretion to grant time.

The Court has a double function : it has its judicial function to hear and decide cases ; it also acts as a collector of revenue, and its duty is to collect the revenue for the Government in the shape of court-fees according to the statutes provided, and in exercising that function it has a discretion granted it to allow time. In the exercise of both of these functions, Subordinate Courts are under the direction of the High Court. [P 551 C 1]

(b) Practice — Discretion — Interference — Exercise of discretion wrongfully by trial or first Appellate Court—Party failing to get it remedied by superior Court at once before allowing case to proceed cannot attack it in appeal from decision of case.

The exercise of discretion by the lower Courts, whether by the trial Court or the first Appellate Court, must be got remedied by the party aggrieved thereby by approaching the superior Court at once ; but if the party does not take such step but allows the case to proceed on merits, such party cannot claim in first or second appeal, as the case may be, from the decision of the case, to attack the order ultimately passed by the Court on the ground that there was wrongful exercise of discretion by the Court : *A I R 1916 Pat 317* and *16 Pat 371, Rel. on.* [P 552 C 1, 2]

✻ (c) Civil P. C. (1908), O. 7, R. 11 — Court is bound to grant some extension of time to make up deficiency before rejecting plaint — Suit filed in time—Deficiency made up within time allowed by Court after limitation—Plaint is within time.

Order 7, R. 11, Civil P. C., makes it compulsory for the Courts, before rejecting the plaint, to give some time to the plaintiff to make up the deficiency, however short that time may be, and the Court cannot straightway reject the plaint without giving such time. [P 553 C 2]

Where a suit is filed within the limitation prescribed by law but on an insufficiently stamped paper and the plaintiff makes up the deficiency within the time allowed by the Court but after the expiry of the period of limitation for such suit, the fact that the plaint was not properly stamped when it was filed does not in the least militate against its efficacy and the plaint does not become as though it had not been lodged at all. The plaint remains in time even then. [P 553 C 2]

(d) Interpretation of Statutes—Two possible alternatives - Construction more favourable to subject should be preferred (Per *Manohar Lall, J.*)

Per *Manohar Lall, J.*—The well-known rule of construction of a statute is that where there are two possible alternatives, the one more favourable to the subject must be preferred when a question of forfeiture of rights of the subject is involved. [P 553 C 2]

(e) Civil P. C. (1908), O. 7, R. 11 (c) — Cl. (c) lays down two conjunctive conditions to be satisfied before rejection of plaint (Per *Manohar Lall, J.*)

Per *Manohar Lall, J.* — It is the duty of the Court only to interpret the plain meaning of the words deliberately used by the Legislature in O. 7, R. 11, Cl. (c), Civil P. C., and not to guess the possible intention of the Legislature. The clause lays down two conditions which are conjunctive and not disjunctive which must both be satisfied before a plaint can be rejected. [P 553 C 2 ; P 554 C 1]

S. M. Mullick, N. K. Prasad II and *K. N. Lal* — for Appellants.

S. N. Ray, B. N. Rai and *R. S. Sinha* — for Respondents.

Courtney-Terrell, C. J.—This is a first appeal from a decision of the Subordinate Judge of Gaya and is directed to be heard by a Special Bench because of a point of importance arising in connexion with the levying of the court-fee on the plaint. The suit was brought by the plaintiff on a mortgage bond dated 8th June 1918, the claim being for Rs. 6,549-8-0 upon which the court-fee, as is admitted, would be a sum of Rs. 502. The suit was filed on the last day of limitation, having regard to extensions of time which the plaintiff was entitled to by reason of the occurrence of certain holidays. It was filed on 1st June 1931 with a court-fee of Rs. 11. The plaintiff petitioned, when filing his plaint, that he be allowed time to file the deficiency on the court-fee stamp which deficiency amounted to Rs. 491-8-0 and he undertook to pay it on 29th June. On 29th June the plaintiff had not complied with the order for the payment of the balance. The Subordinate Judge, who was in charge of the matter at the time, for some reason took an extremely lenient view of the failure on the part of the plaintiff to pay up the deficit. He directed that the pleader was to comply with the

order for payment by 3rd July, and on the same day the plaintiff paid up a further Rs. 50 and asked for one month's time. The order by the Subordinate Judge was that the matter should be put up on 3rd July as he had already directed. When the 3rd July came, the Judge allowed a further extension until 20th July. On 20th July the plaintiff was again not ready and the learned Subordinate Judge allowed him until the 31st of the same month. On the 31st, the plaintiff paid a further Rs. 30 and the Judge thereupon allowed him till 10th August to pay up the balance. When 10th August in its turn came, the plaintiff asked for time until 'tomorrow' undertaking to pay on the following day Rs. 295 and the Judge allowed him until the following day. On the next day the plaintiff paid up the Rs. 295 and prayed for two weeks further time to deposit the balance, after the payments I have mentioned, which amounted to Rs. 116.8.0. On 25th August further excuses were advanced owing to an alleged difficulty in the purchase of stamps. The Judge allowed two further days' time, directing payment of the deficit on 27th August and it was not until 27th August that the plaintiff paid up the deficit of Rs. 116.

Now the Court has a double function: it has its judicial function to hear and decide cases; it also acts as a collector of revenue, and its duty is to collect the revenue for the Government in the shape of court-fees according to the statutes provided and in exercising that function it has a discretion granted it to allow time. In the exercise of both of these functions Subordinate Courts are under the direction of the High Court. There is no doubt whatever that in this particular case the learned Judge, in exercising his discretion to grant time for the payment of the deficit court-fee, acted in a most undesirable manner and that undesirable exercise of his discretion undoubtedly prejudiced the defendant, although the defendant was no proper party to questions of revenue as between the plaintiff and the Government. It would have been quite possible for the defendant, who was injured by this repeated and unnecessary delay in the levying of the court-fee, to come to this Court and complain that in the exercise of its function as a revenue collector the Court had acted in the matter prejudicially to the defendant and that the discretion vested in the Court to grant adjournments had been improperly exercised. Had such an application been made, no doubt the Court would have, by virtue of its general powers of superintendence of lower Courts, checked the action of the Subordinate Judge. The suit was, after the payment of the deficit, heard on its merits and was decided against the defendant and the action of the Judge in the wrongful exercise of his discretion in permitting extensions of time for the payment of the court-fee is not a matter which concerns in any way the merits of the dispute in the suit which he had to try. It is contended, however, by the defendant that the plaint as originally filed without an adequate court-fee of Rs. 502 was no plaint at all, inasmuch as the original plaint was filed on the last day permitted by the Limitation Act after all the extensions had been granted. It is contended that when the deficit on the court-fee had actually been paid and the plaint had become, on the contention of the defendant a regular plaint, the period of limitation for the bringing of the suit had expired.

I am unaware of any provision which states that a plaint must be a plaint on which the whole of the leviable duty has been paid and that if the whole of the leviable duty has not been paid, the plaint is as though it had not been lodged at all. The argument is based in the main upon S. 6, Court-fees Act, which states:

> .... no document of any of the kinds specified as chargeable in Sch. 1 or Sch. 2 to this Act annexed shall be filed, exhibited or recorded in any Court of justice, or shall be received or furnished by any public officer, unless in respect of such document there be paid

the schedule court-fee. The Court-fees Act was passed in 1870 and S. 149, Civil P. C., which was newly added in 1908, expressly provides:

> *149.* Where the whole or any part of any fee prescribed for any document by the law for the time being in force relating to court-fees has not been paid, the Court may, in its discretion, at any stage, allow the person, by whom such fee is payable, to pay the whole or part, as the case may be, of such court-fee; and upon such payment the document, in respect of which such fee is payable, shall have the same force and effect as if such fee had been paid in the first instance.

The Judge, therefore, at the very least clearly had a discretion to allow the payment of the court-fee and when the court-fee had been paid, the plaint upon which it was paid must be deemed as having been filed on the day on which it

was actually filed. The provision for the payment of court-fees has really nothing whatever to do with the litigation as such; it merely means that notwithstanding that a suit may be brought to compel payment of a debt due, the Court is not allowed to go into the matter and adjudicate upon its merits until the court-fee has been paid and the provisions for court-fees are merely provisions enforcing the payment of revenue by a denial of judicial process to a person who does not pay the provided fees.

Now in this case the learned Judge having a discretion to allow time did exercise his discretion. As I have indicated, if the discretion were exercised in an outrageous fashion it would be quite right for the person injured, that is to say the defendant, to come to this Court for relief; but the defendant took no such step and claims to be entitled in appeal to attack the order ultimately passed by the trial Court on the basis of the wrongful exercise of discretion by the Judge in allowing extensions of time for payment of the court-fee. That argument cannot be entertained; it has been attempted in similar cases. I may instance, for example, the case of a Court allowing an extension of time under S. 5, Limitation Act. It is not possible after the extension has been granted and after the case has been decided on the merits, for the Appellate Court to interfere with the final order upon the basis of a wrongful extension of time. That point was decided finally by this Court in 1 P L J 485[1] where the Chief Justice Sir Edward Chamier stated :

> It is now settled by a long string of authorities that where a Court, after considering all the circumstances of the case, has come to the conclusion that sufficient cause has or has not been established for filing an appeal within time, the High Court in second appeal will not interfere.

The same reasoning is applicable to a Court sitting in first appeal, because the matter which was under discussion in that case was in connection with an extension of time given by the first Appellate Court for lodging the appeal. A second illustration is to be found where the first Appellate Court has exercised its discretion to admit further evidence. Let it be supposed that the first Appellate Court in exercising that discretion exercised it wrongfully and admitted further evidence which was relevant to the issues in dispute. It has been decided by this Court in 16 Pat 371[2] that no interference in second appeal could take place. In that case the first Appellate Court had allowed the admission of further relevant evidence. A learned Judge of this Court, sitting singly in second appeal, was disposed to send the matter back to the lower Appellate Court with a direction to dispose of the appeal on the evidence on the record, ignoring the evidence which had been in his view wrongfully admitted though relevant to the issue. In Letters Patent Appeal, however, that view was dissented from and it was held that the lower Appellate Court having exercised its discretion to take further evidence and there having been no steps taken by the other party to have that discretion interfered with by way of revision or otherwise, the evidence was rightly taken into account by the Judge in disposing of the case on its merits. I may instance a further possibility. A Judge might grant an adjournment of a case for a period, let us say of five years. At the end of that five years no steps having been taken by the party aggrieved to have such outrageous exercise of discretion corrected, the Judge takes up the hearing of the case upon its merits. It would not be possible for the Court of Appeal to say that the case should not have been disposed of on its merits after the adjournment, although the Court might properly censure the trial Court for having granted such an outrageous adjournment. In short, these exercises of discretion by lower Courts, whether the trial Court or the first appellate Court, must be remedied, if at all, at once by the superior Court on the application of the party aggrieved and it is too late if that party allows the case to proceed and then seeks to interfere with the discretion in appeal.

A further point was argued in connection with the consideration of O. 7, R. 11, Civil P. C. That Order is somewhat unfortunately worded. It provides for the rejection of the plaint in certain cases, one of them specified in clause (c) being as follows :

> . . . where the relief claimed is properly valued, but the plaint is written upon paper insufficiently stamped, and the plaintiff on being required by the Court to supply the requisite stamp paper within a time to be fixed by the Court fails to do so,

1. Debi Charan Lal v. Mehdi Hussain, A I R 1916 Pat 317=35 I C 888=1 Pat L J 485.

2. Durga Tewari v. Ramrati Kuer, (1937) 16 Pat 371=18 P L T 618.

It has been argued that the meaning of the Rule is that in such circumstances the Court is bound to grant an extension in a case where the plaint is insufficiently stamped and the plaintiff asks for an extension of time for filing the deficit. If the matter had been res integra, I speaking for myself, would have been disposed to hold that that was not the meaning of the Rule and that the Rule necessarily implies first an application to the Court to grant an extension and does not imply that the Court has no discretion to refuse the application. But a different view of the Rule has for long been held in this province and by the Courts of other provinces, and it has been thought and it is still thought by many that the Rule necessarily implies an obligation on the part of the Court to grant an extension of time. Speaking for myself, I would not be disposed to give any decision which might express as a matter of ruling any dissent from that view, for it is manifestly a convenient Rule for the disposal of justice. It is a matter of some misfortune that the method of collection of reveuue should be done through the Courts. An instance of the convenient working of the Rule on the interpretation that it involves an obligation to grant an extension is seen in the case of rent suits. In a great number of cases a tenant merely requires stimulation of legal proceedings to pay up the rent which may be due, and if the landlord could not sue without filing the whole of the court-fee on the first filing of the suit, the result might ultimately be a great deal worse for the tenant: it would be firstly a hardship on the landlord and in the event of the decision being against the tenant, the tenant would ultimately have to pay up the whole of the court-fee in addition to the debt which he owed to the plaintiff landlord. Therefore no great injustice occurs. Indeed there is a convenience in allowing an extension of time. Nevertheless in applications for extension as regards the period of extension of time, Judges should have regard to the justice in each particular case. It might easily be that the proper extension of time in some cases might be a period as short as half an hour or even less and in some cases the extension might be greater and Judges should not automatically grant long extensions of time for the payment of court-fee because of the duty which is owed by the judicial authorities to protect the revenue. This, however, is not a matter which concerns the defendant; the matter is as between the Crown and the plaintiff.

In this case the defendant was actually sued in time as provided by the Limitation Act. The fact that the plaint was not properly stamped does not in the least militate against its efficacy, although it might very likely happen that the Court might be prevented from entering into the merits of the suit and from making an order by way of judgment. So much for the point which led to the constitution of this Bench to hear this first appeal. As regards the merits of the appeal itself, that has become a matter of arrangement between the parties: they have consented to the disposal of the first appeal on the basis that the claim for interest made by the plaintiff is to be reduced to 12 per cent. simple interest instead of the compound interest originally claimed. It will be for the office to work out the amount of the decree in accordance with this compromise. The decree of the trial Court will accordingly be modified. The plaintiffs are entitled to the full costs of the lower Court as well as the full court-fee and to the costs of the appeal.

Mohamad Noor, J.—I entirely agree with the judgment which is delivered by my Lord the Chief Justice. I would, however, wish to add that in my opinion O. 7, R. 11 makes it compulsory for the Courts, before rejecting the plaint, to give some time to the plaintiff to make up the deficiency however short that time may be, and the Court cannot straightway reject the plaint without giving such time.

Manohar Lall, J.—I also agree. I wish to add that in my opinion the duty of this Court is only to interpret the plain meaning of the words deliberately used by the Legislature in O. 7, R. 11, clause (c) and not to guess the possible intention of the Legislature. When I consider this language, keeping in mind the well-known rule of construction that where there are two possible alternatives, the one more favourable to the subject must be preferred when a question of forfeiture of rights is involved (because all fiscal statutes should be strictly construed and in cases of doubts in favour of the subject). I find that on a fair construction the statute lays down two conditions which are conjunctive and not disjunctive which must

both be satisfied before a plaint can be rejected. This view has been adopted by various other High Courts and is based upon a reasonable construction of the words used by the Legislature. The Courts before whom plaints are presented insufficiently stamped, are required to determine judicially the extent of time which must be given to make up the deficiency. It may be that in some cases a short time should be allowed, while in other cases the facts of the case demand that a longer interval of time should be given to the plaintiff to make good the deficiency, but some time must be given before the plaint can be rejected.

A.L./R.K. *Decree modified.*

A. I. R. 1937 Patna 554

FAZL ALI AND DHAVLE, JJ.

Rabindra Chandra Ghosh and *others* — Plaintiffs — Appellants.

v.

Mahtha Gauri Singh and *others* — Defendants — Respondents.

Appeal No. 839 of 1934, Decided on 4th May 1937, from appellate decree of J. C., Chota Nagpur, D/- 2nd May 1934.

Landlord and Tenant—Adverse possession—Zamindar making grant of village to his son *J* terminable on extinction of male line of *J*—*J* granting mukarrari to tenants—*J* dying without male issue—Subsequent acceptance of rent by zamindar from tenants held created tenancy from year to year—Suit by zamindar for ejectment 12 years after *J's* death — Possession of tenants held was not adverse to zamindar.

If a man enters upon a void lease, he is not a disseisor but a tenant-at-will under the terms of the lease in all other respects except the duration of time; and when he pays or agrees to pay any of the rent therein expressed to be reserved, he becomes a tenant from year to year upon the terms of the void lease so far as they are applicable to and not inconsistent with a yearly tenancy. [P 555 C 2]

A certain zamindar granted his son *J* a village for his maintenance. The grant was determinable on the extinction of the male line of *J*. *J* granted a mukarrari in respect of that village to certain tenants. *J* died without any male issue and the grant extinguished. The tenants continued to pay rent according to their lease to the zamindar who accepted it. The zamindar then brought a suit after more than 12 years from the date of the death of *J* to eject the tenants :

Held: that the duration of Mukarrari granted by *J* could not exceed that of the original grant to *J* and it could not be inferred that the zamindar confirmed all the terms of the mukarrari, from the mere fact that he continued to accept rent from the tenants. The effect in law of the payment of rent and its acceptance was to create a new tenancy by which the tenants became the tenants from year to year under the zamindar. The mere fact that the zamindar did not take any steps to eject the tenants at an earlier date after the death of *J* did not make their possession adverse to the zamindar, nor were they entitled to resist the suit for ejectment : *27 Cal 156 (P C), Foll.* ; *A I R 1925 Pat 216* and *A I R 1928 P C 146, Disting.* [P 555 C 2]

Manmatha Nath Mukherjee and *B. C. De* — for Appellants.

Fazl Ali, J.—This appeal arises out of a suit which was decreed in part by the Additional Subordinate Judge of Hazaribagh but has been dismissed in its entirety by the Judicial Commissioner of Chota Nagpur. The appellants (who are the sons of the original plaintiff and were substituted in his place upon his death during the pendency of this appeal) are admittedly the proprietors of Taluk Jagodih which includes village Phulwaria, the subject matter of the present suit. This village was granted by one Raja Bed Khan by way of khorposh or maintenance to his son Jobraj Khan long ago and in 1864 Jobraj Khan granted a mukarrari in respect of it (subject to the payment of a quit rent) to a certain person whose interest has now passed to the defendants. As the grant of Raja Bed Khan was determinable on the extinction of the male line of the grantee and according to the plaintiff such an event did happen on the death of Jobraj Khan, the plaintiff in the year 1918 sent a notice to the defendants asking them to give up possession of the disputed village. The defendants, however, refused to give up possession and so the plaintiff brought the present suit which has been dismissed by the learned Judicial Commissioner. Now, it seems to have been conceded before the learned Judicial Commissioner that the disputed village was liable to be resumed upon the death of Jobraj Khan and that he had died without male issue about forty years ago. The only material plea that was raised before him was one of limitation and it was dealt with by him in these words :

The final position, therefore, is as follows : (1) Jobraj Khan died 40 years ago, (2) plaintiff became aware of this fact, or can be reasonably expected to have become aware of this fact, shortly afterwards, (3) defendants admittedly continued in possession of the disputed land for 40 years after Jobraj's death without notice from the plaintiff to quit, (4) during this time defendants' possession was that of a trespasser, and not that of a tenant, and (5) therefore defendants have been in

adverse possession of the land for more than the statutory period of 12 years with the result that plaintiff is now debarred from ejecting them therefrom under the law.

The learned Judicial Commissioner has not stated clearly what precise evidence there is in the case to show that shortly after Jobraj Khan had died, the plaintiff became aware of his death; but even assuming that he has correctly surmised the position, the inference of law which he draws from the facts before him appears to me to be not correct. The fact which ought to be borne in mind in determining the question of limitation is that according to both parties' case, the defendants have continued to pay rent to the plaintiff since the death of Jobraj Khan in the same manner as they used to pay it to him before his death. It was therefore urged on behalf of the plaintiff before the Judicial Commissioner that the case came within the application of S. 116, T. P. Act, and the result of the continued payment of rent by the defendants was that when the lease was determined on the death of Jobraj Khan, a new tenancy was created by reason of the plaintiff accepting rent from the defendants, such a tenancy being in law a tenancy from year to year. The learned Judicial Commissioner held that S. 116, T. P. Act, had no application to the case for the reason that the defendants were never in the position of lessees under the plaintiff and he quoted in support of his opinion a passage from the decision of Jwala Prasad, J. in 4 Pat 139.[1]

Now, even though S. 116 may not be directly applicable to this case, we have still to consider the legal effect of the acceptance of rent by the plaintiff after the mukarrari grant by Jobraj Khan to the defendants' predecessors-in-interest became a defunct instrument, because the case of the contesting respondent in the Court below seems to have been that merely by such acceptance of rent all the terms of the mukarrari lease granted by Jobraj Khan to the predecessors-in-interest of the defendants became binding upon the zamindar. I think that the answer to the problem is provided by the decision of the Judicial Committee in 27 Cal 156.[2] In that case a zamindar had granted a village to his nephew for maintenance, the grant operating only for life. The grantee survived the grantor and by an ekrarnama acknowledged the succeeding zamindar to be entitled to the village. He had, however, already executed a patta in favour of a third person describing him to be a permanent lessee and the zamindar who succeeded the grantor accepted rent from him at the rate stipulated in the patta and did not disturb his possession for some time after the death of the original grantor. Nevertheless when the zamindar subsequently claimed the village as part of the inherited zamindari, it was held: (1) that the original grant not having extended to more than the life of the grantee, the patta was void as against the successor in title of the grantor; and (2) that the acceptance of rent at the rate provided in the patta could not have the effect of confirming the document in its entirety. Now, the decision of the Judicial Committee appears to me to cover fully the points raised in the present case. It is clear that the duration of the mukarrari granted by Jobraj Khan could not exceed that of the original grant and from the mere fact that the plaintiff continued to accept rent from the defendants, it cannot be inferred that he confirmed all the terms of the mukarrari in favour of the defendants. The law on the subject has been stated in Woodfall's Law of Landlord and Tenant in these words :

> If a man enters upon a void lease, he is not a disseisor but a tenant-at-will under the terms of the lease in all other respects except the duration of time; and when he pays or agrees to pay any of the rent therein expressed to be reserved, he becomes a tenant from year to year upon the terms of the void lease so far as they are applicable to and not inconsistent with a yearly tenancy.

Thus the effect in law of the payment of rent by the defendants to the plaintiff and its acceptance by the latter was that a new tenancy which was similar in all other respects to the original tenancy of the defendants under Jobraj Khan except as to the duration of time was created and the defendants became tenants from year to year under him. If this view is correct, the mere fact that the plaintiff did not take any steps to eject the defendants at any earlier date after the death of Jobraj Khan does not make their possession adverse to him or entitle them to resist his suit for ejectment. The learned Judi-

1. Ram Rachhya Singh v. Kamakhya Narain Singh, A I R 1925 Pat 216=84 I C 586=4 Pat 139=6 P L T 12.
2. Beni Pershad Koeri v. Dudhnath Roy, (1900) 27 Cal 156=26 I A 216=4 C W N 274 = 7 Sar 580 (P C).

cial Commissioner has based his decision on 4 Pat 139[1] which if held to be applicable to the present case would have concluded the matter, because that decision has been affirmed by the Judicial Committee of the Privy Council: *see* 7 Pat 649.[3] But the distinguising feature of that case is that no new tenancy had been brought into existence in that case inasmuch as the zamindar used to grant receipts only in the marfatdari form, that is to say, in the name of the original mukarraridar and not in the name of the persons who held the lands after the mukarrari had become void by the death of the original grantor. This aspect of the case was particularly emphasised by the Judicial Committee as will appear from their following observations :

> In their Lordships' opinion this appeal must be decided upon the special facts of the case which go to show, as already stated, that after the lease for lives expired, the plaintiff's predecessor in title did not recognize the heirs of the mukarraridars as tenants. He was aware of the position taken up by the heirs of the original mukarraridars and the permanent right which they claimed and which they were desirous of establishing, and he was at pains not to do anything which might be taken to recognize that liability. The parties were really at arms length. The original lessees were asserting their permanent interest with a liability to pay a rent, a right which the Maharaja refused to recognize, but which they continued to assert consistently. . . . It is argued that the principle contained in the provisions of S. 116, T. P. Act, 1882, should be applied, for although it could not be said that this case came expressly within the provisions of the section, it was argued that the provisions thereof should be used by way of analogy as laying down a rule of equity and good conscience. In their Lordships' opinion there is not a case of lessee or under-lessee holding over within the meaning of the section, but even if the case were to be considered on the assumption that the provisions of the section were applicable, the facts of this case would go to show, as already stated, that the parties in paying and accepting rent after the expiration of the lease for lives were acting without prejudice to their respective contentions, and it would have to be held that there was an agreement to the contrary which would prevent the application of the provisions of the section in the present case.

These observations cannot apply to the present case, because here the plaintiffs by accepting rent from the defendants have treated them as their tenants and beyond the payment of rent there is nothing in the present case to show that the defendants ever asserted their permanent interest in the land after the death of Jobraj Khan. There can therefore be no doubt that the plaintiff is entitled to eject the defendants and the only question is whether a decree for ejectment can be passed in this suit. It may be stated here that when the case was before the Munsif, defendants 11 and 19 to 22 entered into a compromise with the plaintiff and he rightly decreed the suit in terms of the compromise. The Munsif however found that there was no proper service of notice to quit on the defendants and so he disallowed the plaintiff's claim for khas possession in respect of the 14 annas share in the disputed village which belonged to the defendants other than defendants 11 and 19 to 22, but he passed a decree declaring that the plaintiff was the owner of the village in question and the defendants had no right to remain in possession thereof. As the finding of the trial Court as regards the service of notice has not been challenged before us, the proper order to be passed in this appeal seems to be to restore the decree of the trial Court. It is true that ordinarily a Court would not grant a merely declaratory relief when the consequential relief claimed by the plaintiff cannot be granted. In the present case however the title of the parties having been fully investigated in the course of this somewhat prolonged litigation, I am inclined to think that the plaintiff ought to get a decree in the terms in which the Munsif had granted it to him. I would therefore allow the appeal, set aside the judgment and decree of the lower appellate Court and restore the decree of the trial Court. As no one appears in this Court to contest the appeal, there will be no order for costs.

Dhavle, J.—I agree. If the principle of S. 116, T. P. Act, were to be applicable to this case, it would have been open to the plaintiff to show that there was no tenancy, because he accepted the rent in ignorance of the fact that the tenancy had terminated. The lower appellate Court has apparently found on mere surmise that the plaintiff became aware of Jobraj Khan's death and the consequent termination of the khorposh grant shortly after that event; but even if this finding had been based on evidence, the decision relied on by the learned Munsif—27 Cal 156[2] —makes it clear that the continued acceptance of rent from the defendants could not, in the circumstances of the case, give them the permanent interest claimed by them ;

3. Kamakhya Narayan Singh v. Ram Rachhya Singh, A I R 1928 P C 146=109 I C 663=55 I A 212=7 Pat 649 (P C).

and as my learned brother has shown, the decision in 4 Pat 139[1] is distinguishable on the facts.

S.C./R.K. *Appeal allowed.*

A. I. R. 1937 Patna 557

MADAN, J.

Babu Chandeshwar Prasad Narayan Singh and *anothers* — Petitioners.

v.

Dwarka Singh and *others* — Opposite Party.

Criminal Revn. No. 201 of 1937, Decided on 21st July 1937, from order of Dist. Magistrate, Gaya, D/- 26th April 1937.

Criminal P. C. (1898), S. 145 — Criminal Court must support parties placed in possession by Civil Court—Party subsequently coming into possession should show lawful entry — Magistrate should look into dispute from date of granting of possession by Civil Court.

Under S. 145, Criminal P. C., the Criminal Court is bound to support persons placed in possession of property by the Civil Court and whose possession has been wrongfully disturbed. It is for the other party to show that they subsequently came into possession by some lawful means. Magistrates are bound not only to look into events occurring within two months of the date when the proceedings were drawn up but they should consider the whole history of the dispute from the date when a party was put in possession by the Civil Court. [P 557 C 2; P 558 C 1]

Baldeo Sahay and *G. P. Singh* — for Petitioners.

Rajkishore Prasad — for Opposite Party.

Order.—This is an application against an order passed by the Subdivisional Magistrate of Gaya under S. 145, Criminal P. C., declaring the second party to the proceedings to be in possession of about 50 bighas of land in village Bhindaspur. The history of the case is briefly as follows: The first party is the landlord Babu Chandeshwar Prasad Narayan Singh together with one of his patwaris. The first party sold raiyati holdings of about 200 bighas in area under rent decrees and obtained delivery of possession in the years 1933 and 1934. In 1935 there was a S. 144 case about these lands in which notices were confirmed against the tenants concerned. In March 1936 there was a further trouble and a report was submitted for binding down the tenants under S. 107, Criminal P. C. On that occasion the Subdivisional Magistrate intervened, and the landlord agreed under certain conditions about which it is not necessary for me to comment, to return about 50 bighas out of the lands sold to certain of the tenants. The case of the first party is that out of the remaining 150 bighas, one hundred was left for rabi and 50 bighas, which are the subject matter of the present dispute, were sown with paddy. There was some disturbance at the time of harvesting the crop, and the Sub-Inspector went to the spot. He reported for action under S. 144 against the second party, but the Subdivisional Magistrate having drawn up proceedings under S. 145 found the second party to be in possession of the land. The District Magistrate declined to refer the case to this Court, and the first party has now come to this Court direct.

Mr. Rajkishore Prasad for the second party contended that this Court is bound by the findings of fact arrived at by the trial Court and has no jurisdiction to interfere. This Court, however, has pointed out in a number of cases that the Criminal Court is bound to support persons placed in possession of property by the civil Court and whose possession has been wrongfully disturbed. In this case it is admitted that the first party got possession of the disputed plots through the Civil Court, and it is for the second party to show that they subsequently came into possession by some lawful means. It therefore goes very much against the second party that when the Sub-Inspector went to the spot in December last, they chose to disclaim all concern with the land. Even in the written statement filed in the S. 145 case, the second party were content with a bare assertion of the possession of themselves and other persons not included in the present proceedings, with no suggestion as to how and when they came to acquire possession. It is not till the evidence stage that the second party suggested that they received verbal permission from the first party's manager to cultivate the lands and that they accordingly grew the crops. This suggestion was denied by the manager and was not accepted by the learned Magistrate himself. The Magistrate decided in favour of the second party largely on the strength of certain rent receipts which were not brought on to the record, but according to the first party were granted to tenants by the manager for amounts claimed to have been paid by

them, which were set off against rents which had subsequently become due. The learned Magistrate surmised that having been granted these receipts, the tenants might have thought that their dues had been satisfied and that owing to this misunderstanding they cultivated the lands. It was not open to the Magistrate to decide the case on a speculation of this character which was not the case of either party before him. Moreover, the Magistrate made a mistake of law in supposing that he was only bound to look into events occurring within two months of the date when the proceedings were drawn up. The Magistrate should have considered the whole history of the dispute from the date when the first party was put in possession by the Civil Court, and his failure to do so has vitiated his findings. Even supposing that the second party were able to commit certain acts of trespass on the lands, that does not establish their right to an order in their favour under S. 145.

For these reasons I am unable to support the learned Magistrate's order, and find that the first party is in possession under decree of the Civil Court, and that their possession must be maintained. I accordingly allow this application and declare the first party to be in possession of the disputed lands.

B.D./R.K. *Application allowed.*

A. I. R. 1937 Patna 558

MADAN, J.

Janki Singh and *others* — Appellants.

v.

Jevanandan Singh and *others* — Respondents.

Appeal No. 416 of 1935, Decided on 30th July 1937, from appellate decree of Dist. Judge, Patna, D/- 31st January 1935.

Bihar Tenancy Act (8 of 1934), S. 148-A—Suit for arrears of rent in respect of portion of holding omitting certain plot—Landlord is not entitled to rent-decree but is entitled to money decree.

A landlord brought a suit under S. 148-A, Bihar Tenancy Act for the recovery of arrears of rent in respect of a portion of a holding omitting a certain plot constituting the whole. The tenants admitted that rent was due at a certain rate of rent. It was found that by a previous decision the holding included the plot :

Held : that though the landlord was not entitled to a rent-decree, the entire suit should not be dismissed but a money decree should be passed in his favour : *A I R 1932 Pat 304, Rel. on; A I R 1922 Pat 608, Ref.* [P 558 C 2; P 559 C 1]

G. P. Singh and *B. N. Rai* — for Appellants.

R. Misra — for Respondents.

Judgment.—This is a second appeal by certain landlords whose rent suit has been dismissed. The suit was brought under S. 148-A, Tenancy Act, for recovery of rent for the years 1337 to 1340 in respect of a holding comprising khatas Nos. 222 and 921. The area of the holding was given as about 6 bighas and the rent was claimed at the rate of Rs. 42-6-2 excluding cess. The respondents who were the defendants in the suit pleaded that the holding included a further area of 1·50 acres, being part of plot No. 3751 which they said had also been settled with them with a total rental of Rs. 42-14-5. They did not dispute that rent at that rate was due. The trial Court found that the tenants' contentions regarding the area and the rent were correct and that that issue had already been decided in a previous suit so long ago as the year 1928. It found that the landlords were not entitled to a rent decree as the suit had been brought in respect of a portion of the holding, and passed a money decree at the rate claimed in the plaint but without costs. On appeal the District Judge held that the landlords were not even entitled to a money decree and dismissed the suit.

The tenants relied on A I R 1922 Pat 608,[1] where it was held that a rent decree could not be passed in respect of a portion of a holding as the effect would be to allow a splitting up of the tenancy without ascertainment of the portion of the rent which was due from the particular portion of the holding for which the rent had been claimed. It does not appear that the question of passing a money decree was considered in that case. In 13 P L T 392[2] a money decree was passed in a rent suit brought in respect of a portion of the holding. In that case the question of the area of the holding was at issue in a separate suit in which an appeal was pending in the High Court at the time of the plaint, and in those circumstances a money decree was allowed. I think, however, that the principle laid down in this case should be followed here. There is

1. Keshava Prasad Singh v. Mathura Kuar, A I R 1922 Pat 608=69 I C 704.
2. Rambeas Tewari v. Akhauri Raj Mohan Sahay, A I R 1932 Pat 304=139 I C 535=13 P L T 392.

an obligation to pay rent apart from the Tenancy Act, and the tenants admitted that rent was due at the rate claimed. The landlords were to blame for ignoring the previous judicial decisions in their plaint, but I do not think that this is a case where their entire suit should have been dismissed. I therefore allow this appeal and restore the order of the Munsif passing a money decree, but without costs.

K.B./R.K. *Appeal allowed.*

A. I. R. 1937 Patna 559

MADAN, J.

In the matter of

Udhab Chandra Pal and *others*

v.

Sideswar Prasad Singh and *others*

Criminal Ref. No. 2 of 1937, Decided on 29th July 1937, made by Sess. Judge, Purnea, D/- 2nd January 1937.

(a) Criminal P. C. (1898), S. 145—Magistrate not awarding costs to successful party without giving reasons — Successful party should be given reasonable costs.

In a proceeding under S. 145, Criminal P. C., the trying Magistrate has discretion to award costs to a successful party, but where he does not give reasons for not exercising such discretion in favour of the party who is declared to be in actual possession, the successful party should be given a reasonable amount of costs. [P 559 C 2]

(b) Company— Liability—Proceedings under S. 145, Criminal P. C.—Costs awarded against managers of company can be realised either from managers or from company.

Where one of the parties to the proceedings under S. 145, Criminal P. C., consisted of some managers of a certain limited company and the company was the real contestant and costs were awarded to the successful party against them :

Held : that the costs could be realised either from the managers or from the company itself. [P 559 C 2 ; P 560 C 1]

B. C. De — for Reference.

Order.—This matter arises from a proceeding under S. 145, Criminal P. C., in respect of about three thousand bighas of diara land. The parties were the Suksena Estate or its representatives as first party, and three persons described as head manager and managers of the Mathurapore Estate Zamindari Company as second party. The proceedings were instituted on 21st February 1935, and after a protracted hearing were decided in favour of the first party on 28th March 1936. A reference by the Sessions Judge to this Court was discharged on 24th August 1936. There is now a further reference by the Sessions Judge on the ground that the trying Magistrate has not awarded costs to the successful party. The learned Sessions Judge has recommended that the sum of Rs. 858.7.0 should be allowed as costs. The learned Magistrate had discretion to award costs, and he has given no reason for not exercising that discretion in favour of the first party who was declared to be in actual possession of the land after a lengthy trial. It is therefore proper that the first party should be given a reasonable amount of costs. The claim of the first party is as follows :

	Rs.	a.	p.
1. Pleaders and Mukhtears fees ...	2,587	0	0
2. Talbana	54	8	0
3. Court-fee stamps	19	12	0
4. Costs for meeting travelling allowance of Government officers and police witnesses examined by the first party ...	208	0	0
5. Travelling expenses of the first party	752	0	0
6. Costs of bringing 16 witnesses examined by the first party ...	80	0	0
7. Costs for taking certified copies of documents	165	0	0
8. Typing charges	40	0	0

The Sessions Judge recommends that items 2, 3, 4 and 6 of the above should be allowed in full, a total of Rs. 362-4-0 (the Sessions Judge's figure of Rs. 358-7-0 under this head appears to be a mistake). Items 7 and 8 also appear to be reasonable, and I would allow a total of Rs. 500 under these six heads. The Sessions Judge recommends a sum of Rs. 500 only as lawyers' fees, but I think that this is inadequate, and that a sum of Rs. 1,500 will be suitable for lawyers' fees, and for travelling and other expenses as claimed in item 5. I therefore allow a sum of Rs. 2,000 as costs. There is a further question as to the realization of these costs. It appears that the three persons forming the second party have now left the service of the Estate, and that the notices issued from this Court could not be served on them. The first party now claims against the Mathurapore Zamindary Company itself. The second party's written statement was filed on behalf of the Company, and it is clear that the Company has been the real contestant throughout. Notice has also been issued on the registered office of the Company in Calcutta to show cause why it should not be made liable for costs, but no appearance has been made on its behalf. I direct

that the sum of Rs. 2,000 allowed as costs may be realized from the members of the second party or from the Mathurapore Zamindary Company Limited. This reference is allowed accordingly.

K.B./R.K. *Reference allowed.*

A. I. R. 1937 Patna 560

MOHAMAD NOOR, J.

Banke Bihari Lal — Plaintiff — Petitioner.

v.

Ram Uchit Singh and *others* — Defendants — Opposite Party.

Civil Revn. No. 3 of 1937, Decided on 28th July 1937, from order of Dist. Judge, Monghyr, D/- 1st December 1936.

Promissory Note—Promissory note executed on 28th March 1934 bearing revenue stamps — Use of revenue stamps made compulsory only from 1st April 1934 – Suit based on such note cannot be dismissed merely on this ground.

A promissory note executed on 28th March 1934 was affixed with revenue stamps, the use of which was made compulsory by the Government only from 1st April 1934 :

Held : that these stamps must have been available before 1st April 1934 and that a suit on the promissory note should not be dismissed merely on this ground especially when the defendant had admitted his liability. [P 560 C 1, 2; P 561 C 1]

S. K. Mitra — for Petitioner.

S. N. Rai and *A. N. Lal* — for Opposite Party.

Order.—This application in revision is directed against an order of the District Judge of Monghyr, dismissing under O. 41, R. 11, Civil P. C., the petitioner's appeal to him against the dismissal of his suit based on a hand-note by the Munsif of Begusarai. The suit was for the principal sum of Rs. 332 with interest and was valued at Rs. 475. The defendants appeared and admitted the debt but asked the Court for consideration in respect of interest and prayed for an instalment decree. The learned Munsif, however, discovered that the stamp on the hand-note, which was dated 28th March 1934, was not available till 1st April 1934, that is three days after the date mentioned in the hand-note and on this ground alone he dismissed the suit. The plaintiff's appeal to the District Judge was, as I have said, summarily dismissed. The plaintiff has come up to this Court in revision.

In my opinion the dismissal of the suit was without jurisdiction, after the defendants had admitted the liability. Assuming for the sake of argument that the stamp which was affixed on the hand-note was not available till the 1st April, there may be a number of explanations for it though the explanation given by the learned Advocate for the plaintiff before the learned Munsif was not satisfactory. The date of the hand-note is mentioned at the end of it by the scribe. It is quite possible that though the hand-note was written on 28th March 1934, it was not actually executed and signed till the 1st April or a day or two later. An interval of three or four days between the writing of a document and its execution is not an unknown thing and it usually happens. In my opinion, however, the learned Munsif had no foundation for holding that the two stamps on the hand-note were not available till 1st April 1934, and he has misunderstood the Board's Circular No. 26-51-27, dated 17th October 1935, addressed to all the Divisional Commissioners. I have consulted that Circular and also the Government Communique, dated 30th November 1933. The position is this. For a long time unified stamps of certain denominations were used both for postage and revenue purposes. In the end of 1932 the Government of India decided to issue separate stamps for postage and revenue and they ordered that the use of the separate revenue stamps would be obligatory from 1st April 1934. This order was communicated to the Commissioners of the various Divisions of the Board of Revenue in the circular referred to by the learned Munsif. It shows that the Government of India had decided to abolish the unified stamps then in use and to introduce separate revenue stamps of the denominations of half an anna, one anna, two annas and four annas, and from 1st April 1934 the use of new revenue stamps would be obligatory. The Government of this province realized that for a long time the public were in the habit of using unified stamps both for postage and revenue purposes and they thought that the compulsory use of the newly introduced stamps would cause some hardship and the public might use unified stamps and thus make the documents ineffective. Therefore, they for the intermediate period introduced the ordinary postage stamp over-printed with the words 'Revenue B & O', so that in a few

months' time the public might become accustomed to the use of different sets of stamps for different purposes. Both the circular and the Government Communique mention that the use of the newly introduced stamps would be obligatory from 1st April 1934. The Board's Circular is based upon the letter of the Government of India, dated 30th June 1932, showing that about 21 months' notice was given before the use of new stamp on a compulsory basis. The stamp must have been in use for some time on an optional basis. It is nowhere mentioned that these stamps could not be used, if available, before 1st April 1934. The date '1st April 1934' is the date when the use of separate revenue stamps would be, as I have said, obligatory. The stamps must have been available several days before 1st April 1934, in post offices which are agencies for the sale of revenue stamps and there is nothing extraordinary in the post offices issuing these revenue stamps before 1st April 1934. Unless the newly introduced revenue stamps were available a few days before 1st April 1934, the public would have been put to a good deal of inconvenience. Those who have to use a large number of revenue stamps for purposes of granting receipts must obtain them before that date. I am absolutely certain that these new revenue stamps must have been available some time before the 1st April and were being used though on an optional basis.

This seems to me to be the real explanation of the revenue stamps being on the hand-note. It is impossible to conceive, if the hand-note were a forged one, that the defendant would have admitted the claim throughout. The common feature of such cases is that the defendants deny even the genuine hand-notes. The defendant of this suit would not have accepted the liability under the hand-note which he never executed. The defendants have appeared before this Court. Mr. S. N. Rai, who appears for the major defendants, has admitted the genuineness of the hand-note. The principal defendant was present in Court and was himself instructing the learned advocate. From the attitude of the parties I am satisfied that there was no collusion between the plaintiff and the defendant and I appreciate the honesty of the defendant who was willing to suffer a decree if it was passed in such a way as to enable him to pay up, in spite of the fact that the suit was dismissed by the lower Court.

In my opinion the plaintiff is entitled to a decree against the defendants, but with the consent of the plaintiff the sum to be decreed will be only Rs. 300 for principal, costs and interest inclusive. The amount will be payable in six equal instalments of Rs. 50 each. Each instalment must be paid on the 30th of Jeth of each Fasli year commencing from the 30th Jeth next, that is of 1345. In case of default of payment of any instalment, the amount due will carry interest at one per cent. per month till realization.

K.B./R.K. *Revision allowed.*

A. I. R. 1937 Patna 561

MOHAMAD NOOR, J.

Mahabir Ram Marwari and *another* — Appellants.

v.

Bhadai Mander and *others* — Respondents.

Appeal No. 411 of 1935, Decided on 28th July 1937, from appellate decree of Sub-Judge, 1st Court, Monghyr, D/- 8th May 1935.

Evidence — Admissibility — Road cess return filed by entire body of landlords — Statements therein can be used by one against the other.

The Road Cess Act does not stand in the way of admission of road cess return filed by the entire body of landlords and the statements made by all the proprietors can be used by one of them against the other. [P 562 C 1]

Pitamber Misra — for Appellants.

S. K. Mitra and *C. P. Sinha* — for Respondents.

Judgment. — This second appeal arises out of a suit for rent. The plaintiffs are proprietors of one-third of the tauzi where the rent claimed land is situated. The defence was that by an arrangement between the landlords the rent claimed land was in exclusive possession of the proprietors of the remaining two-thirds share of the tauzi and rent was payable to them alone and has been paid to them. The proprietors of the two-thirds of the tauzi were made pro forma defendants, but they were dismissed from the suit by the trial Court and no objection was taken to this order. Now the question is between the plaintiffs and the tenant defendants alone. The trial Court dismissed the suit

accepting the contention of the tenant defendants, while on appeal the learned Subordinate Judge has decreed it.

In my opinion this appeal is concluded by the finding of fact. The learned Subordinate Judge has held that from the road cess return filed by all the proprietors it appears that up till 1911 the land was in joint possession of the entire body of landlords and he has further held that it has been shown that no arrangement was arrived at between the landlords as to the possession of this land by one to the exclusion of the other and therefore he has held that the land is the joint property of all the co-sharers and the plaintiffs being admittedly owners of one-third of the tauzi are entitled to rent to that extent. The learned advocate of the appellants first of all contended that the road cess return on which the learned Subordinate Judge has relied was inadmissible in evidence. There is no merit in this contention. The Road Cess Act does not stand in the way of admission of this return which was filed by the entire body of landlords and the statements made by all the proprietors can be used by one of them against the other.

The next contention has been that the tenant defendants adduced evidence to show that they had been paying rent to the two-thirds proprietors only. It seems that the learned Subordinate Judge has not placed any reliance upon the receipts and in fact there is evidence to show that the plaintiffs have also realized rent from the tenant defendants. A dispute like this cannot be settled in a purely rent suit. It seems that the landlords are not pulling on well among themselves, and the question of joint or separate possession of land is one which they should settle in a properly framed suit. Till the matter is settled, the plaintiffs in my opinion are entitled to succeed. They are the recorded proprietors of one-third of the village and in the absence of anything to the contrary they are entitled to realize rent from the tenants. This will not in any way affect the right of the other co-sharers to have the dispute between them settled in a proper suit. The appeal is dismissed with costs.

D.S./R.K. *Appeal dismissed.*

A. I. R. 1937 Patna 562

WORT, J.

Bansidhar Jaglik — Petitioner.

v.

Samu Singh — Opposite Party.

Civil Revn. No. 585 of 1936, Decided on 8th March 1937, from order of Munsif, Patna, D/- 31st August 1936.

(a) Civil P. C. (1908), S. 47 and O. 21, R. 100—Purchaser of non-transferable holding dispossessed in execution of rent decree against his transferor—He can apply under S. 47 and not O. 21, R. 100.

The purchaser of a non-transferable holding can apply under S. 47 and not O. 21, R. 100, Civil P. C., on being dispossessed in execution of a rent decree against his transferor, the judgment-debtor, as such purchaser is a representative of the judgment-debtor: *A I R 1918 Pat 483, Foll.*; *A I R 1927 Cal 156* and *A I R 1933 Pat 581, Not foll.* [P 563 C 1]

(b) Civil P. C. (1908), S. 11—Principle of res judicata is wider than that stated in S. 11.

The principle of res judicata is wider than that stated in S. 11, Civil P. C. Even where S. 11 in terms does not strictly apply, the principle of res judicata can apply. [P 563 C 1]

D. L. Nandkeolyar — for Petitioner.

N. K. Prasad II — for Opposite Party.

Order. — This Rule is directed against the order of the learned Judge in the Court below rejecting an application made by the petitioner under O. 21, R. 100. The facts have been found in favour of the petitioner by the Judge, but as regards the legal position he has come to the conclusion that the application under O. 21, R. 100 at the instance of the petitioner does not lie. Apparently an application was previously made by the petitioner under O. 21, R. 89 which application was rejected and then he proceeded to make this application under O. 21, R. 100.

The Judge in the Court below points out that the decree in execution of which the petitioner alleges he has been dispossessed, is a rent decree and that in those circumstances O. 21, R. 100 does not apply. That is a doubtful question of jurisdiction, and in any event there appears to be a decision of this Court in favour of the decision on which the Judge in the Court below has relied. I refer to the decision in 3 Pat L J 579.[1] That was a case of a non-transferable holding and the purchaser proceeding under O. 21,

1. Panchratan Koeri v. Ram Sahay Singh, A I R 1918 Pat 483=43 I C 969=3 Pat L J 579.

R. 100. The learned Judge deciding that case held that the holding not being transferable, the purchaser who was a representative of the judgment-debtor could object to the sale under S. 47 and O. 21, R. 100 did not apply. In 53 Cal 913[2], the Calcutta High Court commented upon the Patna decision, but I feel very considerable difficulty in holding, with great respect to the learned Judges of that Court, that the comment was justifiable. There have been a number of cases of this Court which appear to be against the decision reported in 3 Pat L J 579[1] for instance, the case in 14 P L T 573.[3] But that was a case where the holding was transferable and it was held that the purchaser was not a representative of the judgment-debtor. It is rather difficult to see how it can be said that the purchaser of a non-transferable holding is not a representative of the judgment-debtor in those circumstances. I have already pointed out there was a previous application under O. 21, R. 89. Although perhaps S. 11, Civil P. C., in terms does not strictly apply, it has been pointed out by their Lordships of the Judicial Committee of the Privy Council that the principle of res judicata is wider than that stated in that section.

On the whole I feel, especially having regard to the decision of the Divisional Bench of this Court (which decision is binding on me), that I cannot interfere in this case. In those circumstances the application is dismissed with costs : hearing fee two gold mohurs.

A.L./R.K. *Application dismissed.*

2. Purna Chandra v. Manobini Devi, A I R 1927 Cal 156=99 I C 718=53 Cal 913.
3. Ramlaik Rai v. Rajballam Rai, A I R 1933 Pat 581=147 I C 344=14 P L T 573.

A. I. R. 1937 Patna 563

COURTNEY-TERRELL, C. J. AND MANOHAR LALL, J.

Nirmal Kumar Nawlakha — Defendant—Appellant.

v.

Sant Lal Mahto, Plaintiff and *others*, Defendants—Respondents.

Appeal No. 89 of 1933, Decided on 9th August 1937, from original decree of Sub-Judge, Purnea, D/- 20th December 1932.

(a) Evidence — Onus of proof — Onus will shift on to defendant only if evidence adduced by plaintiff is sufficient to establish prima facie case.

The onus is upon the plaintiff and nonetheless so even when he has adduced some kind of evidence. The onus will shift on to the defendant only if the evidence adduced by the plaintiff is held to be sufficient to establish a prima facie case. It is not merely a question of weighing feathers on one side or the other and of saying that if there were two feathers on one side and one on the other that would be sufficient to shift the onus. What is meant is that in the first instance the party on whom the onus lies must prove his case sufficiently to justify a judgment in his favour if there is no other evidence given : *Stoney v. Eastbourne Rural District Council, (1927) 1 Ch 367, Rel. on.* [P 565 C 2]

(b) Mortgage—Substituted security—Mortgage of undivided share — Subsequent partition but mortgagee not party to it—Mortgagee can seize only that property which falls to mortgagor's share.

A mortgagee who takes a mortgage of an undivided share from his mortgagor is entitled to seize only that property, which after the partition has fallen to the share of the mortgagor. The fact that the mortgagee was not made party to the subsequent partition proceedings makes no difference : *1 I A 106 (P C)* and *A I R 1932 P C 235, Rel. on; 8 Cal 72, Disting.* [P 566 C 2]

(c) Record of Rights — Presumption of correctness.

The Record of Rights must be presumed to be correct unless it is established on evidence that it is incorrect. [P 566 C 2]

S. M. Mullick, Mahabir Prasad, Hareshwar Prasad Sinha, P. Jha and *R. J. Bahadur* — for Appellant.

B. C. De, M. K. Mukherjee and *P. B. Ganguli* — for Respondents.

Manohar Lall, J. — The plaintiff-respondent instituted the suit giving rise to this appeal on 1st August 1930, for partition of five annas four pies share in the property mentioned as lots 1 to 17 in Sch. A and lots 1 to 4 in Sch. B and 1 bigha out of lot No. 5 in Sch. B. There were a number of defendants to this action but we are here concerned with defendant 16, Nirmal Kumar Nawlakha who resisted the claim for partition so far as the properties with which he was concerned as purchaser from two ladies of the family of Bansing Mahto, the remote ancestor of their husbands. The learned Subordinate Judge has given a decree to the plaintiff as claimed and defendant 16 alone has appealed.

The following facts are necessary in order to understand the nature of the controversy and the points that arise for our decision. Bansing Mahto, the remote

ancestor already named, had four sons : Bhagwan, Hardayal, Makhan and Madan. Bhagwan had two sons, Kishun, the father of Kamala and Lachmi, and Rajbahadur who was the husband of Mt. Sampato. (It is not necessary to state that Bhagwan had another son Chandi but the evidence is not clear on this point and therefore he is ignored for the purpose of this decision.) Hardayal had a son, Shib Prasad, who left a widow, Mt. Saro. Makhan had two grandsons, Jagat and Bhukhan, and the last son, Madan, had two sons, Gopal, father of Mewa, and Tilak, father of Khantar and Ajodhya. The remoter descendants of these persons named above are not being mentioned in this statement. The plaintiff took a mortgage on 9th September 1920 with respect to five annas four pies share of Sch. A properties mentioned above from Kamla and Lachmi, who, according to the plaintiff, were entitled to this share on the death of Raj Bahadur who died in a state of jointness with Kishun and his sons. The plaintiff also alleges that Hardayal and Shib Prasad having died in a state of jointness with the brothers of Hardayal, the joint family property came to be owned by three branches, namely Bhagwan, Makhan and Madan's branch and they continued as such till 1914 when he alleges that the partition took place between these surviving branches with the result that each branch came to own an ascertained share of five annas four pies in the joint family property. The plaintiff obtained a mortgage decree which was made final on 5th November 1927 and he purchased the properties which were mortgaged to him in execution of his decree on 22nd December 1928. The plaintiff also purchased on 17th November 1927 some of the properties in suit by sale deed from the same Kamla and Lachmi. The plaintiff therefore bases his title upon these transactions and claims to be entitled to be placed in possession of the five annas four pies share of his vendors. So far as this appeal is concerned, it is only necessary to state that this action was also resisted by defendant 16 who asserted his title in the following circumstances : His case is that the joint family of Bansing effected a separation by ascertainment of shares in or about the year 1894 with the result that each of the four brothers named above were entitled to a four annas share in the family properties. Therefore Hardayal was entitled to four annas and on his death his son Shib Prasad became entitled to that four annas which became the inheritance of his widow Mt. Saro. Similarly Bhagwan having died, his share descended to his sons Kishun and Rajbahadur in equal two annas share each. Rajbahadur having died, his share descended to his widow Mt. Sampato and Kishun's two annas descended to his two sons Kamla and Lachmi by survivorship. Therefore defendant 16 contends that the plaintiff is entitled to only two annas share of his mortgagors and not five annas four pies as erroneously asserted by him.

The next relevant event which is necessary to state is that the two Mts. Sampato and Saro instituted partition suits in 1925 in the Court of the Subordinate Judge of Purnea in which they made all the members of the joint family defendants. Kamla and Lachmi (who are defendants 33 and 34 in this action) resisted the claim on the ground that the ladies had no right to claim partition but were entitled to maintenance only and these defendants also asserted in that suit that they were entitled to five annas four pies of the properties and that the Musummats were entitled to no share. But the learned Subordinate Judge in his judgment dated 8th July 1925 (Ex. M) decreed the suit of the two ladies holding that he was satisfied that the share of those ladies was as asserted by them and he was also satisfied that the partition in the family took place in 1894. This was followed by actual partition effected by a commissioner appointed by the Court at the instance of the plaintiff Musummats. Defendant 16 has taken two conveyances dated 9th August 1928 from these two ladies, with respect to six items of property from Mt. Saro (defendant 19) for Rs. 4,000 and for eight items of property from Mt. Sampato (defendant 20) for Rs. 2,000. This defendant says that he is a bona fide purchaser for value from these two ladies whose title was determined in judgment (Ex. M.) He also relies upon the survey of 1905 which supports the case of partition before the survey. He accordingly resists the claim of the plaintiff to partition and he contends that the plaintiff being the simple mortgagee is bound by the result of the partition action unless it is held to be fraudulent and that the plaintiff cannot question the title and possession of

this defendant 16. The plaintiff is fully alive to the difficulty in his way and accordingly he alleged in his plaint that the partition action was instituted with the object of defrauding him of his just claim and that the same was collusive and fraudulent.

It will be noticed that the critical points which will determine this appeal are whether the partition took place in this family in 1894 or in 1914 and also whether the partition decree of 8th July 1925 is collusive and fraudulent. The learned Subordinate Judge has written a most painstaking judgment and has held that the oral evidence adduced by both parties does not establish beyond all doubt the partition as alleged by them; that is to say in his opinion the plaintiff has failed to prove the partition in 1914 and the defendants have failed to prove the partition as alleged by them in 1894 by the oral evidence in the case. Neither party in their elaborate arguments before us challenged this finding of fact of the learned Subordinate Judge based upon his appreciation of the oral evidence adduced and we also are satisfied that this estimate of the learned Subordinate Judge is perfectly correct.

What then is the evidence of reliable character adduced by the plaintiff which will go to establish the partition in 1914 or which will go to establish that the family was joint in 1905? The plaintiff has two difficulties in his way, first the survey Record of Rights prepared and finally published in 1905 which goes to support that there was a partition in this family before that date. It is a matter of common experience that the survey Records of Rights are prepared with the utmost care and with full publication of the orders which are passed in the khanapuri and attestation stages and that the parties are as a rule fully alive to the great value of these records. It is also to be remembered that it takes about three years or more to complete a survey. Therefore it may safely be assumed that a partition must have taken place in this family about the year 1901 or 1902, if not earlier. The entries in the survey record as printed in this paper book are inconsistent with any other hypothesis. The plaintiff has another difficulty in his way and that is the partition decree of 8th July 1925 which again in that year affirmed that the survey entry was correct upon the evidence adduced by the parties.

Mr. Bankim Chandra De, in presenting the case on behalf of the respondents, most strenuously argued that even if his client has not been able to show satisfactorily the date of the alleged partition in 1914, the defendants' case also is wholly false and therefore he asked us to draw some kind of presumption or inference in favour of the plaintiff. With great respect, Mr. De wants to completely misplace the onus of proof. In my opinion the onus is upon the plaintiff and nonetheless so, even when he has adduced some kind of evidence. The onus will shift on to the defendant only if the evidence adduced by the plaintiff is held to be sufficient to establish a prima facie case. The true test of onus in such a case has been well put by Lord Hanworth, M. R. in (1927) 1 Ch 367[1] at p. 397 in the following words:

> It appears to me that there can only be sufficient evidence to shift the onus from one side to the other if the evidence is sufficient prima facie to establish the case of the party on whom the onus lies. It is not merely a question of weighing feathers on one side or the other, and of saying that if there were two feathers on one side and one on the other, that would be sufficient to shift the onus. What is meant is, that in the first instance the party on whom the onus lies must prove his case sufficiently to justify a judgment in his favour if there is no other evidence given.

Applying this test to the present case, it is clear to my mind that the onus which was originally on the plaintiff and which was shifting from time to time during the course of the evidence adduced, lay on the plaintiff the moment the learned Subordinate Judge held that oral evidence adduced by him as to the date of partition was not satisfactory. It then was incumbent upon the plaintiff to prove how he claimed his title to five annas four pies against the defendant who was in possession with an apparent title. Mr. De with great vigour suggested that there are a series of transactions evidenced by registered sale deeds, mortgages and leases between 1894 and 1925 which were executed either by the members of the family in favour of strangers or by strangers in favour of members of this family or by members of the family inter se which contain recitals of an unequivocal character from which the only reasonable inference that can be drawn is that the partition took place in this family in

1. Stoney v. Eastbourne Rural District Council, (1927) 1 Ch 367=95 L J Ch 312=135 L T 281=90 J P 173=24 L G R 333=70 S J 690.

1914 as alleged by him. (His Lordship considered some of the documents and proceeded.) It is enough to say that the documents beginning from the 28th September 1915 right up to 1925 contain recitals in many of them to the effect that the members of this family effected a partition in or about the year 1914; and as the learned Subordinate Judge has pointed out, these documents may be taken to amount to dealings with the property of the family by defendants 1, 7, 8, 13, 33 and 34, as their own property to the exclusion of defendants 19 and 20 (vendors of defendant 16) by making purchases and transferring the properties not only to third persons but also among themselves with an allegation of partition of the lending business and the specification of shares in the manner alleged by the plaintiff. No doubt this is a circumstance of a somewhat reliable character in favour of the plaintiff and ordinarily if there was nothing else in the case I would be inclined to attach great importance to these recitals by competent members of this family as to the state in which the family properties were being held and as to the shares asserted by each branch to the knowledge of the other. The only explanation which Mr. Mullick appearing for the appellant offered as to the recitals mentioned in these documents was that for some reason or other the male members from 1915 onwards began to enter into these transactions with a view to enlarge their shares and to deprive the ladies of their rights in the family property of their husbands. I am not satisfied that this explanation is quite correct and it would be simply acting upon mere suspicion if effect is given to this contention of Mr. Mullick.

It is necessary to examine now whether the plaintiff has succeeded in showing that the partition decree of 1925 was fraudulent or collusive. (After discussing the evidence his Lordship proceeded.) I have looked into all the surrounding and attendant circumstances and am constrained to disagree with the reasonings and the finding of the learned Subordinate Judge in the present case that the partition suit of Mts. Saro and Sampato was fraudulent. The learned Subordinate Judge appears to have based his conclusion upon mere suspicion and did not base his conclusion upon legal evidence admissible in the case.

Mr. De next contends that even if the partition suit and the decree of 1925 were not fraudulent, he is not bound by that decision inasmuch as he was no party to that action and his previous title derived from the mortgage of 1920 which was earlier than the partition suit stood unaffected by the decision to which he was no party. This contention is met by the decisions of their Lordships of the Privy Council in 1 I A 106[2] and in 59 I A 405.[3] Mr. De sought to place reliance upon the case in 8 Cal 72[4] at p. 79. In my opinion this case has no application to the facts of the present case which are fully covered by the authorities of the Privy Council referred to above. To sum up, it is the admitted case of both parties that at the date of the suit this family had actually separated. Each party sought to set up a case of partition on different dates. The evidence oral and documentary is insufficient to prove the case of partition as set up by the plaintiff. The survey Record of Rights prepared in 1905, which must be presumed to be correct, unless it is established on the evidence that it is incorrect, is consistent with the case of the defendant that the partition took place some time before 1905. This survey Record of Rights was again accepted as correct by the Subordinate Judge in 1925 upon oral evidence. The partition decree passed by the Subordinate Judge in that year is not proved to be fraudulent or collusive and therefore binds the plaintiff mortgagee who took a mortgage of an undivided share from his mortgagors and he is entitled to seize only that property which after the partition has fallen to the share of his mortgagor. The onus lies upon the plaintiff to prove his case and also the extent of his title and I hold that he has been unable to prove that his title can prevail against defendant 16, the appellant before us. It is unnecessary to consider whether defendant 16 is a bona fide transferee for value.

The result is that the appeal succeeds. The case of the plaintiff is dismissed so far as he seeks to partition the properties which fell to the share of the two Mts. and which were transferred to the appel-

2. Byjnath Lall v. Ramoodeen Chowdry, (1873) 1 I A 106 (P C).
3. Mohammad Afzal Khan v. Abdul Rahman, A I R 1932 P C 235=139 I C 85=59 I A 405=13 Lah 702 (P C).
4. Obhoy Churn Sircar v. Huri Nath Roy, (1882) 8 Cal 72=10 C L R 81.

lant by the sale deed dated 9th August 1929. In view of the fact that the suit of the plaintiff was not wholly without prima facie reasonable foundation, I would direct that as between the appellant and the plaintiff there will be no order for costs here and in the Court below.

Courtney-Terrell, C. J.—I agree.

V.B.B./R.K. *Appeal allowed.*

A. I. R. 1937 Patna 567

ROWLAND, J.

Jagan Koeri and *others* — Appellants.

v.

Chairman, Gaya Municipality and *another* — Respondents.

Appeals Nos. 1203 to 1207 of 1933, Decided on 18th August 1936, from appellate decree of Sub-Judge, Gaya, D/- 8th July 1933.

(a) Evidence Act (1872), S. 83—Map prepared under Calcutta Survey Act—Presumption of correctness attaches to it.

Where a Municipality, to which the Calcutta Survey Act is made applicable under S. 223-A, Bengal Municipal Act 1884, prepares a map, it is prepared under the authority of the Government and a presumption of correctness attaches to it under S. 83, Evidence Act, even though the Calcutta Survey Act contains no provision for a statutory presumption of correctness to attach to the entries in the maps prepared under it.

[P 568 C 1]

(b) Evidence Act (1872), S. 35 — Entries in khesra are entries in official record—Such entries may be considered by Courts as evidence of possession from which inference as to title may be drawn.

The entries made in the khesra being entries made in an official record by public officers in the discharge of their duties are themselves relevant facts and may be considered by the Courts as evidence of possession from which the Courts may, if they think fit, draw an inference as to title.

[P 568 C 1]

N. K. Prasad II and *K. N. Varma* — for Appellants.

B. N. Rai — for Respondents.

Judgment.—These are five analogous appeals by the plaintiffs who had each been granted a lease of one cuttah of land within plot No. 14628 of the Municipal survey of Gaya town in mohalla Dighi by defendant 2, Rai Bahadur Baijulal Nakphopha, purporting to be the proprietor and in possession of the land. The claim is resisted by the Municipality sued through their Chairman, defendant 1, who, on receiving applications from the plaintiffs for permission to build houses on these plots, refused the applications on the ground that the lands belonged to the Municipality. Hence the plaintiffs brought these suits for a declaration that by the settlement from defendant 2 they had acquired good title to the land and the Municipality were not justified in refusing permission to build. The Munsif before whom the suits came decreed them; but on appeal the Subordinate Judge has reversed the findings of the Munsif and dismissed all the suits. The Subordinate Judge holds that the plaintiffs have not established that the lands in suit are a part of the estate of Rai Bahadur Baijulal Nakphopha known as mahal Alamgir, Tauzi No. 2495. The Subordinate Judge further held that these lands are a part of the lands comprised in the tank and its adjacent lands appertaining to it vested in the Municipality under S. 58, Bihar and Orissa Municipal Act, 1922. The contention for the appellants in second appeal is that the first finding is vitiated by an error of record; and the second by misplacing the onus of proof and attaching an importance to the survey map and khesra which the Subordinate Judge was not entitled to attach to those papers.

As to the former point it appears from Exs. G and H that defendant 2 had brought a mortgage suit against Shamji Mawar and obtained a decree in execution of which he purchased Tauzi No. 2495 Alamgirpur; and the sale certificate Ex. 1 refers to Dighi among the properties included. It is argued that in face of these documents it was not open to the Subordinate Judge to question the contention of the plaintiffs that the sale conveyed title to the whole mahal Dighi, but it appears that the sale cannot have been of the entirety of mahal Alamgirpur because in that mahal there are other tauzis bearing separate numbers 2489 and 2492 which were certainly not sold at that auction sale. Therefore I think that the Subordinate Judge was not in error in requiring the plaintiffs to prove that the disputed land was a part of the property covered by that auction sale. No maps

or description by boundaries of the property conveyed are forthcoming; and I cannot say that the Subordinate Judge was in error in the view that he took on this question of title.

On the second question the Subordinate Judge has relied on the entries in the Municipal survey map and khesra which were prepared under a different procedure from that associated with the preparation of map and Record of Rights in rural areas under the Bengal Tenancy Act. In a Municipality the map was prepared under the Calcutta Survey Act which was made applicable to mufassil municipalities by virtue of S. 223-A, Bengal Municipal Act, 1884. The Calcutta Survey Act has been referred to at the hearing and no doubt it contains no provision for a statutory presumption of correctness to attach to the entries in the maps. At the same time it still remains a fact that the map is a map prepared under the authority of Government and a presumption of correctness attaches to it under S. 83, Evidence Act; while similarly the entries made in the khesra being entries made in an official record by public officers in the discharge of their duties, are themselves relevant facts and may be considered by the Courts as evidence of possession from which the Courts may, if they think fit, draw an inference as to title and therefore if from these entries the lower Appellate Court has thought fit to find that possession has all along been with the Municipality and from that he has drawn the inference that title is with the Municipality, it does not seem to me that I can say that there is any error of law committed in coming to the finding. Reference has been made at the hearing to the decision in 16 Bom 338[1] for the proposition that title by adverse possession will not accrue by reason of such casual acts of use as throwing of rubbish or even grazing or tethering cattle, etc., where it was not clear that such acts were done in an assertion of a title to the land and it is pointed out that there is rather a scarcity of direct acts of possession on the part of the Municipality. In fact throwing of rubbish on this land is the principal use to which it has been put; but this is not a case in which the Municipality is seeking to establish title by means of adverse possession. The Municipality asserts a title and refers to acts of possession as confirmatory of the fact that this title has been asserted by them all along. Plot No. 14628 is in fact a large plot and a portion of it has been undoubtedly used by the Municipality for making a road, this being done apparently without objection by any party about the year 1927. The Municipal survey, I may mention, began about 1913 and was finally approved by Government in 1917. It seems to me that the questions raised for the appellants are really questions of fact and are concluded by the findings of the Court below. I do not find that these findings are vitiated by any error of law. Accordingly the appeals will be dismissed with costs.

S.C./R.K. *Appeals dismissed.*

1. Framji Cursetji v. Goculdas Madhowji, (1892) 16 Bom 338.

A. I. R. 1937 Patna 568

JAMES AND DHAVLE, JJ.

Sita Ram and *others* — Defendants — Appellants.

v.

Secretary of State and *another*, Plaintiffs and *others*, Defendants — Respondents.

Appeal No. 703 of 1933, Decided on 6th April 1937, from appellate decree of Sub-Judge, Purnea, D/- 20th February 1933.

Limitation Act (1908), Art. 149—Secretary of State by contract undertaking to acquire land for Railway Company—Contract providing that land not actually required for railway purposes should be returned to Secretary of State—Land acquired in 1900 and, with exception of suit land, made over to Railway Company — Suit land recorded as raiyati holding of *M* and as part of D estate —*M* transferring it to *R* who in his turn transferring it to *S* in 1924—*S* since then cultivating it without title from Secretary of State or from Railway Company—Government neglecting to take any action for long time but subsequently in 1929 bringing suit for *S's* ejectment — Suit held governed by Art. 149—Question of bona fides on part of *R* and *S* held did not arise—Mesne profits prior to suit held should not be allowed.

The Secretary of State by a contract undertook to acquire land for a Railway Company. The contract provided that the land which might be acquired for the purpose of the railway should, unless it was actually required for railway purposes, be relinquished to the Secretary of State. The Secretary of State acquired the land in 1900 and the land so acquired with the exception of land in suit was duly made over to the Railway Company. The suit land which was not made over to the Railway Company was recorded as

raiyati holding of one *M* and as part of D estate. In 1906 *M* sold the holding to *R* and in 1924 it was purchased by *S* who cultivated the land since then without any title from the Secretary of State or from the Railway Company. These purchasers paid rent to zamindar and were recognized as raiyats. The Secretary of State and the Railway Company neglected for a long period to take action but subsequently brought a suit against *S* for ejectment in 1929 :

Held : that if the Railway Company desired to obtain possession of the land, it must ask the Secretary of State to make it over to it and it was the Secretary of State who must sue, if a suit should be necessary, to obtain possession of land which had never actually been under the management of the company. It was clear throughout the contract that the land, whether utilized for railway purposes or not, remained the property of the Secretary of State and as possession of the land in suit must be recovered by the Secretary of State before it could be made over by him to the Railway Company, the suit was governed by Art. 149, Lim. Act. [P 570 C 1]

Held further : that after acquisition of land by the Secretary of State, the land ceased to be part of D estate and became revenue free estate. Hence *M* had no interest to transfer it to *R*. This being so, even though *R* and *S* were ignorant of the fact that *M* and the zamindar had no title, no question whether *R* and *S* acted in good or bad faith could arise : *20 Cal 708, Disting.* [P 571 C 1]

Held also : that as *R* and *S* were lulled into security by the inaction of the Government, the mesne profits ought not to be allowed prior to the institution of the suit. [P 571 C 2]

S. N. Sahay and *D. L. Nandkeolyar* — for Appellants.

S. N. Bose —for Respondents.

James, J.—In 1900 the Local Government on behalf of the Government of India acquired under the Land Acquisition Act of 1894 a large area of land for the purpose of the Bengal and North Western Railway. By a contract of 18th July 1890 between the Secretary of State and the Bengal and North Western Railway Company, the Tirhut State Railway had been made over to the Bengal and North Western Railway Company for management by the company, with the proviso that the land which might be acquired for the purpose of the railway should, unless it were actually required for railway purposes, be relinquished to the Secretary of State. The land acquired in 1900, apparently with some exceptions including the land in suit in the present case, was duly made over to the Bengal and North Western Railway Company for the purpose of the Katihar-Hajipur extension of the Tirhut State Railway. The land in question in the present suit is 1·52 acres out of Plot No. 7213 of the survey, contained in Plots Nos. 45, 46, 48 and 49 of the plan prepared at the time of the acquisition. It appears that the land was not made over to the railway, since, when the Record of Rights was prepared in 1906, it was recorded as the raiyati holding of one Meghu and as part of the Dharampur estate. This entry appears to have been erroneous because it has been found that the land was acquired in 1900; and by the acquisition under the Land Acquisition Act and the statutory rules of 1895 made by the Government of Bengal under the Act, the acquired land became a part of a revenue free estate, and it ceased to be part of the Dharampur estate which was in the possession of the Maharaja of Darbhanga. Some time after 1906 one Ram Rachhya Singh purchased Maghu Gangota's holding which according to the defendants was transferable by custom; and in 1924 the son of Ram Rachhya Singh sold it to the defendant of the present suit. The area of 1·52 acres according to the survey forms a part of Plot No. 7213 with a total area of 4·39 acres, held under the Dharampur estate; and it appears that these purchasers in due course paid rent and were granted receipts by the Maharaja of Darbhanga who is the zamindar of Dharampur. In 1929 the Secretary of State, joining with the Bengal and North Western Railway Company, instituted a suit for ejectment of the cultivators from the area which was acquired in 1900. The Subordinate Judge by his appellate decision in the suit has found that the Secretary of State was entitled to recover possession of this land, and that the defendants could not claim to be bona fide tenants entitled to the protection of the provisions of Ch. 5 and 6, Ben. Ten. Act. The defendants have preferred a second appeal from this decision.

We have the findings of fact that this land was duly acquired under the Land Acquisition Act in 1900: that the defendants have been cultivating it since 1924 without any title from the Secretary of State or from the Bengal and North Western Railway as a part of a larger holding occupied under the zamindar of the Dharampur estate, and that they have been recognized as raiyats by the zamindar.

Mr. Sri Narayan Sahay on behalf of the appellant argues in the first place that the suit should be regarded as barred by limitation, because the party entitled to

sue for recovery of possession is the Bengal and North Western Railway who hold as lessees of the Secretary of State. In para. 2 of the plaint it has been stated that after the acquisition of the land, the Secretary of State for India under the terms of the lease made over the land to the Bengal and North Western Railway Company for the management of the Tirhut State Railway. Mr. Sri Narayan Sahay suggests that by the use of this term the plaintiffs admit that the Bengal and North Western Railway Company are their lessees, but whether the use of the word "lease" for the contract between the Secretary of State and the Company is correct or not, it is clear that the tenant of the Company is, as the learned Subordinate Judge has pointed out, something very different from that of a lessee under the Transfer of Property Act. It is clear from the terms of the contract that the Secretary of State undertakes to obtain land for the Company as the Company shall require it, but only so much as shall be required; and land not utilized for railway purposes is to return to the possession of the Secretary of State. Whatever may have been the declared purpose for the acquisition of the land now in suit, it appears that if the Bengal and North Western Railway Company desire to obtain possession of it, they must ask the Secretary of State to make it over to them and it is the Secretary of State who must sue, if a suit should be necessary, to obtain possession of land which has never actually been under the management of the Company. It is clear throughout the contract that the land, whether utilized for railway purposes or not, remains the property of the Secretary of State and as possession of the land now in suit must be recovered by the Secretary of State before it can be made over by him to the Railway Company, the learned Subordinate Judge acted correctly in applying Art. 149 of Sch. 1, Limitation Act, in deciding the rights of the parties in this case.

In the second place it is argued that the defendants cannot be ejected from possession because they are bona fide tenants on the land and so are protected by the provisions of Ch. 5 or of Ch. 6, Bihar Tenancy Act. Mr. Sri Narayan Sahay cites the decision in 20 Cal 708.[1] In that case it was held that where the de facto proprietor of a village had made a settlement under good faith with the cultivating raiyats, the person with a better title who succeeded in ejecting the proprietor did not thereby acquire a right to eject the raiyats with whom the proprietor had in good faith made settlement, because by thus taking settlement from the de facto proprietor, they had acquired the rights of non-occupancy raiyats under Ch. 6, Ben. Ten. Act. In the present case it has been found that the land in suit was duly acquired under the Land Acquisition Act in 1900, that is to say the original raiyat Meghu Gangota had in 1900 made a valid transfer of his rights in this land, willingly or unwillingly, to the Government of India. In the same way the zamindar of Dharampur had made a valid transfer of this land, which had ceased to form part of the Dharampur estate bearing Tauzi No. 1, and had become a new revenue free estate possessed by the Government of India. Meghu Gangota who had before the original transfer possessed a transferable interest, subsequently made a second transfer to Ram Rachhya Singh. If Meghu Gangota at the time of the acquisition by the Government of India had, instead of making a valid transfer, merely made a contract for sale, the subsequent transfer to Ram Rachhya Singh (assuming that it took place within three years of the acquisition) would have been valid only if Ram Rachhya Singh had acquired the holding in good faith for consideration without knowledge of the previous contract. But in the present case the transfer in 1900 had been complete and Meghu Gangota had no interest which he could transfer to Ram Rachhya Singh; so that the question of whether Ram Rachhya Singh knew of the previous transfer or did not know of it does not arise. The zamindar in 1900 had transferred his interest in this land to the Government of India. It has ceased to form part of his estate; and it had become a separate estate by the operation of the Land Acquisition Act and the statutory rules under the Act. The zamindar could not by accepting rent from Meghu Gangota's transferee restore this area to his estate, or make the transferee a raiyat of any kind in respect of the area which he had alienated in 1900. Ram Rachhya Singh's transferees are in no better position than

1. Binad Lal Pakrashi v. Kalu Pramanik, (1893) 20 Cal 708.

Ram Rachhya Singh himself. Ram Rachhya Singh could acquire no title from Meghu Gangota; and his transferees could obtain no title from the son of Rachhya Singh ; and the zamindar of Dharampur in 1924 was in the same position with regard to these transferees as that in which he had been when the transfer had been made to Ram Rachhya Singh. For the transfer of the area which lay within his own zamindari he had not, according to the defendants' case, any power to act otherwise than to recognize the transferee as an occupancy raiyat; but the fact that he stated in his receipts a larger area than which the transferees occupied in his zamindari, could not bring that larger area back to the zamindari of Dharampur or make the transferees raiyats of the zamindar of Dharampur in the land which lay within the new revenue-free estate. The tenants who obtained the transfer may have been ignorant of the fact that Ram Rachhya Singh had no title to 1.52 acres out of the area which he transferred, and they may have been ignorant of the fact that this area had been removed from the zamindari of Dharampur in 1900; but the question of whether these transferees acted in good or bad faith cannot arise, because neither Meghu Gangota nor Ram Rachhya Singh, by transferring rights which they did not possess to a person who may have thought that they possessed them, nor the zamindar by purporting to exercise the rights of a zamindar over a portion of his estate which he had alienated, purporting to exercise those rights in favour of somebody who may have believed that the zamindar did possess them, could bring again into existence rights which had been annulled by the land acquisition proceedings in 1900. The case of the defendants may be a hard one, but they are liable to ejectment at the suit of the Secretary of State; and since they resisted the claim to recover possession, they are liable to pay the mesne profits from the date of the institution of the suit. We do not know what notice of suit was given, and in the circumstances the date of institution appears to be the proper date from which mesne profits should be calculated. Government has been negligent in this matter, by allowing the Record of Rights to be published in a form which would be completely misleading to purchasers from Meghu Gangota, and in waiting so long before enforcing the right to possession acquired by the proceedings of 1900. If the plaintiff had been a private person, suing upon title acquired in 1900, his right to recover possession would have long since been barred by the law of limitation. The defendants may have been trespassers, in the strict sense of the word in which it is used with regard to real property, from the time of their entry on the land ; but all the transferees were lulled into security by the inaction of the Government and of the Railway ; and mesne profits ought not to be allowed for the period prior to the institution of the suit.

I would confirm the decision of the Subordinate Judge and dismiss this appeal with this modification that the mesne profits are to be calculated only from 21st November 1929. In other respects the decree of the Subordinate Judge is confirmed. The respondent will be entitled to half his costs in this appeal. The decree for costs of the Subordinate Judge will remain as it stands.

Dhavle, J.—I agree. After the land acquisition of 1900, nothing that the landlord and the tenant could do in co-operation would operate to deprive the Secretary of State of his title to the land acquired except adverse possession, and the period of limitation for suits by the Secretary of State being sixty years under Art. 49, Limitation Act, it was quite clear that the suit of the Secretary of State could not be resisted. Much has been said before us with regard to the principle laid down in 20 Cal 708,[1] but that case is entirely distinguishable. It was not a case where the tenants and the former landlord had, as in the present case, lost their respective titles. That the principle laid down in 20 Cal 708[1] is not to be extended has been observed in many cases both in this Court and in Calcutta, and the appellant's contention that though the landlord of the mauza may have sold out the disputed portion of the land by reason of the land acquisition proceedings, he may have continued to receive rent from the tenants in respect of this portion of the land bona fide, does not seem to me to be entitled to any weight whatsoever. Nor is the question one of bona fides at all. It is either a question of title or of nothing.

D.S./R.K. *Decree modified.*

A. I. R. 1937 Patna 572

DHAVLE AND VARMA, JJ.

Laduram Marwari — Defendant — Appellant.

v.

Bansidhar Marwari and *another* — Plaintiffs—Respondents.

Appeal No. 1370 of 1933, Decided on 6th May 1937, from appellate decree of Sub-Judge, Monghyr, D/- 16th September 1933.

(a) Second Appeal—Construction of plaint.

The construction of a plaint is a question of law. [P 574 C 2]

(b) Deed—Material alteration — Plaintiff is not entitled to decree even for amount admitted to be borrowed by defendant.

Where a plaintiff sues on a handnote which is the basis of the cause of action not existing independently of it, and the handnote is proved to be tampered with, the plaintiff is not entitled to any decree—not even for the amount admitted to be borrowed by the defendant: *A I R 1932 Pat 352, Foll.; Case law discussed.* [P 573 C 1; P 575 C 1]

(c) Evidence Act (1872), S. 91 — Handnote containing promise of repayment, sole consideration for advance—Creditor must sue on handnote and not on implied contract — Whether handnote sole consideration for advance and not merely collateral security is question of fact.

Where there is an express contract, promise of repayment put into writing as part of the loan transaction, if the plaintiff recovers at all, it must be on the contract actually made and not on some implied contract, though it will of course be open to a creditor who lends irrespective of handnote and afterwards takes a handnote merely by way of conditional payment or collateral security to rely on the implied promise contained in the receipt of the money by the debtor. Whether a handnote is the sole consideration for the advance and not merely a conditional payment or a collateral security must be a question of fact : *Case law discussed.* [P 577 C 2]

(d) Practice—Amendments — Plaint based on forged document—Amendment in second appeal should not be allowed.

When a party comes to a Court with a forged document, he should not be allowed to amend the plaint in second appeal : *A I R 1936 Mad 785 (FB)* and *A I R 1933 Bom 476, Disting. : 7 Cal 256, Rel. on.* [P 575 C 2]

S. S. Bose — for Appellant.

Rajkishore Prasad — for Respondents.

Varma, J. — This second appeal arises out of the appellate judgment of the officiating Subordinate Judge at Monghyr, dated 16th September 1933, by which he partly decreed the suit of the plaintiffs. In order to understand the point of law that has been urged before us, it is necessary to give the short facts of this case. The suit was to recover a sum of Rupees 1,950 principal besides interest at the rate of Rs. 1-12-0 per cent. per mensem. It was said that the loan was advanced by plaintiff 2 out of her own money but in the name of her son, plaintiff 1. The defendant admitted that he had executed a handnote but with regard to the particular handnote that was produced in the case, his contention was that the original handnote that had been executed was tampered with and that the sum of Rs. 950 had been altered into Rs. 1,950. He further alleged that the handnote which he had executed for the sum of Rs. 950 was not for consideration paid in cash at the time of the execution, but that it was for sums found due from him on an old account. He further said that on account of certain acts of his, the plaintiff was annoyed with him and therefore he had filed the suit for a sum of Rs. 1,950. The trial Court found that the handnote was a forged document and also that the sum of Rs. 950 was advanced to the defendant in cash by plaintiff 1 on 21st Paus 1338 Fasli. For these reasons the trial Court dismissed the suit on the ground that when the plaintiff had tampered with the handnote, a decree could not be passed even for the amount admitted by the defendant. On appeal the lower Appellate Court agreed with the trial Court that the handnote was tampered with and that Rs. 950 was converted into Rs. 1,950 but gave a decree to the plaintiffs for the sum of Rs. 950. In the course of the judgment the lower Appellate Court has observed as follows :

> A reference to the plaint will show that the suit is not based on the handnote alone. But the plaintiffs' case is that the defendant took the amount in cash and executed the handnote for the same. The suit is thus principally based on the advance of the amount, though the handnote is put in evidence to show the advance and also the terms in which the advance was made. It is proved apart from the hand-note that the defendant took Rs. 950 in cash from the plaintiffs on 21st Pous 1338 Fs. The defendant admitted that Rs. 950 was actually due by him on the date that handnote was executed, but he says that it was due on account of previous transactions. If his case had been accepted, then the suit would probably have failed as being barred by limitation.

Mr. Satya Sunder Bose on behalf of the appellant has drawn our attention to para. 3 of the plaint which runs as follows in the paper book :

> The defendant took a loan of Rs. 1,950 in cash from the plaintiff in order to meet his necessities and executed the hand-note in suit payable on demand, dated 26th Paus 1338 Fs. and affixed his

thumb impression and signature by his own pen thereon and made it over to the plaintiff.

Mr. Bose however takes exception to the expression "handnote in suit" and urges that "*handnote bunai dawi inaultalab*" should be translated as "the handnote which is the basis of the suit." He has also referred to para. 6 of the plaint where the cause of action is mentioned. That paragraph runs as follows :

The cause of action arose on 26th Paus 1338 Fs. the date of the execution of the handnote and on 1st April 1932 when the demand was made for the last time. As the defendant resides at a place within the jurisdiction of this Court, hence taking into consideration the value of this suit, this suit has been instituted in this Court.

Mr. Bose urges that looking at these two paragraphs of the plaint, it is clear that the suit was based on the handnote and, as the handnote has been found to be a document which has been forged, the case is covered by the decision in 11 Pat 782.[1] In that case their Lordships (Khaja Mohamad Noor and Dhavle, JJ.) observed as follows :

Having come to Court with tampered handnotes, the plaintiff is not entitled to any decree as was held in A I R 1924 Cal 452.[2] The same principle seems to have been laid down in an earlier case in 33 Cal 812.[3]

Our attention has been drawn to a number of cases in which this point has been discussed. In 7 Cal 256[4] the distinction between two types of cases was pointed out : (1) when the cause of action is complete in itself and the debtor gives a bill or note to the creditor for payment of the money at a future time, the plaintiff can sue for the original consideration, and (2) when the original cause of action is the bill or note itself and does not exist independently of it, then if the note is not admissible in evidence for want of proper stamp or some other reason, the creditor must lose his money. But in the same volume in 7 Cal 616[5] it was held that a person who had a bond executed in his favour by one of three brothers forged the signature of the other two brothers to the bond and brought a suit upon it in its altered form against the three brothers, the suit when based upon such a document must fail. Their Lordships went further and held that no Court should allow any amendment to enable the plaintiff to succeed on a document in its forged state.

5 C W N 56[6] has been relied upon for the proposition that even if the promissory note be a forgery, the plaintiff could succeed if he could prove the loan by independent evidence. In 33 Mad 746[7], where the case in 33 Cal 812[3] was relied upon, a negotiable instrument was altered by causing the words "or order" to disappear. The alteration was such as enabled the plaintiff to sue at a place where he could not sue without the alteration. It was held that if the document upon which the suit is based was materially altered, the plaintiff could not be allowed to succeed and the decision in 33 Cal 812[3] was approved in this case.

Mr. Rajkishore Prasad appearing on behalf of the respondents has drawn our attention to a number of cases. He has first referred to the case in 1 P L T 203[8] where their Lordships of this Court (Mullick and Sultan Ahmad, JJ.) held that even if the handnote produced in the case was found to be forged, the plaintiff could maintain the suit on the basis of their accounts. There the plaintiff alleged that the defendant had money transactions with him and had purchased cloths from the shop of the plaintiff which were entered in the books of accounts kept in the shop. After an adjustment of accounts which the defendant admitted, he executed the handnote in suit and handed it over to the plaintiff and the date of cause of action according to the plaint was 21st April 1914 when the handnote was executed. The trial Court held that the statement of accounts between the parties as alleged by the plaintiff was not proved nor that the defendant executed the handnote, and therefore dismissed the suit. The lower Appellate Court observed that :

The shop books may be good, bad or indifferent, but as they are not the basis of the case, they cannot avail except as corroborative evidence on only one point, viz. whether there were any dealings between the parties and whether anything was

1. Ram Autar Shukul v. Baldeo Shukul, A I R 1932 Pat 352=140 I C 895=11 Pat 782.
2. Dula Meah v. Abdul Rahaman, A I R 1924 Cal 452=81 I C 641=28 C W N 70.
3. Gour Chandra Das v. Prasanna Kumar Chandra, (1906) 33 Cal 812 = 10 C W N 788 = 3 C L J 363.
4. Sheikh Akbar v. Sheikh Khan, (1881) 7 Cal 256=8 C L R 528.
5. Gogun Chunder Ghose v. Dhuronidhur Mundul, (1881) 7 Cal 616=9 C L R 257.
6. Moti Lal Saha v. Monmohan Gossami, (1901) 5 C W N 56.
7. Lakshmammal v. Narasimharaghava Aiyangar, (1910) 33 Mad 746 = 21 I C 445 = 25 M L J 572.
8. Suraj Lal v. Anant Lal, A I R 1920 Pat 730= 55 I C 556=1 P L T 203.

due to the plaintiff by the defendant. The case before me as framed stands or falls on the genuineness of the handnote.

Mullick, J. observed :

Now, if the handnote is a forgery, then undoubtedly the plaintiffs can fall back upon their claim on the account stated. But the finding of both Courts is that the allegation that there was a stated account is false, and that in fact and truth no account was stated or adjusted between the parties.

In that view of the matter their Lordships dismissed the appeal in spite of their observation that even if the note produced was a forgery the plaintiff could sue on the accounts stated. In A I R 1923 Cal 318[9] a contrary view was expressed that even if promissory note sued upon was a forgery, the plaintiff would succeed on proof on the loan by independent evidence. The next case for consideration is A I R 1926 Cal 831[10] where, although a mortgage deed was found to be invalid on account of subsequent alterations, it was held that the mortgagee could recover upon the original consideration. In that case their Lordships of the Calcutta High Court distinguished the case in 33 Cal 812[3] on the ground that there the suit was based not upon the original consideration but upon the bond itself. Their Lordships further referred to the case in 23 Cal 851[11] for the proposition that if the original consideration could be proved by independent evidence, the plaintiff was entitled to succeed even if the document produced in support of the case be found to be altered.

In 7 Pat 845[12] the handnote in suit was found to have been insufficiently stamped. Kulwant Sahay, J. was of opinion that where a handnote bore a one anna stamp instead of a two anna stamp, the plaintiff was entitled to prove the loan by other evidence. Macpherson, J. expressed some doubt on the point but yielded to the authority of the series of decisions of the Calcutta High Court prior to 1916, and he said that had it been open he should have experienced considerable hesitation in rejecting the opposite view.

Mr. Rajkishore Prasad further observes that the lower Appellate Court had found the suit was on loan itself, and in support of this he refers to para. 2 of the plaint which runs as follows :

As the amount sued upon belongs to the private fund of plaintiff 2, she is made plaintiff 2 and as she was a pardanashin lady the handnote in suit was got executed in the name of plaintiff 1.

But it must be remembered that the construction of a plaint is a question of law. The Full Bench decision in 53 All 114[13] lays down that it is not open to a party who has lent on terms recorded in a promissory note which turns out to be inadmissible in evidence for want of proper stamp duty, to recover his money by proving orally the terms of the contract, in contravention of the provisions of S. 91, Evidence Act. In cases in which there is already a completed cause of action for recovery of money on foot of a distinct and separate transaction, and a promissory note is afterwards given as a collateral security, the creditor may, if the promissory note be inadmissible in evidence, recover on the original consideration and evidence aliunde can be given to prove the same. But where the promissory note and the lending of the money are part and parcel of the same transaction and the terms of the loan are the very terms of the promissory note, the contract of loan cannot be proved apart from the document itself and the plaintiff's suit must fail if the document itself be inadmissible in evidence.

Our attention has been drawn further to a Single Bench decision in A I R 1936 Cal 127[14] where it has been held that if a promissory note is not admissible in evidence on account of its being insufficiently stamped, the plaintiff is entitled to sue on a cause of action which is independent of promissory note. In a Full Bench decision of the Madras High Court in A I R 1936 Mad 179[15], it has been held that if the promissory note itself is a contract, then no further evidence can be permitted, but if it is expressed in such a way as to leave

9. Khosal Mohammad v. Amiruddin Mohammad Paramanik, A I R 1923 Cal 318=68 I C 331.
10. Parbati Charan v. Amarendra Nath, A I R 1926 Cal 831=96 I C 97=53 Cal 418.
11. Pramatha Nath Sandal v. Dwarka Nath Dey, (1896) 23 Cal 851.
12. Dhaneswar Sahu v. Ramrup Gir, A I R 1928 Pat 426=111 I C 482=7 Pat 845=9 P L T 471.
13. Nazir Khan v. Ram Mohan, A I R 1931 All 183=133 I C 307=53 All 114 = 1931 A L J 64 (F B).
14. Indra Chandra Bag v. Hiralal Rong, A I R 1936 Cal 127=167 I C 441=40 C W N 696= 62 C L J 545.
15. Ramaswami Pillai v. Murugiah Padayachi, A I R 1936 Mad 179=161 I C 273 = 59 Mad 268=70 M L J 267 (F B).

the parties in any doubt, then the facts must settle the question. A Full Bench decision of our Court in 14 P L T 651[16] follows the decision in 7 Cal 256[4] and lays down that when a cause of action for money is once complete in itself whether for goods sold or for money lent or for any other claim, and the debtor then gives a bill or note to the creditor for payment of the money at a future time, the creditor, if the bill or note is not paid at maturity, may always as a rule sue for the original consideration, provided that he has not endorsed or lost or parted with the bill or note. But this was a case which was based on the finding of the lower Court that the plaintiff had proved that there was an independent contract to repay the advance.

Now in the case before us the plaintiff relies upon a handnote for a sum of Rs. 1,950 executed by the defendant on 26th Paus 1338 Fs. for the said amount received in cash. There is no story of there being a previous due independent of the handnote and this handnote has been found to be forged. In most of the cases dealing with forged handnotes to which I have referred, it was clear from the plaint that there was originally a previous consideration and then a handnote was executed which was found to be forged : *vide* 7 Cal 256,[4] 5 C W N 56,[6] 37 Mad 746,[7] 1 P L T 203,[8] A I R 1923 Cal 318[9] and A I R 1926 Cal 831[10] (case of an altered mortgage deed). But here in the present case looking at the plaint it is clear that there was no story of any previous account of which the handnote was merely a piece of evidence. The cases in 7 Cal 256,[4] 53 All 114,[13] A I R 1924 Cal 452[2] and 33 Cal 812[3] are more applicable to the facts of the present case. Cases of handnotes which were held to be inadmissible on account of insufficiency of stamps or otherwise are distinguishable from cases of forged handnote, and in such a case I prefer to follow the decision of our own High Court in 11 Pat 782.[1] I would therefore allow the appeal with costs throughout.

The matter however does not end here. Mr. Rajkishore Prasad appearing on behalf of the respondents urges that he should be given an opportunity to amend his plaint and relies upon the cases in A I R 1936 Mad 785[17] and 57 Bom 802[18] where the handnote was executed for a previous debt which was agreed to be paid by instalments. It was held in the former case that the suit brought within three years of the last payment of instalment was not time barred. The Court allowed the plaint to be amended. A similar view was taken in the case reported in 57 Bom 802,[18] but both these cases were dealing with cases in which there was no promissory note which was found to be forged. But authority is not wanting : *vide* 7 Cal 256[4] in which it has been held that when a party comes to a Court with a forged document, he should not be allowed to amend the plaint in second appeal.

Dhavle, J.—I agree that the appeal should be allowed and the suit dismissed. The lower Appellate Court observed that the suit was "principally" based "on the advance of the amount, though the handnote was put in evidence to show the advance and also the terms on which the advance was made." This point was not expressly dealt with by the learned Munsif because he dismissed the suit on the authority of such cases as 25 I C 667,[19] following 33 Cal 812,[3] and 107 I C 475.[20] The learned Subordinate Judge points out correctly enough that the former of these rulings related to a suit based on the handnote itself; as to the latter, he observes that it "was decided by a Single Judge of the Hon'ble Calcutta High Court," when he might with greater propriety have pointed out that the learned Judge Duval, J. found that it could not be said that the plaintiff had really produced any evidence at all apart from the tampered deed to prove the debt. The extract quoted by my learned brother clearly shows that the lower Appellate Court was wrong in concluding that the suit was based "principally" on the advance. At the same time para. 2 of the plaint speaks of the advance which is the basis of the suit (*zar-karza bunae davi*), and para. 5 mentions the defendant's agreement to pay interest. Though, as in

16. Domoo Khan v. Agha Arshad Khan, A I R 1933 Pat 575=146 I C 471 = 12 Pat 862=14 P L T 651 (F B).

17. Official Assignee v. V. Kuppuswami Naidu, A I R 1936 Mad 785=165 I C 301=71 M L J 250 (F B).

18. Sarafalli Mahomadali v. Mahasukhbhai Jechandbhai, A I R 1933 Bom 476=147 I C 426=57 Bom 802=35 Bom L R 965.

19. Baru Mal v. Dwarka Dass, A I R 1914 All 410=25 I C 667.

20. Diljan v. Makbul Khan, (1928) 107 I C 475.

9 Rang 56,[21] which was followed in 158 I C 533,[22] the plaint was apparently drafted as for a suit on the handnote, it disclosed a cause of action in respect of the advance even independently of the handnote, notwithstanding the fact that the cause of action is dated the "26th Paus 1338 Fasli, the date of the execution of the handnote" and the later date of demand. The learned Subordinate Judge says that it is proved "apart from the handnote" that the defendant took Rs. 950 in cash from the plaintiffs on 21st Paus 1338 Fasli. It seems to me that this finding is clearly vitiated by an error of law. It was not the case of the plaintiffs that Rs. 950 was advanced in cash on the 21st Paus, and the evidence adduced by them which was all to the effect that Rs. 1,950 had been advanced on 26th Paus, has been concurrently disbelieved by the lower Courts. Nor was it the defendant's case that Rs. 950 was advanced in cash on 21st Paus or on any other date. Both the Courts below have found that Rs. 950 was advanced in cash on 21st Paus only because the handnote in its original condition said so and the defendant's story of the handnote being executed in consideration of dues on two other notes was found unacceptable by them. But it is well settled that a plaintiff who sues upon a fraudulently altered document is not entitled to relief on the document even in its original condition: *see* cases like 7 Cal 616[5] and 28 C W N 70,[23] though (a consideration which does not arise in the case of handnotes) such alterations may not affect a title to property already created. And yet this is what the learned Subordinate Judge has done in substance. It is true that he carefully leaves the handnote out of consideration when, dealing with the consequences if the defendant's story of past advances had been accepted, he observes

> then the suit would probably have failed as being barred by limitation. For the plaintiffs would not have been able to take advantage of the fresh acknowledgment and promise to pay as made in the document.

Under the issue relating to the interest claimed, he also speaks of the handnote "having been eliminated from evidence." But he clearly overlooks this—as did the trial Court—when arriving at the finding that Rs. 950 was advanced in cash, and actually relies on the circumstance that "the handnote itself shows that it was for a cash loan." On the plaintiff's story the defendant was under no pre-existing liability; the fraudulent alterations made the handnote void, and though no doubt the document could be used for collateral purposes, it was in my opinion erroneous in law to use it as the foundation of any relief to be given to the plaintiffs in respect of a loan not of the 26th but of the 21st Pus 1338 (a date not in suit). No cash advance could legally have been found by the Courts of fact independently of the altered handnote, and the suit must fail whether it is regarded as a suit on the hand note or as a suit on an original consideration of the 26th Paus.

In this view the question which has been recently discussed by Full Benches in Allahabad, Rangoon and Madras (53 All 114;[13] 12 Rang 500[24] and 59 Mad 268[15]) does not really arise—the question viz. whether it was open to the plaintiffs to sue on the loan apart from the altered handnote. In 7 Cal 256,[4] referred to by my learned brother, Garth, C. J. distinguished between (1) cases in which a bill or note is taken by the creditor on account of the debt and (2) cases where

> the original cause of action is the bill or note itself and does not exist independently of it, as for instance, when, in consideration of *A* depositing money with *B*, *B* contracts by a promissory note to repay with interest at six months date;

so that

> there is no cause of action for money lent or otherwise than upon the note itself, because the deposit is made upon the terms contained in the note and no other. In such a case the note is the only contract between the parties, and if for want of a proper stamp or some other reason the note is not admissible in evidence, the creditor must lose his money.

If the learned Chief Justice spoke of a deposit by way of example, that, I think, was because the cases that he distinguished on this ground immediately afterwards, 21 W R 1[25] and 24 W R 88,[26] were cases of deposits, though the particular case before him was a case of what

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21. Ram Raghubir Lal v. United Refineries (Burma) Ltd., A I R 1931 Rang 139=134 I C I C 737=9 Rang 56.
22. Maung Po Chein v. C. R. V. V. V. Chettyar Firm, A I R 1935 Rang 282=158 I C 533.
23. Dula Meah v. Abdul Rahaman, A I R 1924 Cal 452=81 I C 641=28 C W N 70.
24. Maung Chit v. Roshan N. M. A. Kareem Oomer & Co., A I R 1934 Rang 389=152 I C 1038=12 Rang 500 (F B).
25. Ankur Chandra Roy v. Madhub Chunder Ghose, (1874) 21 W R. 1.
26. Prossunno Nath Lahiree v. Tripoora Soonduree Dabee, (1875) 24 W R 88.

he calls "a sort of loan transaction", though without any loan independently of the note. In 8 Cal 721,[27] which was decided about a year afterwards, the learned Chief Justice indicated clearly that his second class of cases included cases of advances on bills for he said that

> if the consideration for the bill (a hundi for Rs. 500) had been an independent cause of action complete in itself, before the bill was given,

the appellant's contention, that though the instrument itself was not admissible in evidence they were entitled to recover upon proving the consideration for the bill, would have been well founded. In 23 Cal 851,[11] Petheram, C. J. was of opinion that Garth, C. J. when he spoke of a deposit did not mean a loan, and that an implied contract to repay money lent always arises from the fact that the money is lent, even though no express promise, either written or verbal, is made to repay it and that the creditor may maintain an action against the debtor for breach of his implied promise or contract, entirely independently of any security which may have been given for the advance. The same view was apparently taken by Jenkins, C. J. in 24 Bom 360.[28] A hand-note given by a debtor to a creditor may—like negotiable instruments in England—be a conditional payment of the debt, or it may be a collateral security which the creditor may or may not avail himself of as he pleases, or again, as usually happens in the mofussal in this country, it may be the sole consideration for the advance embodying in writing all the terms on which the advance is made. In the last class of cases and it was evidently this class that Garth, C. J. had in mind in the case before him (for he distinguishes 3 Cal 314[29] and 1 East 55[30]), it seems clear that it is not open to the creditor to recover his money independently of the hand-note by proving orally the advance and the terms of an implied contract in contravention of the provisions of S. 91, Evidence Act. As was pointed out in 10 Mad 94[31]:

> It is a necessary condition to every written contract that the terms should be orally settled before they are reduced to writing and to hold when such a contract has been reduced to writing that a plaintiff can take advantage of the absence of a stamp on the promissory note to sue at once for the return of money which he may have contracted to lend for a fixed period, would entirely defeat the provisions of S. 91, Evidence Act.

Another way of putting the case against treating the money paid at the very time of the execution of a promissory note which is inadmissible in evidence as giving rise to a contractual or other obligation, is found in the observations of Sadasiva Ayyar, J. in 38 Mad 660[32]:

> To import the doctrine laid down in English cases about vague obligations to repay arising out of equity and not out of contract, or about obligations which can be enforced if the plaintiff skilfully draws up his plaint as one on account for money had and received, concealing the real contract of loan which had been reduced to the form of document is, it seems to me, merely trying to nullify S. 91, Evidence Act.

Where there is an express contract promise of repayment put into writing as part of the loan transaction, it seems to me that if the plaintiff recovers at all, it must be on the contract actually made and not on some implied contract, though it will of course be open to a creditor, who lends irrespective of a hand-note and afterwards takes a hand-note merely by way of conditional payment or collateral security, to rely on the implied promise contained in the receipt of the money by the debtor. Whether a hand-note is the sole consideration for the advance, and not merely a conditional payment or a collateral security, must be a question of fact. This question has not been investigated below. I should be inclined to doubt very much whether the hand-note in the present case was anything other than the entire consideration for the advance. The learned Subordinate Judge relied on A I R 1923 Cal 318[9] in support of the proposition that "if a promissory note sued for is a forgery, the plaintiff will succeed on proof of the loan by independent evidence". That was a case where the defendant admitted executing a bond for a smaller sum than the plaintiff claimed to have advanced, and the Court of fact had found that this smaller sum had been paid to the defendant. Upon this, Newbould and Panton, JJ. accepted the cre-

27. Radhakant Shaha v. Abhoychurn Mitter, (1882) 8 Cal 721=11 C L R 310.
28. Krishnaji Narayan Parkhi v. Rajmal Manikchand, (1900) 24 Bom 360=2 Bom L R 25.
29. Golap Chand Marwaree v. Thakurani Mohokoom Kooaree, (1877) 3 Cal 314=2 C L R 412n.
30. Farr v. Price, (1800) 1 East 55=5 R R 515.
31. Pothi Reddi v. Velayudasivan, (1887) 10 Mad 94.
32. Muthu Sastrigal v. Visvanatha Pandarasannadhi, A I R 1914 Mad 657=21 I C 864=38 Mad 660=26 M L J 19.

ditor's contention, following 5 C W N 56,[6] that "even if the promissory note sued upon were a forgery, the plaintiff would succeed on proof of the loan by independent evidence". In 28 C W N 70[23] Newbould, J. himself noticed that 5 C W N 56[6] was not a case of material alteration of a bond but a case where the whole bond was held to be a forgery, so that all that the case established was that the plaintiff may succeed even though some of the evidence that he produces is entirely forged, a proposition which on the doctrine in (1791) 2 R R 399,[33] is of little help in cases where plaintiffs sue on notes materially altered by them. Rankin, J. in the same case pointed out how an independent cause of action must be shown if the doctrine in (1791) 2 R R 399[33] is not to take effect and how where there is an express promise, an implied promise will not be inferred. This was the case on which the decision in 11 Pat 782,[1] to which I was a party, a suit on the basis of hand-notes that had been tampered with, was based. Reference was also made to 33 Cal 812,[3] a case in which the contention was negatived that the plaintiff was entitled to succeed on the basis of the original consideration and to rely upon the altered bond as embodying an acknowledgment sufficient to save the bar of limitation. This case was commented upon in 53 Cal 418,[34] the other case relied on by the Subordinate Judge who has, however, overlooked the fact that Chatterjea and Page, JJ., both held in this case that (to quote Page, J. at p. 431 of the report):

> If the execution of a document is the consideration for a contract, the legal obligations of the party executing the document to the other party to the contract are limited to those which can be enforced under the document and not otherwise.

In our own Court, Kulwant Sahay, J. held in 7 Pat 845[12] that:

> Even in cases where the lending of the money and the execution of the promissory note are contemporaneous, the plaintiff is entitled to maintain a suit for recovery of the money lent and to adduce evidence, other than the instrument or the promissory note itself, in order to prove the loan.

The learned Judge put this on the ground that:

> Apart from the instrument, namely, the promissory note, there is always a contract to repay a loan, and such contract can be proved independently of the instrument.

Macpherson, J. who agreed to the answer proposed by Kulwant Sahay, J. in that case, was however by no means of the same view, and sitting with Agarwala, J. in 14 P L T 651[16], referred the matter to the Full Bench. Kulwant Sahay, J. (sitting with Jwala Prasad, J.) having in the meanwhile re-affirmed his view in 11 Pat 135.[35] The point was, however, not decided by the Full Bench, as the learned Judges found that by reason of the terms of the judgment of the lower Court the general question whether parallel evidence of what was said to be a written contract could be allowed did not arise. That question, as I have already indicated, does not arise in the present case because it is clear not only that the alterations of the hand-note make relief on it impossible, but also that the learned Subordinate Judge has not been able to arrive at a finding that the plaintiff had advanced any money to the defendant on the date stated in the plaint.

V.B.B./R.K. *Appeal allowed.*

33. Master v. Miller, (1791) 2 R R 399=5 T R 637=2 H Bl 141=1 Anst 225.
34. Parbati Charan v. Amarendra Nath, A I R 1926 Cal 831=96 I C 97=53 Cal 418.
35. Abdul Muhammad Khan v. Mahananda Upadhyaya, A I R 1931 Pat 293=133 I C 685=11 Pat 135=13 P L T 52.

A. I. R. 1937 Patna 578

DHAVLE AND VARMA, JJ.

Phul Mohammad Khan and *another*—Defendants—Appellants.

v.

Qazi Kutubuddin, Plaintiff and *another*, Defendant — Respondents.

Appeal No. 1302 of 1933, Decided on 6th May 1937, from appellate decree of Sub-Judge, Arrah, D/- 24th May 1933.

Mahomedan Law—Pre-emption — There is no right of pre-emption with regard to mokarrari or raiyati interest — Along with sale of touzis, mokarrari and raiyati lands transferred — Pre-emption in respect of milkiat rights only is maintainable.

There can be no right of pre-emption with regard to a mokarrari or raiyati interest. Where therefore along with the sale of certain touzis some mokarrari as well as raiyati lands are transferred by the same transaction, a suit for pre-emption in respect of milkiat rights only is maintainable: *Case law discussed.* [P 579 C 1; P 581 C 2]

Md. Hasan Jan and *Syed Hassan* — for Appellants.

K. Hasnain and *Qazi Nazrul Hassan* —for Respondents.

Varma, J.—This second appeal arises out of a suit for pre-emption filed by the

plaintiff which was dismissed by the trial Court, but partly decreed by the lower Appellate Court. The defendants have come up in appeal before us. The facts out of which this appeal arises are as follows: The plaintiff's case is that he and defendant 3 are full brothers but they are on bad terms. Defendant 3 sold his properties to defendants 1 and 2 under a kebala dated 25th January 1930 without the knowledge of the plaintiff. He learnt of this on 26th January 1930 at 2 A. M. in the night at Gaya. As soon as he learnt of the sale he performed the ceremony of talab-i-mowasibat saying that he had a share and right of pre-emption in Kazipura Tauzi No. 1437 joint and separate account No. 1 and in Bhojpur Jadid Tauzi No. 1296, he was claiming pre-emption and was ready to pay the price mentioned in the kebala in respect of the shares claimed. He started that very day and reached Dumraon that very noon. From there he went to Kazipura and in the presence of respectable persons performed the ceremony of talab-i-ishhad saying that he had a share in these two tauzies and so he had a right to pre-empt. He also informed the people there that he had already performed the ceremony of talab-i-mowasibat. From there he went to Bhojpur and performed the ceremony of talab-i-ishhad. After performing these ceremonies he offered the price of the shares to defendants 1 and 2, but they refused and therefore the plaintiff filed the suit. It appears that along with the sale of these two tauzis some mokarrari as well as raiyati lands were transferred by the same transaction. The plaintiff claimed right to pre-empt in regard to the milkiat rights only. Defendant 3 did not appear to contest the suit but defendants 1 and 2 filed written statement. They denied many of the allegations made in the plaint and said that the two ceremonies of talab-i-mowasibat and talab-i-ishhad were never performed and also raised the question that the plaintiff was not entitled to pre-empt in regard to a part of the properties sold. These were their chief contentions apart from the usual questions of estoppel and limitation.

The trial Court held that the ceremonies were not performed. It further held that as the ceremonies were not performed with regard to all the properties transferred, the plaintiff could not be said to have performed the ceremonies in accordance with law. On these findings the trial Court dismissed the suit of the plaintiff. The lower Appellate Court however believed the evidence of the plaintiff and held that the ceremonies were performed as alleged by him.

The next question for determination was whether the plaintiff's suit was maintainable. In the course of argument it was stated before the lower Appellate Court that the plaintiff would have a right to pre-empt for a proprietary interest only if it was found that a right of pre-emption did not accrue on transfer of raiyati lands. The lower Appellate Court referred to Ch. 28 of Ameer Ali's Mahomedan Law, A I R 1921 Pat 164 [1] and A I R 1923 Pat 217 [2] and held that the plaintiff was not entitled to pre-empt with regard to the raiyati lands. That being so, the plaintiff's suit was maintainable in respect of such properties only in respect of which the right of pre-emption accrued. The lower Appellate Court ordered that if the plaintiff deposited Rs. 1,700 within a period of three months to the credit of defendants 1 and 2, a decree for possession of the property in suit would be finally passed in his favour; and if he deposited only Rs. 1,100, a decree declaring his right to possession would be passed but he would not be able to get possession until he deposited Rs. 550 more and in case he made no deposit at all within the time allowed the plaintiff's suit would stand dismissed. I may note here that Rs. 550 represented the plaintiff's share of the encumbrances on the properties in suit after their purchase.

Mr. Hasan Jan appearing on behalf of the appellants attacks the judgment of the lower Appellate Court in the following manner. He urges that the pre-emptor must pre-empt with regard to the whole of the property transferred by the sale and as in this case the pre-emption was with regard to milkiat properties only and not with regard to the mokarrari and raiyati interests, the present suit must fail.

In this High Court it has been held in a number of decisions that there can be no pre-emption with regard to a mokarrari or raiyati interest, the earliest deci-

1. Mohammad Jamil v. Khub Lal Raut, A I R 1921 Pat 164=58 I C 534=5 Pat L J 740=2 P L T 138.
2. Dhirakashan Singh v. Triloki Prasad Singh, A I R 1923 Pat 217=71 I C 318.

sion being the case in 5 P L J 740,[1] decided in 1920, , where it was held that the doctrine of pre-emption applies only to the sale of the proprietary interest and therefore does not apply to the sale of the mokarrari interest. One of the arguments advanced in that case was that the right of pre-emption extended even to the mokarrari lease that was vended in that case. Sultan Ahmed, J. relying upon the cases in 8 W R 106,[3] 25 W R 43[4] and 15 Cal 184,[5] held that this objection was untenable. Mr. Hasan Jan has taken us through these cases with the object of showing that there was no authority for the proposition of law laid down in 5 P L J 740.[1] The case in 8 W R 106[3] was case in which the question before the Court was whether a lease in perpetuity with a rent reserved amounted to a sale. Their Lordships held that it did not and as pre-emption applied only to sales, therefore a lease in perpetuity could not be the subject of pre-emption.

In 25 W R 43[4] the plaintiff sued the defendants to recover possession by determination of right and for registration of his name in the milkiat and malgoozar's column of the Government record jointly with the name of Khookum Singh, the recorded proprietor, in respect of a certain share in a particular tauzi on the ground of a right of pre-emption as a partner in the property sold. In the plaint it was alleged that defendant 2 had, without the plaintiff's knowledge, sold her mokarrari right, and defendant 1 his milkiat or proprietary right, to the same defendant, that is defendant 4, who is a stranger to the parties under a deed of sale dated 26th January 1874. Getting information of it, he performed the various ceremonies connected with pre-emption. The defendants contested the suit and in his written statement defendant 4 alleged that he had purchased the mokarrari and milkiat rights of two different persons; that according to the law of pre-emption no claim for pre-emption could be valid in respect of a mokarrari property and therefore the claim of the plaintiff with reference to the mokarrari property must be dismissed. There were other points taken in the written statement with which we are not concerned. Of the points discussed before the lower Court in that case, one was whether with regard to the mokarrari a claim for pre-emption could be allowed by the Mahomedan law, and if not, whether the Court had jurisdiction. The lower Court had held that there was no right of pre-emption with regard to a mokarrari interest. It was argued before the High Court that the learned Judge was wrong in holding that under the Mahomedan law a claim to the mokarrari by right of pre-emption would not lie. The other points urged before it do not affect the case in hand. While dealing with the first point their Lordships observed :

> Now the plaintiff comes into Court claiming the right of pre-emption on the ground that he is a partner in the property of the land sold. Can it be said that he is a partner in the mokurruree ? And if the plaintiff, as a partner in the milkiat, can interfere in the sale of the mokurruree right by the mokurrureedar, on the ground that he is partner in the property sold, it follows that the mokurrureedar can also interfere in the exercise of his rights by the proprietor in selling his proprietary rights ; but this, the pleader for the appellant admits, the mokurrureedar cannot do.

They referred to the case reported in 8 W R 106[3] with approval and finally agreed with the finding of the lower Court that the plaintiff was not entitled to claim the right of pre-emption with regard to the mokarrari right. Mr. Hasan Jan urges that the remarks of their Lordships at p. 44 in 25 W R 43[4] do not support the proposition of law laid down in 5 P L J 740.[1] I cannot accept this contention. There also it appears from the facts that defendant 2 sold her mokarrari right and the plaintiff as a partner in the proprietary right wanted to claim pre-emption and this was, for the reasons given by their Lordships, held to be untenable. In 15 Cal 184[5] the facts were as follows : The plaintiff and defendant 1 were joint proprietors of a certain mokarrari tenure. Defendant 1 granted a sub-lease in perpetuity of his share. The plaintiff wanted to enforce his right of pre-emption. Their Lordships referring to the cases in 8 W R 106[3] and 25 W R 43[4] held that the grant of a permanent lease does not give rise to the right of pre-emption. Their Lordships did not express any opinion on the question whether the parties being merely lessees in perpetuity had such a milkiat

3. Moorooly Ram v. Baboo Huree Ram, (1867) 8 W R 106.
4. Baboo Ram Golam Singh v. Nursingh Sahoy, (1876) 25 W R 43.
5. Dewanutulla v. Kazemmolla, (1888) 15 Cal 184.

in the property as would entitle either of them to claim the right of pre-emption.

Mr. Hasan Jan next refers to Vol. 3, Ch. 3, Book 38 at page 558 of Grady's Edition of Hamilton's Hedaya and says that pre-emption relates to immoveable property whether they are capable of division or not, and from this he concludes that as the mokarrari land sold in this case is an immoveable property, the law of pre-emption applies. He further urges that the term "milkiat" may have a technical meaning now, but it means landed property, revenue or rent-free property. To this Mr. Khursaid Hasnain replies that in early times only full ownership was contemplated by the Mahomedan legislators and the Hedaya refers to proprietary interest only. For the latter statement, Mr. Khursaid Hasnain relied on the case in 7 All 775[6] at p. 799 where Mahmood, J. gives the definition of pre-emption in the following terms:

> Pre-emption is a right which the owner of certain immoveable property possesses, as such, for the quiet enjoyment of that immoveable property, to obtain, in substitution for the buyer, proprietary possession of certain other immoveable property, not his own, on such terms as those on which such latter immoveable property is sold to another person.

He next relied on the case in 10 All 472[7] at p. 477 where Mahmood, J. says that in the pre-emptive tenement (the tenement by the ownership of which the pre-emptor wants to exercise his right of pre-emption), the pre-emptor should have vested ownership and not a mere expectancy of inheritance or a reversionary right, or any other kind of contingent right, or any interest which falls short of full ownership. The learned advocate refers to another authority, viz. Baillie's Mahomedan Law, Book 7, Ch. 1 at p. 478 and urges that :

> When it is said that akar are proper objects of the right of pre-emption, it is by virtue of a right of milk or ownership that they are so, and one of the conditions mentioned in the early parts of the chapter is that the thing sold must be akar, or what comes within the meaning of it, whether the akar be divisible or indivisible, as a bath or well or a small house or a mill or road.

In Siv Saran Lal's book on the Law of Pre-emption, the various definitions of akar have been collected together in Ch. 3 at p. 64. According to Fata. A 1 (Vol. 3, p. 605) the strict meaning of the word akar is "a space covered with buildings" so that properly speaking the term is not applicable to a zuyut; but according to the Kifayah (Vol. 4, p. 940) and the Inayah (Vol. 4, p. 263), akar in the sense in which it is liable to pre-emption includes zuyut. According to Freytag, zuyut is a field, whether arable or pasture (Baillie, Vol. 1, p. 472).

In our own High Court in 8 Pat 251[8] it was held that a mukarraridar holding under a co-sharer had no right to pre-empt as against another co-sharer and as a mukarraridar could not claim pre-emption, the co-sharer on the doctrine of reciprocity, which is well understood in the Mahomedan law, could not claim pre-emption against the mukarraridar. This case relied on 5 P L J 740[1] and explained the cases in 52 Cal 417[9] and 89 I C 421.[10] In A I R 1923 Pat 217,[2] Das, J. delivered the judgment of the Court and held that there was no right of pre-emption with regard to the mokarrari land. In 15 P L T 796,[11] the question was whether the right of pre-emption could be exercised in respect of a birit land. It was held that the definition of proprietor in the Bengal Tenancy Act did not include all kinds of proprietorship and that the fact that the biritdar is treated as a tenant in the Record of Rights is not incompatible with the conception of his ownership of the land. From this it is clear that their Lordships relied upon the proposition that the full owner of a property has a right to pre-empt but not a person who is in the possession of a right falling short of it. Therefore, relying upon the various decisions of our own High Court, I am of opinion that the Court below was right in holding that there could not be any right of pre-emption with regard to a mokarrari or raiyati interest. I would therefore dismiss the appeal with costs.

Dhavle, J. — I agree.

D.S./R.K. *Appeal dismissed.*

6. Gobind Dayal v. Inayatullah, (1885) 7 All 775=1885 A W N 182 & 228 (F B).
7. Sakina Bibi v. Amiran, (1888) 10 All 472=1888 A W N 177.
8. Mt. Bibi Saleha v. Amiruddin, A I R 1929 Pat 214 = 117 I C 865 = 8 Pat 251 = 11 P L T 24.
9. Katyayani Devi v. Udoy Kumar Das, A I R 1925 P C 97=88 I C 110 = 52 I A 160 = 52 Cal 417 (P C).
10. Ram Bali Singh v. Jagadat Singh, A I R 1925 Oudh 624 = 89 I C 421 = 2 O W N 367 = 29 O C 90.
11. Chariter Dusadh v. Bhagwati Pandey, A I R 1934 Pat 596=152 I C 983=15 P L T 796.

A. I. R. 1937 Patna 582

MOHAMAD NOOR AND ROWLAND, JJ.

Mt. Walihan — Defendant —

Appellant.

v.

Parmeshwar Narain Patakh —

Plaintiff — Respondent.

Appeal No. 1011 of 1934, Decided on 16th March 1937, from appellate decree of Dist. Judge, Saran, D/- 15th September 1934.

(a) Bihar Tenancy Act (8 of 1934), Ss. 26-N and 26-O—Retrospective effect.

Sections 26-N and 26-O, Bihar Tenancy Act, are intended by the Legislature to have retrospective effect : *A I R 1936 P C 49, Foll.*

[P 582 C 2]

(b) Bihar Tenancy Act (8 of 1934), S. 26-O —Decree for ejectment—Title of transferee of occupancy holding does not become extinct until such decree is final—Deposit of transfer-fee during pendency of second appeal —Landlord would be deemed to have consented to transfer.

The title of the transferee of occupancy holding is from the outset good against all the world except the landlord and does not become extinct by the passing of a decree for ejectment against him unless and until such decree has become final as it might by the lapse of the period of limitation for an appeal and the omission of the defendant to file an appeal against the decree. Failing that, the title can hardly be deemed to be extinct while a second appeal is pending from the decision and if during the pendency a deposit of the transfer-fee is made, the effect of the deposit will be that the landlord would be deemed to have consented to the transfer. [P 582 C 2; P 583 C 1]

Syed Ali Khan — for Appellant.

N. K. Sahai — for Respondent.

Rowland, J.—This is an appeal by the defendants, the transferees of an occupancy holding which was not transferable without the consent of the landlord. The tenant transferred 13 kathas by sale deed dated 31st March 1931, the entire holding being of 13 kathas 14 dhurs; but the Courts below have held that the exclusion of 14 dhurs was purely nominal and that in fact the whole holding was transferred. This it was held amounted to an abandonment of the entire holding thereby giving the landlord the right to re-enter. Such was the decision and decree of the Munsif dated 13th December 1933, which was upheld on appeal by the District Judge on 15th September 1934. Pending a second appeal to this Court, the Bihar Tenancy Act came into force and the present appeal now rests not on the contention that the Courts below were wrong in the view they took of the law as it stood at the time, but that since the passing of the Act the consent of the landlord to such a transfer is deemed to have been given under certain conditions and those conditions have been fulfilled. The section of law applicable in this case is 26-O which deals with transfers made on or after 1st January 1923 and before the commencement of the Bihar Tenancy (Amendment) Act. The transferee under this section is permitted to pay to the landlord or deposit with the Collector, in accordance with sub-s. (1) of S. 26-E, a transfer-fee and on his doing so and complying with the other requirements of S. 26-E, the consent of the landlord is, under S. 26-O (3), deemed to have been given on the date on which the landlord's transfer-fee having been deposited with the Collector, the receipt for the same is granted by the Collector. The appellant has asked us at the hearing of this second appeal to admit and accept in evidence a receipt granted by the Collector on 18th June 1936 for the sum of Rs. 12. The respondent not objecting and this being a piece of evidence which in the nature of things could not be produced before, we have admitted it in evidence. It shows that the deposit has been made with the Collector and therefore under S. 26-O it ought to be deemed that the landlord has consented to the transfer.

For the respondent the contention that Ss. 26-N and 26-O were not intended by the Legislature to have retrospective effect is hardly maintainable in face of the Privy Council decision in 15 Pat 268,[1] but it is pointed out that the terms of Ss. 26-N and 26-O are not identical and it is argued that S. 26-O can only come into operation if at the date of making the payment and obtaining a receipt from the Collector there is a subsisting title in the transferee and it is said that in this case the Courts below having decreed the landlord's suit in ejectment, the title of the transferee was extinct and could not be revived by a subsequent deposit of the amount. The argument is at first sight attractive; there are no doubt difficulties in the way of holding that a title once finally extinct can be revived in such a manner. But can it be said that the title of the transferee had become extinct? The title of the transferee is from the outset good against all the world except the landlord and does not in my opinion become extinct by the

1. K. C. Mukherjee v. Mt. Ram Ratan Kuer, A I R 1936 P C 49=160 I C 105=63 I A 47=15 Pat 268 (P C).

passing of a decree against him unless and until such decree has become final as it might by the lapse of the period of limitation for an appeal and the omission of the defendant to file an appeal against the decree. Failing that, the title can hardly be deemed to be extinct while a second appeal is pending from the decision. To extinguish it, there must have been a final decision of the litigation.

Therefore I think that this appeal must be allowed as the effect of the deposit is that the landlord is deemed to have consented to the transfer. The decree of the Courts below must be set aside and the suit dismissed; but in the circumstances of this case as the suit at the time of its institution was a good suit, there should be no order for costs.

Mohamad Noor, J.—I agree.

D.S./R.K. *Appeal allowed.*

A. I. R. 1937 Patna 583

FAZL ALI, J.

Sheik Idan Sadagar and *another* — Appellants.

v.

Firm Premsukdas-Ramchandra — Respondent.

Appeal No. 503 of 1934, Decided on 11th December 1936, from appellate decree of Deputy Commissioner, Sub-Judge, Manbhum, D/- 28th February 1934.

Limitation Act (1908), S. 20—Payment and appropriation towards interest — Option to creditor to appropriate towards interest or principal — Creditor appropriating towards interest—Payment is not within S. 20 — It is not necessary to state each time explicitly that payment is towards interest—It is sufficient if circumstances warrant it.

Where money is paid by a debtor without his specifying whether his payment is towards interest or towards principal leaving it to the option of the creditor to appropriate it as he likes, and the creditor appropriates it towards interest, there is neither a payment of interest as such nor a part payment of the principal within the meaning of S. 20, Lim. Act. But in order to bring a case within S. 20, Lim. Act, it is not essential that the debtor should, on the occasion of each payment, state explicitly that the payment is made on account of interest as such ; it is sufficient if circumstances exist which make the conclusion inevitable that the payment must have been made on account of interest : *A I R 1935 All 946* and *A I R 1918 Cal 477, Rel. on.*

[P 584 C 1, 2]

S. C. Mazumdar — for Appellants.

R. S. Chatterji — for Respondent.

Judgment.—This appeal arises out of a suit brought by the respondents to recover a sum of Rs. 739 and odd from the defendants. The suit was based upon a chitha in which there are a number of entries both on the debit and the credit sides. It appears from these entries that about 11th August 1926, the defendants borrowed a sum of Rs. 350 from the plaintiffs and executed a handnote in their favour promising to pay interest at the rate of 24 per cent. per annum. Again on 22nd September, 3rd October and 1st November 1926 and 24th November 1928, the defendants purchased some cloth on credit from the plaintiffs for various sums which are noted in the chitha. The chitha also shows that payments by or on behalf of the defendants were made of various sums of money on 16th April, 20th October, 22nd August 1927, 5th September 1928 and 21st April 1929, the sum paid on the last occasion being Rs. 100. Most of these payments including the last one have been noted in the handwriting of one Riazuddin who has been found by both the Courts below to be an agent of the defendants and to have been duly authorized by them to make the payments.

The only point which is raised in this appeal on behalf of the appellants is one of limitation and it is contended that (1) each transaction must be regarded as an independent transaction for the purpose of limitation, and (2) neither S. 19 nor S. 20, Lim. Act applied to the facts of this case. It may be stated here that the trial Court applied S. 19, Lim. Act which does not seem to be applicable and the case was dealt with in a very perfunctory manner by the Appellate Court. The matter was therefore argued very elaborately in this Court and it became clear in the course of the argument that unless the facts of this case could be brought under S. 20, Lim. Act, the suit would be barred by limitation. S. 20 provides among other things that when interest on a debt is, before the expiration of the prescribed period, paid as such by the person liable to pay the debt or by his agent duly authorized in this behalf, a fresh period of limitation shall be computed from the time when the payment is made. The learned advocate for the appellants rightly contended that in order to bring the case under this provision, it must be shown that interest was paid as such. In the course of his arguments the learned advo-

cate referred to a number of decisions, but he relied principally on A I R 1935 All 946.[1] In that case it has been pointed out that the Legislature must be deemed to have fully understood the significance of the words 'paid as such' in S. 20, Lim. Act and therefore where money is paid by a debtor without his specifying whether his payment is towards interest or towards principal leaving it to the option of the creditor to appropriate it as he likes and the creditor appropriates it towards interest, there is neither a payment of interest as such nor a part payment of the principal within the meaning of S. 20. As the view put forward in this case is the view generally accepted in all the Courts, the only question to be considered is whether in the circumstances of the present case it can be held that the whole or any portion of the payment which was made on 21st April 1929 was made towards interest as such.

Now it appears that it was definitely stated on oath by one of the witnesses of the plaintiffs in the course of the trial that it had been agreed between the parties that "interest would be paid first of all and that anything paid by them (defendants) would go first of all towards interest". This statement was not controverted by the defendants and therefore there can be no doubt that there was such an agreement between the parties. The plaintiffs again included in their plaint an account of the transactions which shows that the payments referred to above were appropriated towards interest from time to time and a portion of the last payment was also appropriated towards interest. This account was part of the plaint and I find no specific objection in the written statement to the various items in the account which have been credited towards interest. The defendants simply denied that any payment had been made on 21st April 1929; but both the Courts below have held against them on this point. It appears to me that in these circumstances it must be held that there was a payment in this case towards interest as such and that payment was sufficient to save limitation. It has been held in 27 C L J 141,[2] that in order to bring a case within S. 20, Lim. Act, it is not essential that the debtor should, on the occasion of each payment, state explicitly that the payment is made on account of interest as such; it is sufficient if circumstances exist which make the conclusion inevitable that the payment must have been made on account of interest. The correctness of this proposition has not been challenged in any of the cases which have been relied on by the learned advocate for the appellants, and in my opinion the circumstances of this case make it clear that the disputed payment was made towards interest.

I would therefore dismiss this appeal with costs.

V.B.B./R.K. *Appeal dismissed.*

1. Udeypal Singh v. Lakshmi Chand, A I R 1935 All 946=159 I C 387=58 All 261=1935 A L J 1029 (F B).
2. Charu Chandra Bhattacharjee v. Karam Bux Sikdar, A I R 1918 Cal 477=43 I C 812=27 C L J 141.

A. I. R. 1937 Patna 584

COURTNEY-TERRELL, C. J. AND JAMES, J.

Mt. Durga Tewary — Defendant — Appellant.

v.

Ramrati Kuer, Plaintiff and *another*, Defendant — Respondents.

Appeal No. 79 of 1933, Decided on 26th February 1937, from appellate decree of Sub-Judge, Saran, D/- 28th September 1932.

(a) Civil P. C. (1908), O. 41, R. 27 (1) (b)— Powers of Court — Appellate Court can admit additional evidence not only when it requires it, but even when produced by party to appeal and when on such evidence review can be obtained.

It is not that additional evidence should not be admitted by the Appellate Court under O. 41, R. 27 (1) (b), Civil P. C., except on the definite requirement of the Court itself and that if the new and additional evidence is produced by one of the parties it should be ignored. [P 585 C 1, 2]

If one of the parties offering to produce new and additional evidence would have been entitled to obtain a review of the judgment on the ground that such evidence was not available since the trial and was material to the decision of the issue, the Appellate Court will be justified in admitting such additional evidence: *A I R 1931 P C 143, Expl.* [P 585 C 2]

(b) Practice—Discretion — Interference — No interference unless exercised on fundamentally wrong principles.

An Appellate Court does not interfere with the discretion of a lower Court unless that discretion has been exercised upon fundamentally wrong principles. [P 586 C 1]

Har Narayan Prasad — for Appellant.

Janak Kishore — for Respondents.

Courtney-Terrell, C. J.—This second appeal is by defendant 1 against a decree of the Subordinate Judge of Saran reversing a decision of the Munsif of Chapra. The plaintiff claimed as the sister of a lady named Kalika who had died, and one of the important issues in the case was as to when Kalika in fact died. The matter was heard by the trial Court, and it was held that the lady died as alleged by the plaintiff in the year 1928. The matter went on appeal to the lower Appellate Court, and the lower Appellate Court had brought to its notice a certain document purporting to be an admission by the plaintiff of the date when the lady died and putting that date not at the date alleged by the plaintiff but at a subsequent date, the 8th May 1929. The learned Judge decided to admit this document into evidence and having considered it together with the rest of the evidence allowed the appeal, deciding that the lady in fact died on 8th May 1929. The matter was taken on second appeal to a learned Judge of this Court sitting singly, and the appellant took the ground that the lower Appellate Court should not have admitted this additional evidence. There was another point in dispute which was a matter of law only. The learned Judge heard the second appeal and decided to refer the matter of the legal point to a larger Bench. It was accordingly heard by a Full Bench and the matter of its disposal is of no great interest, the order being in so far as it affects this case that the case was sent back to a Division Bench and now comes before us.

The main point which has been taken before us is that of the admission of the evidence by the lower Appellate Court. On behalf of the appellant and in assistance of his argument there has been produced before us an expression of opinion by the learned Judge who first heard the case in second appeal, to the effect that the additional evidence should not have been received by the lower Appellate Court and that the case should have been indeed decided ignoring the additional evidence which was in fact admitted and taken into consideration. The argument of the learned advocate and the opinion of the learned Judge of this Court are based upon the wording of O. 41, R. 27, Civil P. C. It is suggested that the meaning of para. (b) of that Order is that the evidence should not be admitted except on the definite requirement of the Court itself and that if the new and additional evidence is produced by one of the parties, it should be ignored. It is sought to base this argument upon certain passages in a judgment of their Lordships of the Privy Council in 58 I A 254.[1] In my opinion the judgment referred to lays down no such proposition. It is suggested from the wording of the judgment that unless the Appellate Court itself finds some good reasons for filling up some lacuna in the evidence, the parties have no right to produce such further evidence. The wording of para. (b) is quite against such a view and I am perfectly certain that their Lordships of the Privy Council intended to lay down no such principle. The Appellate Court may require any document to be produced or any witness to be examined to enable it to pronounce judgment or for any other substantial cause, and as was pointed out by their Lordships of the Privy Council in the case referred to, the word "requires" means that it is necessary. It may be necessary for the purpose of enabling the Court to pronounce judgment, that is to say the Court may find that unless such evidence is produced before it, it has not sufficient material before it to decide the case or there may be some other good and substantial cause and the most common and frequent is that the evidence was not available in the trial Court because the party was unaware of it at the time of the trial and only has it been brought to the notice of the party. It must be remembered that a party is entitled to obtain a review of a judgment, and one of the grounds upon which it is entitled to obtain a review is that evidence which it could not be expected to have produced at the trial has become available since the trial which is material to the decision of the issue.

It would be ridiculous to imagine that the Appellate Court should first of all ignore the profferred new evidence and then allow the profferred new evidence to be brought before it on an application for review of its own judgment. There is a point further which must be noticed in considering the judgment of the Privy Council: they did not decide that if the Court should have exercised its discretion to admit further evidence upon grounds

1. Parsotim Thakur v. Lal Mohar Thakur, A I R 1931 P C 143=132 I C 721=58 I A 254=10 Pat 654 (P C).

which did not appeal to the Privy Council, the Privy Council would have proceeded to refer the matter back to the lower Appellate Court to be heard with directions that the additional evidence given was to be ignored, nor did they decide the matter themselves ignoring such additional evidence. The principles upon which the Court is to exercise its discretion are well known. If that discretion, however, has been exercised and if the additional evidence has been admitted, and is admissible as relevant, the additional evidence must be heard upon its merits even if the discretion to admit it may have been exercised upon erroneous grounds, for an Appellate Court does not interfere with the discretion of a lower Court unless that discretion has been exercised upon fundamentally erroneous principles. The learned Judge of this Court, however, seems to have been led to the impression that the case ought to have been remanded by him to the lower Appellate Court to be decided on the evidence as it stood before the admission of the additional evidence, and I see no justification for that point of view. In the case before the Privy Council, their Lordships, as a matter of fact, while stating that the additional evidence ought not to have been admitted, considered that additional evidence on its merits which governed the decision on the appeal and nothing else.

There is one further small point which is conceded by the learned Advocate on behalf of the respondents. It is pointed out that the suit was to recover a certain mukarrari No. 655 as having belonged to the deceased lady and certain moveable property as having been owned by the deceased lady and that the trial Court found as a matter of fact that she did not possess the mukarrari and did not possess any moveable property. This point of fact was not considered at all by the Appellate Court which reversed the decision of the Munsif on wider grounds, but it is quite clear that the judgment of the Munsif can only stand on the hypothesis of the findings of the Munsif as to these two items of property, which findings have not been disturbed by the Appellate Court. Therefore the decree will stand in favour of the plaintiff subject to the modification that those two items of property will be excluded from the decree. The appeal fails and must be dismissed with costs.

James, J.—I agree entirely. The learned Subordinate Judge admitted this additional evidence on grounds which would have justified the admission of an application for review by the original Court if no appeal had been preferred. If such grounds are made out by an appellant in an application under O. 41, R. 27, they should always be regarded as substantial cause justifying the admission of the additional evidence. It appears to me that O. 47, R. 1 cannot be reasonably read as implying anything else; though if there should appear any danger of it being read in any other manner, I consider that this Court with the Rule Committee ought to amend it. It appears to me that it would be absurd to lay down as a general rule that a respondent is permitted in certain circumstances to adduce additional evidence before the Court of Appeal, and a person who being a party to the suit is not a party to the appeal is similarly permitted to do so; and to provide that the only person who cannot in these circumstances produce additional evidence before the Appellate Court is the appellant himself. The whole of R. 1 of O. 47 proceeds on the assumption that if the person who has discovered new and important matter or evidence which after exercise of due diligence was not within his knowledge at the time of the trial, is a person who is in any way concerned in a pending appeal from the decree, he will be permitted to produce that evidence before the Appellate Court and it will be heard at the time of the appeal.

A.L./R.K. *Appeal dismissed.*

A. I. R. 1937 Patna 586

VARMA, J.

Commissioners of Patna City Municipality—Appellants.

v.

Bishambhardeo Narain—Respondent.

Second Appeal No. 253 of 1934, Decided on 25th February 1937, from appellat decree of Addl. .Offg. Sub-Judge, Patna, D/- 8th March 1934.

(a) Bihar and Orissa Municipal Act (7 of 1922), S. 380—Notice served under S. 115 (2) instead of under S. 107 (2)—Defect is not curable under S. 380.

Where a notice instead of being served under S. 107 (2), Bihar and Orissa Municipal Act, is served under S. 115 (2) of the same Act, and there

is no defect in form, the defect is not curable under S. 380 of the Act. [P 588 C 1]

(b) Bihar and Orissa Municipal Act (7 of 1922), S. 107 (2)—Non-service of notice—Illegality is not cured by assessee's appearance before committee.

The appearance of the assessee before the Committee appointed by the Municipality does not cure the non-service of notice under S. 107 (2), Bihar and Orissa Municipal Act: *A I R 1936 Pat 322, Rel. on.* [P 588 C 1]

G. S. Prasad — for Appellants.

Brahmadeva Narain—for Respondent.

Judgment.—This second appeal arises out of a suit instituted by Bishambhardeo Narain for a declaration that the assessment of the municipal tax of his house No. 108-B, Circle No. 6, within the Patna Municipality at the rental basis of Rs. 50 per month is excessive, illegal, ultra vires and without jurisdiction, and for an injunction restraining the municipality to realize tax from him at a rate higher than Rupees 17-12-6 per quarter which is the old rate of municipal tax payable for his house. The trial Court dismissed the suit. The lower Appellate Court has decreed the suit and passed a decree in the following terms :

That the suit is decreed and the appeal is allowed with costs at 6 per cent. per annum future interest ; pleader's fee Rs. 5 per cent. The judgment and the decree of the learned lower Court are herewith set aside. It is hereby declared that the re-assessment of municipal tax of plaintiff's holding at the rental basis of Rs. 50 per month is illegal, ultra vires, and without jurisdiction, and the defendant is restrained to realize tax therefor at a rate higher than Rs. 17-12-6 per quarter, that is the old rate of municipal tax therefor from the plaintiff.

The chief point which was the subject matter of dispute between the parties was whether a notice under S. 107 (2), Bihar and Orissa Municipal Act, was served on the plaintiff or not. A look at some of the exhibits in this case discloses a curious state of affairs. The defendant municipality claimed that a notice under S. 107 (2) was issued by the municipality and it was intended by the municipality that a notice under that section should be issued. But looking at the two parts of the notice—the one that is kept in the office and the other that is served upon the assessee—it appears that whereas that part of the printed notice which was kept in the office shows that S. 115 (2) has been changed into S. 107 (2), the other part that was served upon the assessee does not show any such change, with the result that the notice received by the assessee is a notice under S. 115 (2) of the Act. The lower Appellate Court has held that this was a fatal defect and that the enhancement could not be allowed because the provisions of S. 107 (2) had not been complied with. On this point the learned Subordinate Judge is at variance with the judgment of the trial Court which held that at best it was an irregularity curable by S. 380 of the Act, and moreover that the plaintiff put in an objection before the committee appointed by the municipality but that was rejected and therefore, at any rate, the enhancement was not made without notice to the assessee.

Mr. Rai Guru Sharan Prasad, appearing on behalf of the municipality, has adopted the same line of argument as advanced by the trial Court and he has emphasised the fact that the assessee was before the municipality before the enhanced rate was actually demanded. He has also relied upon S. 380, Bihar and Orissa Municipal Act. A careful scrutiny of the terms of S. 380 will show that it is not all irregularities that are curable: it is only the irregularities mentioned in that section that are curable. I cannot do better than quote the section itself to point out what the type of mistakes are that are curable under that section. The section runs as follows :

No assessment list or other list, notice, bill, or other such document specifying, or purporting to specify, with reference to any tax, charge, rent or fee, any person, property, thing or circumstance shall be invalid by reason only of a mistake in the name, residence, place of business or occupation of the person or in the description of the property, thing or circumstance, or by reason of any mere clerical error or defect of form, and it shall be sufficient that the person, property, thing or circumstance is described sufficiently for the purpose of identification, and it shall not be necessary to name the owner or occupier of any property liable in respect of a tax.

I need not quote Cl. (2) because it is not necessary for the purposes of this case. Now from this it will appear that the mistakes that are covered by this section are in the case of a notice in the name, residence, place of business or occupation of the person, or in the description of the property, thing or circumstance, or by reason of any clerical error or defect of form. The mistake in question here is a mistake which could be covered by the last two items, viz. clerical error or defect of form. Now the notice that was served upon the assessee cannot be said to contain any clerical error because it is on the face of it a notice under S. 115 (2). If the

municipality intended that it should be a notice under S. 107 (2), the correction should have been made here. So from the assessee's point of view there is no clerical error in the notice that was received by him. There is no defect in form either. Therefore, although certain types of irregularities are curable by S. 380, it cannot be said that a defect of this nature can be cured by that section, because it will amount to this that although you serve a notice which is to all intents and purposes a notice under S. 115 (2), you want to take advantage of having served a notice under S. 107 (2). Then the question is whether the appearance of the assessee before the committee cures the non-service of notice under S. 107 (2). I am of opinion that it does not, and I am supported in this opinion by the decision in 17 P L T 420.[1] I agree with the lower Appellate Court that this was an illegality and I would dismiss the appeal with costs. Leave to appeal under the Letters Patent is refused.

V.B.B./R.K. *Appeal dismissed.*

1. Lachminarayan Das v. Chairman, Cuttack Municipality, A I R 1936 Pat 322=163 I C 131=17 P L T 420.

A. I. R. 1937 Patna 588

MOHAMAD NOOR, J.

Raja Ram Chandra Prasad — Defendant — Appellant.

v.

Patna City Municipality — Plaintiff — Respondent.

Appeal No. 712 of 1935, Decided on 9th August 1937, from appellate decree of Dist. Judge, Patna, D/- 17th January 1935.

Appeal — Abatement of — Municipality is Corporation and continues so even when administered by Special Officer — Appeal from decision of suit by Municipality, making Special Officer respondent — No substitution of Commissioners after restoration is necessary in place of Special Officer — Appeal does not abate.

The Municipality is a Corporation and continues to be a Corporation even when it is administered by the Special Officer appointed by the Government. The only difference is that by statutory provision the powers of the Commissioners are vested in an individual. But the corporate existence of the Municipality remains the same as a Corporation never dies. [P 588 C 2 ; P 589 C 1]

The Municipality brought a suit for the recovery of certain amount, through its Special Officer appointed by the Government. On a decree in favour of the Municipality, the defendant filed an appeal against the Municipality making the Special Officer as representing the Municipality, a respondent. Before such appeal the administration of the Municipality was restored back to the Commissioners. It was contended by the respondent municipality that the appeal abated as the Commissioners were not substituted in place of the Special Officer as respondents :

Held : that the Municipality was a corporate body and it never died. The Commissioners who had taken charge of the Municipality could not be said to be representatives of the Special Officer, who was made a respondent. No substitution was therefore necessary in such a case and the appeal therefore did not abate. [P 588 C 2 ; P 589 C 1]

Ramnandan Prasad and *Krishnadeo Prasad* — for Appellant.

Guru Saran Prasad — for Respondent.

Judgment.—This appeal has arisen out of a suit instituted by the Patna Municipality for realization of a sum of Rs. 392 from the defendant who is a lawyer and who used to work in Courts for the municipality. The sum claimed was realized by the defendant in this capacity. The defendant admitted having realized the money, but alleged that a large amount of money amounting to Rs. 686 was due to him from the municipality and claimed a lien of this amount on the sum claimed in the suit. The trial Court dismissed the suit, holding in favour of the defendant, but the lower Appellate Court has decreed it. It has held that the defendant failed to establish the amount due to him from the Municipality nor has he paid court-fee on the amount which he claimed to be due.

The learned advocate appearing on behalf of the municipality has raised a preliminary objection that the appeal has abated on account of the fact that since its institution the municipality, which was being then administered by a Special Officer appointed by the Government, has been restored to the Commissioners and is now being administered by them and they have not been substituted as respondents in the appeal. I overrule this contention. The municipality is a Corporation and continues to be a Corporation even when it is administered by the Special Officer appointed by the Government. The only difference is that by statutory provision the powers of the Commissioners are

vested in an individual. But the corporate existence of the municipality remains the same. Corporation never dies and in my opinion no substitution was necessary. The Commissioners who have taken charge of the municipality cannot be said to be the representatives of the Special Officer who was made respondent.

Now, the judgment of the learned District Judge is not very satisfactory. The defendant was not claiming a set-off or asking for a decree for the amount which might be found due to him from the plaintiff. His case was that he was not liable to pay the amount claimed unless there be an adjustment of account between the plaintiff and the defendant. The learned District Judge has not properly appreciated the case of the defendant. On the other hand the fact remains that the defendant had not placed before the Court materials to enable it to decide what sum, if any, was due to him from the municipality. This was necessary in order to decide whether the defendant had any lien on the amount claimed. But though there was a total denial by the Municipality of there being any sum due from them to the defendant, it is obvious from the comment in the judgment of the learned Munsif on the evidence of some of their witnesses that much reliance cannot be placed upon the case of the plaintiff, and it seems to me that the case of the defendant is not entirely unfounded. But much cannot be done in his favour. He has not chosen to bring a suit for the realization of the amount said to be due to him and the claim has become barred. Neither the plaintiff nor the defendant seems to have acted in a business-like manner. Since the time when the defendant was working for the municipality, there have been three changes in its administration. It was being managed by the Commissioners elected and nominated, then there was supersession and a Special Officer administered it for about five years. Thereafter the supersession order has been cancelled and the municipality has been restored to the Municipal Commissioners. Taking all these circumstances into consideration, I do not think any useful purpose will be served if any attempt be made to order adjustment of accounts between the parties. Therefore on my suggestion the parties have come to terms and with the consent of their advocates I order the defendant to refund half of the amount claimed by the plaintiff. The decree of the learned District Judge will be set aside, and in lieu thereof there will be a decree in favour of the plaintiff for Rs. 196 that is, half the principal amount claimed. The plaintiff will also be entitled to get half the court-fee paid by it in the trial Court and in the Court of Appeal below. All other costs will be borne by the parties. A decree will be prepared in this Court on the lines indicated above.

A.L./R.K. *Decree modified.*

A. I. R. 1937 Patna 589

ROWLAND, J.

Balkrishna Das—Defendant—Appellant.

v.

Shyam Sunder Mandal and *others*—Plaintiffs—Respondents.

Appeal No. 114 of 1933, Decided on 8th April 1937, from appellate decree of Addl. Sub-Judge, Cuttack, D/- 31st May 1933.

Easement — Easement of necessity when arises—It does not arise when its exercise is necessary merely for reasonable enjoyment of property — Necessity set up must exist on date of transfer of property—Inconvenience arising on its denial to party claiming it is not sufficient to establish it.

An easement of necessity arises when immoveable property is transferred by one person to another. It arises in favour of the transferee if the easement is necessary for enjoying the subject of the transfer, i. e. when the property cannot be used at all without exercising it. It does not however arise where its exercise is merely necessary to the reasonable enjoyment of the property. The necessity set up must have been a necessity existing at the time of the transfer of the property. To establish an easement of necessity, it is not sufficient to show that if the easement is denied, the party claiming it will be put to inconvenience : *A I R 1918 Pat 327, Rel. on; A I R 1929 Pat 124, Ref.* [P 590 C 1, 2]

H. P. Bhagat and *B. N. Dutta* — for Appellant.

S. C. Chaterji—for Respondents.

Judgment.—This appeal arises out of a suit brought to declare a right of easement in favour of the plaintiffs as owners of a house and bari in village Jaganathpur. The right claimed is a right of way as an easement over an adjacent plot on the east and north bearing No. 121 and shown in the Record of Rights as a rasta or pathway, the property of the defendant. The house and bari of the plaintiffs are accessible from a road on the west side as well as

from the disputed land on the east. The Munsif dismissed the suit following the entries in the Record of Rights, that is to say in the provincial record prepared in 1898 the plot in question was shown as a pathway of the defendant, no right of way over it being entered in favour of any person. In the revision record of 1911 it was similarly entered. In the current record of 1930 it was entered as a pathway in the property of the defendant, but in the remarks column a note was made that five named persons had a right of way over it. These are neighbours. But no such right was noted in favour of the plaintiffs, hence this suit. It is alleged that after the Record of Rights was prepared, the defendant closed a passage or exit leading from the plaintiff's bari to the disputed rasta.

The Subordinate Judge who heard the appeal of the plaintiffs has allowed it, finding that the plaintiffs were entitled to the easement claimed as an easement of necessity. He considers that this easement is necessary to the plaintiffs for two purposes, one being for access because failing use of this pathway, the plaintiffs would have to go round another and a longer way to get to another road on the east; secondly, that it was necessary for the plaintiffs to have the use of this path because the fence and ridge which he erected on the north and east of his bari requires to be repaired from time to time and this repair needs to be done both from outside and from inside, that is to say, it cannot be effectively done without going on the disputed path. The third ground given by the learned Subordinate Judge for decreeing the suit is that the plaintiffs have been using this path since 1887. The reasoning of the Subordinate Judge on the first two points, I regret to say, betrays ignorance of what is an easement of necessity. To establish an easement of necessity it is not sufficient to show that if the easement is denied, the party claiming it will be put to inconvenience. The Easements Act (5 of 1882), though not in force in this province, furnishes a guide to what is meant by an easement of necessity in S. 13. It is clear in the first place that an easement of necessity arises when immoveable property is transferred by one person to another. It arises in favour of the transferee of a property if the easement is necessary for enjoying the subject of the transfer. If this is what is an easement of necessity means, (and there is no doubt that the Easements Act was intended to express or consolidate rather than create new principles of law) the necessity set up must have been a necessity existing at the time of the transfer of the property. Therefore, when the Subordinate Judge argues that the repair of the plaintiffs' fence was a necessity and that the plaintiffs were entitled to an easement of necessity for the purpose of repairing this fence, his view is entirely erroneous. It was at the plaintiffs' choice to erect a fence in any part of their property in which they chose to erect it and they could be quite well have placed their fence a few feet back from the extreme boundary of their property in order that they may be able to get to the other side of the fence without stepping beyond their own land. Therefore, the fact that the plaintiffs require to go outside their fence in order to repair it cannot make the easement claimed as easement of necessity.

Then as regards the requirement of the plaintiffs to use the path, the Subordinate Judge has found that the path was in existence at the time of the transfer of the property to the plaintiffs' predecessor. But it has not been found that this path was then or has ever been the only way by which the plaintiffs could obtain access to their property. As pointed out in 48 I C 670[1], it is well settled that an easement of necessity can only arise when the property cannot be used at all and not where it is merely necessary to the reasonable enjoyment of the property. If it had been impossible for the plaintiffs to have any access to and egress from their own property in any other direction than through the disputed path, then they might have claimed effectively an easement of necessity. But this is no such case and they cannot claim an easement of necessity merely because by the denial of the right of way now claimed they are put to some inconvenience by having to leave their house by a longer and more circuitous route if they wish to proceed in an easterly direction. The judgment of the Subordinate Judge so far as it proceeds on the view that the plaintiffs are entitled to an easement of necessity is therefore based on an incorrect idea of law, and the Subordinate Judge would have been well

1. Daroga Lal v. Devi Lal, A I R 1918 Pat 327 =48 I C 670.

advised to take note that the legal advisers of the plaintiffs themselves had not in the plaint set up any such case as an easement of necessity. But for the respondents it is said that the Subordinate Judge, at any rate, has held in definite terms that the plaintiffs and their predecessors have been enjoying the use of this pathway ever since the transfer of the property to them in the year 1887, and this, it is contended, is a sufficient finding to support the decree passed by the Subordinate Judge which should therefore be maintained even though some observations in the course of the judgment are not justified. But the Subordinate Judge, though finding that the plaintiffs have been enjoying a right has not come to a finding of all the elements necessary for the establishment of a right of easement within the terms of S. 26, Limitation Act. A right of easement becomes absolute when the alleged right of way

has been peaceably and openly enjoyed by any person claiming title thereto as an easement and as of right without interruption and for twenty years.

As pointed out in A I R 1929 Pat 124[2], there is a difference between the conditions in India and in England which has a distinct bearing on the presumption to be drawn in cases where a path has been used habitually and for a considerable period by a person whose right to use it as an easement is in dispute. As his Lordship the Chief Justice there pointed out :

In English law the exercise of a right of way and similar positive easements for a prolonged period gives rise to the presumption that such exercise was "of right", that is to say it is presumed that the right of passage was exercised without any permission express or implied on the part of the owner of the servient tenement .....

Accordingly it is to be presumed that if the owner of the dominant tenement has for a long period passed over the servient tenement that he did it from the beginning with a claim of right, for it is unlikely that if he had not such a right that the owner of the servient tenement would have allowed him to pass. In India however and it may be in other countries where such views of the exclusiveness of landed property do not prevail, a mere period of long user will not give rise to the presumption. It is customary for the owner of a piece of waste land not to raise any objection to the passage of strangers over such land .....

It follows that he who claims such a right by reason of long user must plead and establish as a fact that he has exercised his user under a claim of right .....

The circumstances of Indian life do not give rise to the presumption of a claim of right by mere long user.

That being so, the decision of the Subordinate Judge must be set aside and the appeal must be remanded to him to be heard again. If he finds that the right of way has in fact been used by the plaintiffs, he will have to determine the further questions indicated above as necessary to be decided in order to establish a right of easement within the meaning of S. 26, Limitation Act. Costs will abide the result.

A.L./R.K. *Case remanded.*

2. Nasiruddin v. Deokali, A I R 1929 Pat 124 = 115 I C 884.

A. I. R. 1937 Patna 591

JAMES, J.

Kasiram Marwari — Petitioner.

v.

Makhanji Dwarka Prasad —

Opposite Party.

Criminal Revn. Petn. No. 56 of 1936, Decided on 28th January 1937, from order of Dist. Magistrate, Sambalpur, D/- 18th September 1936.

Criminal P. C. (1898), Ss. 517 and 520 — *A* monopolist of biri leaves in certain jungle — *B* trader in leaves — *A* asking Magistrate to seize leaves from *B* — Magistrate directing them to be returned to *B* — District Magistrate acting under S. 520 and directing that leaves be sold and proceeds retained in criminal deposit pending civil suit — Burden of proving that property was his held lay upon *A* — Existence of monopoly did not shift onus on *B* — Court could not, by application of S. 520, make order tantamount to attachment before judgment in civil suit.

In order that the District Magistrate should have jurisdiction to dispose of property under S. 520, Criminal P. C., it is only necessary that he should find that it appears that an offence has been committed in respect of that property, and it is not necessary that the property should be proved to have been stolen. [P 592 C 2]

A was a monopolist of biri leaves grown in a jungle and waste lands of certain zamindari. *B* was a trader in such leaves and purchased leaves from the raiyats grown on their raiyati land. *B* was prosecuted for theft of certain leaves in his possession, but was acquitted. On an application by *A* to seize the leaves, the Magistrate directed that they should be returned to *B*. District Magistrate acting under S. 520, Criminal P. C., set aside the order directing that the leaves should be sold and sale proceeds be retained in

criminal deposit awaiting the decision of a Civil Court:

Held: that *A* should prove that the property was his. The existence of the monopoly could not be held to cast upon *B* the onus of proving that leaves in his possession were not taken from the jungle and as *A* was not able to prove that the leaves were stolen, the presumption of law was that they were not stolen. The Magistrate ought not by the application of S. 520 to have made an order tantamount to attachment before judgment in a civil suit. [P 592 C 2]

P. C. Chaterji — for Petitioner.

C. M. Acharyya and *S. C. Chaterji* — for Opposite Party.

Order.—The petitioner is a trader in Kendu leaves which are used for the manufacture of biris. The opposite party has taken a lease from the zamindar of Kolabira of the right to collect leaves in jungle and waste lands of the zamindari. If any leaves are grown on raiyati land, the raiyats have the right to dispose of them, but it is said that the exclusive right to dispose of the leaves in jungle and waste lands is with the zamindar. There have been frequent quarrels between the petitioner and the monopolist on the question of whether when the petitioner purchases Kendu leaves from raiyats, he is purchasing leaves which are produce of jungle or waste land or he is purchasing leaves which come from raiyati land.

The petitioner was recently prosecuted for theft on account of certain leaves in his possession, but the case ended in acquittal in the Sessions Court. The monopolist had in the meantime applied to the Subdivisional Magistrate to seize the Kendu leaves in the petitioner's phandis in various villages on the ground that they had been collected from jungle and waste lands. The Police accordingly seized a large number of leaves and the Subdivisional Magistrate finding these leaves in his possession had to decide what must be done with them. He held a formal enquiry as a result of which he came to the conclusion that it could not be proved that the leaves came from jungle and waste land, and he therefore directed that they should be returned to the petitioner. The District Magistrate acting under S. 520, Criminal P. C., set aside this order, directing that the leaves should be sold and that the sale proceeds should be retained in criminal deposit awaiting the decision of a civil Court as to their ownership. The District Magistrate has remarked that a civil suit on these matters is still going on, but it does not appear that that suit has any reference to these Kendu leaves.

Mr. Chaterji on behalf of the monopolist points out that in order that the District Magistrate should have jurisdiction to dispose of property, it is only necessary that he should find that it appears that an offence has been committed in respect of that property, and he suggests that it is not necessary that the property should be proved to have been stolen. This, as a general statement of law, is true, and cases may from time to time arise where it may be perfectly manifest that property discovered in some search is stolen property, although the actual owner may not be known; but in the present case if the property is stolen property, it properly belongs to the monopolist, and if it is not, it belongs to the petitioner. The person who claims to be the owner is before the Magistrate, and if he desires that the Magistrate should treat anybody as the owner other than the person who was in possession of them, he should prove that the property is his.

The existence of a monopoly of this kind cannot be held to cast upon another person the onus of proving that Kendu leaves in his possession were not taken from the jungle; and if the monopolist is unable to prove that the property is stolen, the presumption of law is that it is not. I consider that that presumption ought to have been applied in the present case, and even if parties talk of going to the civil Court, the Magistrate ought not by the application of S. 520, Criminal P. C., to make an order tantamonnt to attachment before judgment in a civil suit. The petition is allowed and the leaves may be returned to the petitioner.

S.C./R.K. *Petition allowed.*

A. I. R. 1937 Patna 593

AGARWALA, J.

Raja Rajendra Narayan Bhunj Deo —Defendant—Appellant.

v.

Nilamani Behera, Plaintiff, and *others*, Defendants — Respondents.

Appeal No. 173 of 1933, Decided on 13th April 1937, from appellate decree of Dist. Judge, Cuttack, D/- 26th August 1933.

Landlord and Tenant—Adverse possession —Existence of marfatdari receipts is not necessarily evidence of intention to conceal transfer from landlord—Transferee of tenant in possession of holding within landlord's estate for over 20 years—Possession not concealed—Transferee acquires occupancy rights in such holding.

The existence of marfatdari receipts is not necessarily evidence of an intention of the transferee of the tenant to conceal from the landlord the real state of affairs, for, while in some cases that is the object of paying rent in the name of the original tenant, in other cases the reason for the existence of such receipts is that the landlord knows the real facts but is not willing to give to the transferee a receipt which may be an effective recognition of the transfer. The existence of the marfatdari receipts therefore do not by themselves evidence an intention to conceal a transfer from the landlord. [P 594 C 1]

Where the transferee of a tenant of an occupancy holding has been in possession of the holding within the estate of the landlord for over a period of 20 years and there is no proof that the possession was concealed from the landlord, the transferee acquires the occupancy rights in such holding: *A I R 1934 Pat 458, Disting.*; *A I R 1914 Cal 196, Ref.*; *A I R 1934 P C 23, Rel. on.* [P 594 C 1, 2]

B. K. Ray for *P. Mahanty* — for Appellant.

S. N. Sen Gupta for *L. K. Das Gupta* — for Respondents.

Judgment.—The plaintiff-respondent in 1912 purchased an occupancy holding situated in the permanently settled zamindari of the appellant-defendant. He took no steps to have this purchase mutated in the defendant's sherista. In 1926, in the current survey, the original tenant's name was recorded in respect of the holding with a note that the holding had been sold to the present plaintiff. The appellant took out certificate proceedings against the original tenant to recover arrears of rent and in execution purchased the holding and obtained delivery of possession. The respondent thereupon instituted the present suit for a declaration of his status as an occupancy raiyat of the holding and for recovery of possession. The trial Court held that the respondent had been in possession of the holding from 1912 until 1932 when the appellant obtained delivery of possession in execution of his certificate. The trial Court held however that the marfatdari receipts which had come into existence between the date of the plaintiff's purchase and his dispossession could not be accepted as evidence that the landlord had knowledge of the purchase. Hence he held that the plaintiff's possession was not to the knowledge of the landlord and that he had acquired no tenancy rights in the holding. In appeal to the learned District Judge, the finding that the respondent has been in possession for 20 years has been confirmed: But the learned District Judge held that it was immaterial whether the landlord had knowledge of the plaintiff's purchase or not and that accordingly the respondent had by adverse possession acquired occupancy rights in the disputed holding. In appeal by the landlord, reference was made to the decision of a Single Bench of this Court reported in A I R 1934 Pat 458[1] in which the learned Judge said:

> How can there be an assertion of title to operate against the landlord unless it is made to his knowledge, and how can a purchaser who only pays rent in the name of his vendor be said to assert his own title as a tenant?

That was a case in which the landlord was suing for recovery of the registration fee to which he was entitled on transfer of an occupancy holding by reason of the provisions of S. 31, Orissa Tenancy Act, and the defence appears to have been that the defendant, by reason of his possession, was entitled to retain the holding without payment of the fee. The facts are therefore different from those in the present case. On behalf of the respondent reference was made to a Division Bench of the Calcutta High Court in 19 C L J 62.[2] That was a suit by the landlord auction-purchaser to recover possession of land which was in the possession of the transferee from the original tenant. Referring to the evidential value of the marfatdari receipts and the effect of them in relation to the question of the landlord's knowledge of the transfer, the learned Chief Justice, Sir Lawrence Jenkins, expressed his opinion that in such cases it was a mistake to pay too much attention to mere words but that

1. Nalinikanta Mukherji v. Gobinda Ramanuja Das, A I R 1934 Pat 458=150 I C 102.
2. Probhabati Dasi v. Taibatunnessa Chowdhurani, A I R 1914 Cal 196=20 I C 664=19 C L J 62=17 C W N 1088.

what is essential is to take into consideration all the facts and circumstances for the purpose of determining whether the relationship of landlord and tenant exists between the zamindar and the transferee. That case, however, was not eventually decided on that ground, so that it is not of much assistance for the determination of the present appeal. It is argued by the learned advocate for the appellant that possession without the knowledge of the landlord is insufficient to establish the right which the respondent claimed. In other words, however long the transferee may have been in possession, and however openly his possession may be, if the landlord in fact had not knowledge of it, it is insufficient for the purpose of enabling the transferee of a holding to establish as against him tenancy rights in the holding. Now this question of necessity for knowledge of an assertion of a hostile title was dealt with by their Lordships of the Privy Council in A I R 1934 P C 23[3] at p. 25 where their Lordships said with regard to this question that:

> The classical requirement is that the possession should be *nec vi nec clam nec precario*. Mr. Dunne for the Crown appeared to desiderate that the adverse possession should be shown to have been brought to the knowledge of the Crown, but in their Lordships' opinion there is no authority for this requirement. It is sufficient that the possession be overt and without any attempt at concealment, so that the person against whom time is running ought, if he exercises due vigilance, to be aware of what is happening.

The existence of marfatdari receipts is not necessarily evidence of an intention to conceal from the landlord the real state of affairs, for while in some cases that is the object of paying rent in the name of the original tenant, in other cases the reason for the existence of such receipts is that the landlord knows the real facts but is not willing to give to the transferee a receipt which may be an effective recognition of the transfer. In my opinion, therefore, the existence of the marfatdari receipts did not by themselves evidence an intention to conceal a transfer from the landlord. I have, therefore, in this case the fact which cannot now be disputed that over a period of 20 years the respondent has been in possession of this holding within the estate of the defendant-appellant, and in my view, by that possession which is not proved to have been concealed from the defendant, he has acquired occupancy rights in the disputed holding. I would, therefore, confirm the decision of the learned District Judge and dismiss this appeal with costs.

S.C./R.K. *Appeal dismissed.*

3. Secy. of State v. Devendra Lal Khan, A I R 1934 P C 23=147 I C 545=61 I A 78=61 Cal 262 (P C).

A. I. R. 1937 Patna 594

DHAVLE AND VARMA, JJ.

Sital Prasad Sukul — Plaintiff — Appellant.

v.

Ramsaran Missir and *others* — Defendants—Respondents.

Appeal No. 29 of 1934, Decided on 27th November 1936, from appellate decree of Addl. Dist. Judge, Saran, D/- 8th May 1933.

Pre-emption—Vendor selling his share to vendee—Vendee to pay off zarpeshgidar of vendor from purchase price — Pre-emptor obtaining pre-emption decree on condition of deposit of purchase price—Vendee entitled under decree to withdraw deposit without reference to peshgi money—Vendee withdrawing deposit without paying off zarpeshgi money—Vendee is not obliged to pay unpaid peshgi money to pre-emptor—Pre-emptor is not entitled to possession without paying off zarpeshgidar.

A vendor sold his milkiat share to the vendee for a certain amount out of which a certain sum was to be kept with the vendee for paying off the zarpeshgidar of the vendor. The pre-emptor obtained a pre-emption decree in his suit against the vendee on condition of his depositing the purchase money. The vendee was entitled under the pre-emption decree to withdraw the deposit without any reference to the zarpeshgi money which was not still paid by him. The vendee subsequently withdrew the whole amount. The pre-emptor thereupon brought a suit for possession from the zarpeshgidar and in the alternative prayed for a decree against the vendee for the peshgi money in order to pay it off to the zarpeshgidar and get possession from him:

Held: that as the vendee had never entered into any contract with the pre-emptor to pay the money to the zarpeshgidar and as the obligation of the vendee was one based on the contract with the original vendor, the vendee was under no obligation to pay to the pre-emptor the amount which he had not paid to the zarpeshgidar: *A I R 1918 All 379, Rel. on*; *A I R 1914 Cal 129*; *A I R 1918 Cal 941*; *33 All 410* and *Tweddle v. Atkinson*, (*1861*) *1 B & S 393*, *Disting.*

[P 595 C 2]

Held also: that the pre-emptor after becoming aware of the fact that the zarpeshgidar was not paid off, could and should have obtained a suitable relief in respect of it by amending his plaint in the pre-emption suit: *13 W R 435*, *Disting.*

[P 596 C 1]

Held further: that the vendee could not be regarded as a trustee of the pre-emptor and that the pre-emptor was not entitled to recover possession from the zarpeshgidar without paying him

off, as his title was subject to zarpeshgi encumbrance : *A I R 1923 All 507, Disting.* [P 597 C 2; P 598 C 1]

H. R. Kazimi, A. B. Mukharji and *Har Narain Prasad* — for Appellant.

S. N. Bose, Jadubans Sahay, Jaleshwar Prasad and *K. P. Upadhaya* — for Respondents.

Dhavle, J.—This is an appeal by the plaintiff. Ramyad Gosain had a milkiat share in mauza Sawsara which he gave in zarpeshgi to defendants 6 and 7 for Rs. 1,600. He afterwards sold it to defendants 1 to 3 and one Parmanand, a predecessor of defendants 4, 5 and 8, for Rs. 2,750, out of which Rs. 1,600 was kept with the vendees for paying off the zarpeshgidars. In 1922 the plaintiff brought a pre-emption suit against the vendees, and this suit was decreed in his favour in September 1923. Six weeks afterwards he moved the Court for being permitted to deposit Rs. 1,150 only, so as to have Rs. 1,600 in hand for paying off the zarpeshgidars. This prayer was not allowed, and the plaintiff thereupon deposited the entire amount, viz. Rs. 2,750, in accordance with his pre-emption decree. About two months afterwards, the zarpeshgidars moved the Court for permission to withdraw their Rs. 1,600 out of the deposit made by the pre-emptor, and stated that they had already given up possession. This application of the zarpeshgidars was disallowed. A year afterwards, in February 1925, the vendee defendants withdrew the entire amount deposited by the plaintiff. As the zarpeshgidars had given up possession, plaintiff had come into possession of the property and his possession continued for three years when it came to an end because the zarpeshgidars, who had not been paid off in fact, brought suits for rent against the tenants in actual possession of the lands, and the tenants' defence that they had attorned to the plaintiff was overruled. Plaintiff therefore brought the present suit in March 1930 for recovery of possession with mesne profits. He also made alternative prayers that he may be given a decree for Rs. 1,600 against the vendees, or that they may be ordered to pay off the zarpeshgidars and the zarpeshgidars ordered (upon such payment) to give up possession in favour of the plaintiff. The trial Court gave the plaintiff a decree for Rs. 1,600 against defendants 1 to 3, holding that defendants 4, 5 and 8 were not liable for the act of their relative who had joined defendants 1 to 3 in withdrawing the deposit made by the plaintiff. Defendants 1 to 3 appealed, and the Additional District Judge, who heard the appeal, came to the conclusion that as against defendants 1 to 3, or defendants 1 to 5 and 8, the plaintiff was not entitled to succeed unless the judgment in the pre-emption suit was vacated, but that as against defendants 6 and 7 he was entitled to a decree for redemption on payment of Rs. 1,600. I may say at once that such redemption was no part of the relief specifically sought by the plaintiff, and it is easy to see why he does not altogether appreciate the privilege of redeeming the zarpeshgidars by paying Rs. 1,600; for he has already deposited the entire sale-price in pursuance of the pre-emption decree.

Mr. Mukharji, who has strenuously argued this appeal on behalf of the plaintiff, has urged that the lower Court erred in holding on the authority in 46 I C 83[1] that the plaintiff was not entitled to recover the Rs. 1,600 from those defendants who had withdrawn his entire deposit under the pre-emption decree. His argument is that though the plaintiff was not a party to the arrangement between Ramyad Gosain and his vendees, under which the latter kept Rs. 1,600 out of the consideration money in hand to pay off the zarpeshgidars, he is entitled, by reason of their withdrawal of the deposit made by him in their favour in accordance with the pre-emption decree, to hold them to their obligation of paying off the zarpeshgidars. In support of this contention Mr. Mukharji relied on 41 Cal 137[2] and 22 C W N 279,[3] in the latter of which cases, following the decision of their Lordships of the Judicial Committee in 32 All 410[4], the contention was accepted :

That the rule enunciated in (1861) 1 B & S 393[5] is not applicable in this country and that an agreement may in certain circumstances be

1. Ram Richha Prasad Tewari v. Raghunath Prasad Tewari, A I R 1918 All 379=46 I C 83=16 A L J 531.
2. Debnarayan Dutt v. Chunilal Ghose, A I R 1914 Cal 129=20 I C 630=41 Cal 137=18 C L J 603=17 C W N 1143.
3. Dwarkanath Ash v. Priyanath Malki, A I R 1918 Cal 941=36 I C 792=22 C W N 279=27 C L J 483.
4. Khwaja Muhammad Khan v. Husaini Begam, (1910) 32 All 410=37 I A 152=7 I C 237=7 A L J 871 (P C).
5. Tweddle v. Atkinson, (1861) 1 B & S 393=30 L J Q B 265=8 Jur (N S) 332=4 L T 468=9 W R 781.

enforced by a stranger thereto, that is, in what may be briefly described as cases of trust, quasi-contract, or near relationship.

That principle is well established, but it does not, in my opinion, help the plaintiff in this case, nor could it have been overlooked by Richards, C. J. and Banerji, J. in the Allahabad case of *Ram Richha Prasad Tewari*[1] already referred to. In the two Calcutta cases cited by Mr. Mukharji, there was no decree affecting the rights inter se of the parties and nothing to prevent them from being dealt with according to the rule of justice, equity and good conscience. In the present case, however, as in the Allahabad case, there is the decree which declared the plaintiff to be entitled to pre-emption, for which he was required to deposit in Court the Rs. 2,750 in favour of defendants 1 to 3 and Parmanand. The decree further entitled these defendants to withdraw the entire amount without any reference to the Rs. 1,600 that they had agreed with the original owner to pay (out of the sale-price) in redemption of the zarpeshgi of defendants 6 and 7. Nor can it be said that the plaintiff was not aware, before he obtained such a pre-emption decree, that the zarpeshgi had not been paid off; the trial Court refers to the evidence given by defendant 1 in the pre-emption suit that he had not yet paid off the zarpeshgidars. Notwithstanding this, the plaintiff took no steps to amend the frame of his suit and the relief claimed in it, but obtained a decree, which (as I have already said) required him to deposit Rs. 2,750 and entitled the defendants to withdraw that amount without any reference to the zarpeshgi. In this respect, the case very much resembles the Allahabad case, where the learned Judges reluctantly came to the conclusion that after a decree of this kind, it was not open to them to enforce repayment of the money so held by the vendee to the pre-emptor. It is true that in that case the pre-emptor had after the pre-emption decree had to pay off the mortgagee and thereupon brought a suit to recover the amount from the vendee who had withdrawn the entire deposit made by the pre-emptor in accordance with the pre-emption decree; but this obviously does not affect the principle to be applied to cases where a plaintiff has deposited the entire sale-price in favour of the vendee in accordance with his pre-emption decree, without troubling to secure his own rights in respect of an outstanding mortgage which the vendee was to pay off out of the sale-price. The learned Judges said that they would have been very glad to have seen their way to uphold the decree for the money passed by the lower Appellate Court against the vendee, but they could not discover any basis upon which the plaintiff could succeed. After referring to the circumstances that the vendee had never entered into any contract with the pre-emptor to pay the money to the mortgagee and that the obligation of the vendee was one based on his contract with the original vendor, they pointed out that the whole trouble arose from the plaintiff not taking care to see that the pre-emption decree was drawn up in proper form directing that they should only pay the amount which the vendee had paid to his vendor.

This being so, Mr. Mukharji has raised two other points. In the first place, he has referred to the application which the plaintiff made after the pre-emption decree to be allowed to deposit that part of the sale-price only which was to go to the owner and not also the part that was intended for the zarpeshgidars. He has also referred to the application of the zarpeshgidars asking to be allowed to withdraw the zarpeshgi money and stating that they had already given up possession. Both the applications were dismissed by the Court, and Mr. Mukharji has contended that the orders of the Court on those occasions were wrong and that the plaintiff is entitled to protection from injury from the failure of the Court to pass the right orders. There are two answers to this. It is by no means certain that the orders of the Court on that occasion were wrong. On the contrary, they certainly seem to have been in strict accordance with the pre-emption decree that had been obtained by the plaintiff himself. Secondly, assuming that the orders were wrong, the plaintiff (if aggrieved by them) could and should have appealed against them, and got them corrected. They have now become final, and it is no longer open to the plaintiff to ask the Court to correct them as in an appeal against them. Nor can he ask the Court to ignore them, unless the bar of res judicata is shown on some ground or other to be inapplicable.

Mr. Mukharji's second point was that it was not open to the plaintiff in his pre-emp-

tion suit to raise any question as regards the zarpeshgi; and in support of this contention he relied on 13 W R 435.[6] That however was a case in which it seems to have been argued in special appeal that the plaintiff was entitled to a pre-emption decree on depositing not the entire sale-price but that price minus the amount of a certain mortgage debt. This contention was rejected by Couch, C. J. in the following words :

> That was an arrangement which the parties might well come to, but we think that it does not at all follow that the plaintiff who has a right of pre-emption is entitled to have the same thing done for him. And here it may well be that in reality the mortgage has been already discharged, and there is no ground for the plaintiff having this sum of money deducted from the price of the property that he may himself pay it off. Had this question been raised at an earlier period, a proper issue would have been framed and it might have been shown whether there was or not any necessity for such an arrangement as the plaintiff now contends for. If it had appeared that the mortgage was still existing, it would have been necessary for the defendant to come to some arrangement for its discharge . . . .

These observations clearly show how before he obtained the pre-emption decree as it stands and after he became aware of the fact that the zarpeshgidars had not yet been paid off, the plaintiff could and should have obtained suitable relief in respect of the zarpeshgi by amending his plaint and raising an additional issue about the money required for the redemption. It has also been contended that the effect of a pre-emption decree is to substitute the pre-emptor for the private purchaser as a vendee from the original owner and this, in respect of the rights and obligations arising from the sale under which the private purchaser had derived his title. This contention is perfectly correct so far as the right to redeem the mortgagees is concerned. But if it is meant to imply that as the private purchasers were to have the property clear of all encumbrances on payment of Rs. 1,150 to the original owner and of Rs. 1,600 to the zarpeshgidars, the pre-emptor is entitled to do the same, it is plain that the plaintiff is placed in a different position by his own pre-emption decree which entitled the private purchasers to the entire sum of Rs. 2,750 without any reference to the zarpeshgi.

Mr. Mukharji has also referred to 45 All 482[7] in support of the contention that where the vendee defendant in the pre emption suit has withdrawn the entire consideration money deposited by the plaintiff in that suit in his favour, the former becomes a trustee of the latter. No such broad proposition however was laid down in that case, which was decided on its own peculiar facts. In that case, as in the present, the property was actually in the possession of a mortgagee, and it would therefore have been useless for the holder of the pre-emption decree to take out delivery of possession against the vendee. More than 13 years after the pre-emption decree, the vendee redeemed the mortgagee. The contention on his behalf was that as the pre-emptor (or his successor-in-title) had failed to put his pre-emption decree into execution by taking out delivery of possession, his right in the property absolutely ceased at the conclusion of 12 years from the date of the pre-emption decree. This contention was negatived by the learned Judges acting among other things on the analogy of S. 82, Trusts Act. The question was one of the competing titles of the pre-emptor and the vendee who had actually redeemed the mortgagee years after the pre-emption decree. The learned Judges held that as at the time of the pre-emption decree the property was not in the possession of the vendee defendant, the failure of the decree-holder pre-emptor to take out a formal delivery of possession against him did not affect the pre-emptor's title and that when he complied with the terms of the decree, that is to say in the matter of depositing the sale-price, his title was complete. They were of opinion that that title could not in equity be resisted by such title as the private purchaser had been able to acquire with the use of the pre-emptor's money. The decision of the question of the two competing titles in that case did not directly clash with the terms of the pre-emption decree and, as I have already said, there was also the analogy of S. 82, Trusts Act, which however has no application to the facts of the present case.

Mr. Mukharji has also urged that the plaintiff is entitled to relief on the principle of S. 69, Contract Act, and he has cited 42 Bom 93[8] in support. The terms

6. Sheikh Golam Ayhya v. Joy Mungul Singh, (1870) 13 W R 435.

7. Raghubir Singh v. Jodha Singh, A I R 1923 All 507=73 IC 646=45 All 482=21 ALJ 417.

8. Somashastri v. Swamirao, A I R 1917 Bom 55 =43 I C 482=42 Bom 93=19 Bom L R 939.

of the section obviously do not help the appellant, and the case cited by Mr. Mukharji was not complicated, as is the present case, by a pre-emption decree which has to be taken to govern the monetary relations between the plaintiff and the vendees.

The first relief prayed for in the plaint was that the plaintiff may be declared to be entitled to khas possession without the zarpeshgi encumbrance, because defendants 6 and 7 had given up their claim to the peshgi money and their possession of the lands. This relief cannot be given to the plaintiff because it is clear that they never gave up their claim to the peshgi money. It is true that when they applied to the Court for being allowed to withdraw the zarpeshgi money, they stated that they had given up possession. But they obviously did so, because they expected to get the money from the deposit made by the plaintiff in accordance with the pre-emption decree. It is nobody's case that they actually got the money from that deposit, nor is it anybody's case that they have since received payment from the vendees or the pre-emptor or anybody else. Under the terms of the zarpeshgi deed, they are entitled to retain possession until they are paid off, and as they were admittedly in possession at the date of the present suit, the appellant cannot recover possession from them without paying them off, for his title is subject to the zarpeshgi encumbrance. The first prayer of the appellant, therefore, fails. The second prayer, which was made as an alternative to the first prayer, was that a decree may be passed in favour of the plaintiff for Rs. 1,600 against defendants 1 to 5, and this prayer must be disallowed for the reasons indicated in *Ram Richha's case*.[1] The third prayer was that defendants 1 to 5 be ordered to redeem defendants 6 and 7 and that the latter be ordered to give up possession. This prayer must also fail because in view of the terms of his pre-emption decree the plaintiff has no right to call upon the defendants to pay any money to the zarpeshgidars. All the prayers made by them therefore fail, and the appeal to this Court must be dismissed with costs.

This however is not an end of the matter. The judgment of the lower Appellate Court as originally delivered entitled the plaintiff to recover possession on depositing Rs. 1,600 in Court within two months for redeeming defendants 6 and 7; and it gave him this relief with "costs proportionate to his success with future interest at 6 per cent. per annum and pleader's fee at 5 per cent." This last portion has been naturally objected to by defendants 6 and 7 before us. They have never disputed the plaintiff's right to redeem them, and their action in going to the pre-emption Court and seeking to be allowed to withdraw Rs. 1,600 from plaintiff's deposit is no reason for saddling them with any costs merely because on that occasion they gave up possession in anticipation of and as a preliminary to the Court allowing them to withdraw the sum that was admittedly due to them. That sum is still due to them and, as I have already stated, the plaint did not seek their redemption by the plaintiff at all.

While this part of the judgment was being delivered this morning, it was brought to our notice by the learned advocate who appears for defendants 1 to 3 that the lower Appellate Court had amended its judgment and decree and omitted the portion about redemption with costs. It appears that the amendments were made after hearing the parties including the plaintiff, and it is surprising that the plaintiff who appealed to this Court against the original unamended decree and judgment refrained from bringing the amendments to notice at once. In the result I would dismiss this appeal and the suit with costs in all the Courts to be paid by the plaintiff to defendants 6 and 7. As regards defendants 1 to 3, who also appeared in this Court, I would make no order of costs.

Varma, J.—I agree.

K.B./R.K. *Appeal dismissed.*

A. I. R. 1937 Patna 598

WORT, J.

Mt. Sampat Kuer and *others* —
Defendants — Appellants.
v.
Ramlal Kahar and *others*, Plaintiffs and *another*, Defendant — Respondents.

Appeal No. 374 of 1934, Decided on 5th November 1936, from appellate decree of Sub-Judge, Gaya, D/- 21st December 1933.

Evidence Act (1872), S. 115—Sale-deed with respect to jagir plot reciting that vendor has no more jagir land—Vendor possessing one more jagir plot—Recital does not amount to estoppel as vendee's position is not changed in any way.

Where a sale deed with respect to one jagir plot recites that the vendor has no more jagir land but as a matter of fact it is found that the vendor has one more jagir plot, the recital is only a statement of fact not amounting to transfer and the recital does not estop the vendor unless the vendees have changed their position in any way by such recital. [P 599 C 1, 2]

Khurshed Husnain and *Sundar Lal* — for Appellants.

Rajkishore Prasad — for Respondents.

Judgment.—This appeal arises out of an action in which the plaintiffs claimed survey plots Nos. 31 and 304. Their claim as regards plot No. 31 was disallowed on the ground that it was the subject matter of a sale deed by defendant 3, the father of plaintiffs 4 and 5, and therefore had passed to the defendant-appellants 1 and 2. The plaintiffs however succeeded as regards plot No. 304, and it appears to have been the contention of the defendants in the Courts below that they were not entitled to succeed so far as that khata was concerned, because in the sale deed by defendant 3 there was a recital to the effect that they had no more jagir land. Now, plot No. 304 is admittedly jagir and it is therefore contended that the admission was conclusive against the plaintiffs and that plot No. 304 passed also with khata No. 31 in the sale deed.

The Judge has come to the conclusion that this is nothing more than an admission and that the admission was proved to be incorrect by the Record of Rights. Now, had the matter rested there, nothing more could have been said. But in this Court in order to get over the finding of fact of the lower Appellate Court it has been contended on behalf of defendant-appellants 1 and 2 that the recital or admission as it was called in the Court below amounted to an estoppel. If by the representation or statement or recital, whatever it might be called, a title had passed to the defendants in plot No. 304, it undoubtedly would have been an estoppel which the plaintiffs would not have been allowed to repudiate. But it is not suggested that the representation such as it may be called was in any sense a transfer; it was a mere statement of fact. I pointed out during the course of the argument that there was very little to be said in this case which would entitle the parties to bring the matter within the meaning of S. 115, in other words there was nothing to show that defendants 1 and 2 or their predecessors-in-interest had in any way changed their position by this so-called representation of the executant of the deed. And unless that can be shown, it is quite impossible to hold that it was an estoppel. In my judgment the learned Judge in the Court below was right in treating this as an admission which was rebuttable.

The other question appears to be answered by the finding of the Court below that the ijara had in fact been redeemed. In my judgment there is no error of law in the decision of the learned Judge in the Court below, and therefore the appeal fails and must be dismissed with costs.

K.B./R.K. *Appeal dismissed.*

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* A. I. R. 1937 Patna 599

COURTNEY-TERRELL, C. J. AND MANOHAR LALL, J.

Bengal North Western Railway Co. Ltd. — Defendant — Appellant.

v.

Matukdhari Singh and *others* — Plaintiffs — Respondents.

Appeal No. 133 of 1934, Decided on 17th August 1937, from decision of Sub-Judge, Chapra, D/- 14th August 1934.

*** Tort— Negligence — Law of negligence stated — Railway Company — Gates of level crossing not closed in sufficient time before approach of train—Elephant with mahoot on it crossing level-crossing—Elephant knocked down and killed — Railway Company held liable for damages.**

The law of negligence is this : Where there is a level-crossing and more particularly where it is in the neighbourhood of a place where a considerable population assembles from time to time, the duty to guard that level-crossing by means of gates and the duty of closing gates in sufficient time before the approach of a train is cast on the Railway Company, and if the Railway Company leaves the gates open, it is an invitation on the part of the Railway Company for passengers and traffic to approach the line. In India, where slow moving traffic such as bullock-carts and elephants is common, the gates should be closed and kept closed for a sufficient interval of time before the approach of a train and while the train is at a sufficient distance to prevent the possibility of any accident. Notwithstanding

the duty on the part of the Railway Company, it is the duty of passengers who use the level-crossing, to conduct themselves as reasonable beings and if they are guilty, notwithstanding the fulfilment of the duty by the Railway Company, of stupid and unreasonable conduct, the negligence of bringing about an accident is theirs and not of the Railway Company. To drive an elephant requires concentration on the behaviour of the animal and it takes all the driver's attention to see that the animal pursues the straight path in which he is guiding it and behaves reasonably towards wheel traffic and pedestrians, and seeing the level crossing gate open it is not at all an unreasonable act on the part of the mahoot of the elephant to urge it forward on to the line and cross it and he can hardly be expected either to depute some one else to come down to the line and watch in case a train is coming, nor would it be reasonable for him to dismount and ascertain the fact for himself. He is justified in crossing the line having regard to the way being left open, and if in such circumstances the elephant is knocked down by the train and killed, the Railway Company is liable for damages. [P 602 C 1, 2; P 603 C 1]

S. N. Bose — for Appellant.

B. P. Sinha — for Respondents.

Courtney-Terrell, C. J. — This is an appeal from a decision of the Subordinate Judge of 2nd Court, Chapra, decreeing the suit of the plaintiffs against the B. N. W. Ry. Co. Ltd., for damages in respect of their negligence in running into and killing the plaintiffs' elephant. The elephant was admittedly killed by a train running into it on the line and the only question is whether the occurrence was due to negligence on the part of the Railway Company.

Now the line upon which the accident occurred is a single line by which trains pass east and west between Rajapatti on the east and Dighwa Dobauli Station on the west, and from east to west between those two places the line is not fenced and traverses some level-crossings. The place of occurrence is in the vicinity of a level-crossing which traverses the line from south to north and immediately to the south of this level-crossing a mela is held twice in the week and large numbers of people attend this mela and pass from the mela to villages which lie to the north of the line, by way of the level-crossing.

According to the story of the plaintiffs, the level-crossing is, it is true, provided with the usual gates but the gates are not supervised and it is admitted that there is no house by the level-crossing to accommodate any gate-keeper. The case of the defendant Company is that they had not appointed any permanent gate-keeper for that particular level-crossing but that they had temporarily appointed a person whose normal employment was that of a keyman to take charge of the gates and that this direction had been given about a fortnight before the incident in question. The story of the plaintiffs is that the elephant which had been taken to the mela to the south of the line was being taken across the level-crossing and in doing so it passed through the southern gate which had not been closed and on the train coming from the east along a stretch of line at least half of which is perfectly straight, the elephant took fright at the noise and bolted westwards along the line which runs on a slight embankment. But the train could not be pulled up or was not pulled up in time and struck the elephant in the rear and it fell down the embankment and there died.

The negligence alleged is twofold. First of all, there is that which is involved in not having a gate-keeper in charge of the level-crossing and in not closing the gates on the approach of a train. Furthermore it was contended that the driver of the train was negligent in that he did not pull up on seeing the elephant as he manifestly could have seen it for quite a long stretch of the line to the east of the level-crossing.

Now the accident occurred on 1st November 1932 and within a week or so of the accident, that is to say on the 10th the plaintiffs wrote a letter to the Agent of the Company stating their complaint that the elephant was passing through the level-crossing which had remained unclosed ; that the passenger train reached the crossing without whistling and that it startled the elephant which moved towards the west, and that the driver had not stopped as he should have done but it followed the elephant and collided with it. Para. 3 of the letter is quite specific and is as follows :

> That at the crossing there was no gate-keeper and my clients' elephant has been killed owing to the wilful negligence of your Company's engine-driver as also owing to the unclosed state of the level-crossing and absence of any gate-keeper. The driver having full view of the elephant did not stop the train or took any step to avert the accident.

The plaint filed on 17th June 1933 set forth substantially the same allegations and the defence filed on 31st August denies these allegations and sets up a story that the elephant did not pass over the level-crossing at all but it remained at

a place a little over a hundred yards to the west of the level-crossing under a certain pipal tree and that there, not being properly attended to, it had been startled by the approach of the train, climbed up the embankment and on to the line and there met its death through no negligence of the defendant Company; and the written statement further denied that the death of the elephant was due to any rash, negligent or tortious act of the engine-driver and also denied that the level-crossing gate was open or that the gateman was absent.

The plaintiffs, with a view to test the allegation of the defendant Company that there was in fact a gateman on duty on this particular occasion, asked them to produce certain documents in their possession or power. The reply by the defendant Company was that they declined to produce the documents called for because they would not disclose the matter of the pay of the gateman or his presence, the gateman having been only appointed temporarily some fourteen days before, and secondly that the erection of the hut, meaning the gate lodge took place long after the accident, hence no bill could be produced and that the fencing was erected by the servants of the Railway and hence there was no bill.

It is very clear that the seriousness of the plaintiffs' allegation that the defendant Company were negligent in not providing a gateman was thoroughly understood by the Company. Their explanation in Court was that a person whose normal duty was that of a keyman had been put on duty to look after the gate under verbal orders a fortnight before, but the person alleged to have given the verbal orders was not called and the utmost that the defendant Company could do to endeavour to establish their defence on this point of the case was to call an individual named Ambica Ojha who was the last witness called by them. He stated in his evidence that he was the gateman at the level-crossing on the day of the accident: that he was a keyman and had been deputed as watchman and he purported to describe the occurrence according to the story of the defendant Company that the elephant was left under the pipal tree and that when the engine arrived at the level-crossing, the driver whistled and that the elephant was startled and had crossed the line, and he further stated that he had locked up the gates and stood there before the arrival of the train. To my mind, it is manifest that this story of the elephant standing under the pipal tree has been invented for the purpose of getting over the story of the animal having approached the railway line through the level-crossing. It was manifest that if the elephant had approached the railway line by means of the level-crossing and had been killed by the passing train, the story of the shutting of the gates for some considerable period as would be necessary before the arrival of the train at the level-crossing must be untrue ; and it was for that reason that this story of the pipal tree was invented.

The story of the elephant being under the pipal tree and having approached the line from that place at least a hundred yards away from the level-crossing, is untrue is shown by the evidence of a witness who attempted to support the tale. I forgot to say that one of the undisputed facts is that at the time of the collision between the train and the animal, a mahut was perched on the back of the elephant. If the defendant Company's story were true, the mahut must have been present under the pipal tree ; but, Ambika Ojha, the person who is supposed to have been the gate-keeper, says that when under the pipal tree neither the mahut nor the malik was near the elephant ; it was standing alone under the pipal tree and it was not tied down. The improbability of an elephant being left in such a position unfastened is manifest. The fact is that the unfortunate mahut, who was injured while actually riding on the elephant, is not accounted for, and I have not the slightest hesitation in saying that the story of Ambika Ojha is absolutely false and that the elephant approached the line by means of the level-crossing.

Now the case was conducted on both sides with the utmost extraordinary incompetence in that in a case like this the evidence of the witnesses could have been tested by simple cross-examination, notably of the individual witnesses who claimed to have witnessed the accident; but no real cross-examination took place on behalf of either side and the evidence of these witnesses can only be tested by what they stated in examination-in-chief without reference to any irrelevant evidence

which they gave in answer to questions put in cross-examination. The person who was in charge of the elephant states that the animal had been in the fair, that he had directed the mahut to take it by means of the level-crossing on to the other side of the line. Two mahuts support him in this statement, one was on foot and the other was riding on the elephant at the time.

The witnesses for the plaintiffs were evidently under the impression that the case they had to make out on behalf of the plaintiffs was the negligence of the engine-driver and therefore every one of them concentrated his attention on the alleged callous behaviour of the engine-driver who drove the engine on to an innocent elephant that was standing on the line and that he made no attempt to slow down the speed; and according to one of the witnesses for the plaintiffs the engine driver actually accelerated the speed of his engine so that the elephant was run over and killed in a callous manner. That the engine-driver did all that lay in his power to avoid the accident is clear. He caught sight of the elephant very shortly before he arrived at the level-crossing which corroborates that part of the story given by the plaintiffs' witnesses that the gates were not closed—for at least half a mile eastward of the line the level-crossing would be in full view along a perfectly straight strip of road, and the fact that the driver did not see the elephant until shortly before the accident indicates to me that it came on to the line through the level-crossing. Had the gates been closed as they should have been, when the train was half a mile or a quarter of a mile away from the station, the accident could never have occurred.

Now the law of negligence is perfectly simple. Where there is a level-crossing and more particularly where there is a level-crossing in the neighbourhood of a place where a considerable population assembles from time to time, the duty to guard that level-crossing by means of gates and the duty of closing gates in sufficient time before the approach of a train is cast on the Railway Company, and if the Railway Company leave the gates open, it is an invitation on the part of the Railway Company for passengers and traffic to approach the line. In this country where slow moving traffic such as bullock carts and elephants is common, the gates should be closed and kept closed for a sufficient interval of time before the approach of a train and while the train is at a sufficient distance to prevent the possibility of any accident. It is hardly necessary to say that, notwithstanding the duty on the part of the Railway Company, it is the duty of passengers who use the level-crossing, to conduct themselves as reasonable beings and if they are guilty, notwithstanding the fulfilment of the duty by the Railway Company, of stupid and unreasonable conduct, the negligence of bringing about an accident is theirs and not of the Railway Company.

The law was thoroughly explained by Lush, J. in a well-known case (1922) 2 K B 549.[1] In that case, a wicket-gate had been provided at a level-crossing by the Railway Company but on the occasion of the accident in question the wicket-gate had been left unlocked. A person coming to the gate of the level-crossing found it open and, as he was entitled in law, treated it as an invitation to come on to the railway line. The learned Judge explained the law in this way:

> On the occasion in question, owing to the neglect of the signalman, the gate was unlocked at a time when a train was approaching. To those who knew of the practice this was a tacit invitation to cross the line.

Then at page 553 he said:

> I should certainly hesitate to hold that if in a case of this kind a person wishing to use the level crossing were, merely because he found the gate unlocked, to omit to look and see whether the way was clear when there was nothing to prevent him from doing so, and were to walk on, reading a newspaper, for example, he could make the company liable if he were run down by a train that he could easily have seen or heard. The railway company may have tacitly invited him to cross the line, but they did not invite him to leave his common sense behind him. There are however special circumstances in this case, inasmuch as, owing to the position of the down train, the plaintiff could neither see nor hear the up train.

The same special circumstances are present in this particular case. To drive an elephant requires concentration on the behaviour of the animal and it takes all the driver's attention to see that the animal pursues the straight path in which he is guiding it and behaves reasonably towards wheel traffic and pedestrians, and seeing the level-crossing gate open, it was

1. Mercer v. South Eastern and Chatham Railway Companies' Managing Committee, (1922) 2 K B 549=92 L J K B 25=127 L T 723=38 T L R 431.

not at all an unreasonable act on the part of the mahut of the elephant to urge it forward on to the line and cross it and he could hardly be expected either to depute some one else to come down to the line and watch in case a train was coming, nor would it be reasonable for him to dismount and ascertain the fact for himself. He was justified in crossing the line having regard to the way being left open.

Now the Railway Company clearly neglected their duty in this case. The evidence produced by the defendant Company to try to establish that their gateman (or Ambika Ojha who was said to be that gateman) was on duty on 1st November is of the feeblest character. They called a Mr. S. Ghosh, the Assistant Engineer to the Railway. He said that he had been told by his predecessor, a Mr. Hypher, that a gangman had been deputed to act as gateman, but Mr. Hypher was not called. In cross-examination, Mr. Ghosh stated that he took over charge in succession to Mr. Hypher but it was not until 2nd November, that is to say the day after the accident, that he went over the line and then Ambika Ojha the temporary gateman was in office. This evidence leads to the impression in my mind that Ambika Ojha was really appointed on the day following the accident; but whether he had been a temporary gateman or not, it is perfectly clear that he had not done the duty of a gateman in closing the level-crossing at a sufficient interval of time before the train was expected.

In these circumstances, the allegation of negligence against the unfortunate driver or the guard of the train need hardly be considered. The learned Subordinate Judge was of opinion that the driver was guilty of negligence but how he could have been expected to pull up his train suddenly or how he could have been expected to hear the alleged entreaties of by-standers that he should not pursue an innocent elephant in this cruel manner, I fail to see. The real negligence of the company—and in respect of that there is, to my mind, no answer at all—is in leaving the gates open and so offering an invitation to the mahut of the elephant to take his animal across the line. The story about the elephant not having approached the line by means of the level-crossing but having got on to it from the pipal tree is, in my opinion, fantastic and was only invented for the purpose of getting over the danger constituted by the failure of the Railway Company to provide a watchman for properly closing the gates.

I would therefore dismiss this appeal with costs. The value of the elephant, namely Rs. 5,000 is not disputed and therefore no question of the amount of damages arises.

Manohar Lall, J.—I entirely agree.

D.S./R.K. *Appeal dismissed.*

A. I. R. 1937 Patna 603

JAMES AND MADAN, JJ.

Bansropan Singh and *others*
Petitioners.

v.

Emperor.

Criminal Revn. Petn. No. 328 of 1937, Decided on 1st September 1937, from order of Sess. Judge, Shahabad, D/- 16th June 1937.

(a) Civil P. C. (1908), S. 136 — Exercising powers under—Provisions of the section must be strictly observed.

When a Court exercises the extraordinary powers conferred on it by S. 136, Civil P. C., the provisions of that section must be strictly observed; and the warrant must be endorsed to the District Court outside the jurisdiction of the issuing Court, in which the warrant is to be executed. Where therefore a warrant is sent to the munsif, the warrant is defective. [P 605 C 1]

(b) Penal Code (1860), Ss. 148, 225-B, 324 and 353—Warrants of arrest against *B* and *R* under O. 38. R. 1, Civil P. C. — Warrant against *R* defective — Peon with constables going to house of *B* finding *R* and arresting him—*B* coming with dagger and wounding constable but captured and disarmed — *C* coming with dagger and wounding another constable — Number of men coming with lathis and rescuing *R* and *B* from custody—*B* and *C* convicted under Ss. 148, 324 and 353, I. P. C.—Rest convicted under S. 147 — *R* held could not be convicted as he merely escaped from arrest under defective warrant — *B* could not be convicted under S. 148 he having been disarmed before formation of unlawful assembly.

One *A* brought a civil suit against *B* and *R* and obtained a warrant for arrest of *B* under O. 38, R. 1, Civil P. C., which was directed to District Judge at *S*. Subsequently *A* obtained a second warrant of arrest against *R* which was sent to Munsif instead of to District Judge but it subsequently reached the District Judge. Civil Court peon with three constables approached *B*'s house where they found *R*. The peon informed *R* that he had a warrant of arrest whereupon *R* attempted to run away but was caught by peon. *R* shouted for help and *B* came with a dagger and wounded a constable. The two constables captured and

disarmed him. *B* cried for help calling out *C* who came with a dagger and wounded another constable. He was followed by about fifteen men armed with lathis and one of them *D* struck a peon and a constable with lathi while the rest rescued *R* and *B* from custody. *B* and *C* were charged with having been members of an unlawful assembly armed with daggers under S. 148, I. P. C. and also under S. 324, *D* with causing hurt and the rest for rioting. All accused were charged with offence under S. 225-B for bringing about *B's* and *R's* escape from lawful custody. *B C* and *D* were also charged with an offence under S. 353, I. P. C. All of them were convicted under respective sections :

Held : that *R* could not be convicted as he merely escaped from the custody of the peon who had arrested him on a warrant which was defective. [P 605 C 2]

Held also : that *B* could not properly be convicted of the offence under S. 148, I. P. C., as he was disarmed when the unlawful assembly was formed. [P 605 C 2]

S. N. Sahay and *Harinandan Singh* — for Petitioners.

Advocate-General — for the Crown.

James, J.—On 5th August 1936 Gupteswarnath Tewary, a native of Shahabad district, who had instituted in the Court of the Munsif of Kohima in the Naga Hills Civil Suit No. 77 of 1936 for recovery of Rs. 3,472 against Bansropan Singh and Ramraj Singh of Dalsagar in Shahabad, obtained from the Munsif under O. 38, R. 1 a warrant for the arrest of Bansropan Singh which was directed to the District Judge of Shahabad. On 6th October 1936 the plaintiff obtained a second warrant of arrest before judgment against Ramraj Singh which the Munsif of Kohima endorsed to the Munsif of the second Court at Buxar. Attempts were made to execute the warrants without success until the District Judge of Shahabad asked the Superintendent of Police for the assistance of constables in executing the warrants.

In the early morning of 5th December 1936 the Civil Court peon with three constables approached Bansropan Singh's house where they found Ramraj Singh. The peon informed Ramraj Singh that he had a warrant of arrest against him, and asked him if he would satisfy the claim, whereupon Ramraj Singh attempted to run away, but the peon caught him. Ramraj Singh shouted for help; and Bansropan Singh came up with a dagger with which he wounded the constable Ramanugraha Singh; police constables Ramanugraha Singh and Kuer Singh tackled Bansropan Singh whom they captured. They then bound his hands with Ramanugraha Singh's muretha. Bansropan Singh cried out for help, calling out Biswanath Singh. Biswanath came up with a dagger with which he wounded the constable Ramkripal Singh. He was followed by about fifteen men armed with lathis, one of whom, Rajnath Rai, struck the peon Radha Prasad Pande and the constable Ramswarath Singh with his lathi while the whole body rescued Ramraj Singh and Bansropan Singh from custody. Bansropan Singh, Biswanath Singh and Rajnath Rai with a number of other men who had taken part in the rescue were placed on their trial before the Subdivisional Magistrate of Buxar on various charges. Bansropan Singh and Biswanath were charged with having been members of an unlawful assembly armed with daggers; they were charged with the offence punishable under S. 148, I. P. C., and also with causing hurt to the constables with the daggers, thereby committing the offence punishable under S. 324 of the Code. Rajnath Singh was charged with causing hurt to the peon and the constable with his lathi and he and the rest of the accused were charged with rioting. All the accused were charged with resistance to the lawful apprehension of Bansropan Singh and Ramraj Singh, and with bringing about their escape, thereby committing an offence punishable under S. 225-B, I. P. C. Bansropan Singh, Biswanath Singh and Rajnath Rai were also charged with the offence punishable under S. 353, I. P. C.

The Sub-divisional Magistrate convicted the accused of the offences charged and sentenced each of them to six months' rigorous imprisonment under S. 225-B, I. P. C. He sentenced Bansropan Singh and Biswanath Singh to one year's rigorous imprisonment under S. 148 of the Code; he also convicted them of the offence punishable under S. 324 of the Code, and further convicted them with Rajnath Rai of the offence punishable under S. 353, but passed no separate sentences for these offences. The rest of the accused were sentenced each to six months' rigorous imprisonment under S. 147 ; while Rajnath Rai was also convicted of the offence punishable under S. 323, but no separate sentence was passed against him. The convicted persons appealed to the Sessions Judge of Shahabad who dismissed their appeal.

Mr. Sri Narayan Sahay argues in the first place that the warrants are illegal in

form because it does not appear on the face of them that the Munsif of Kohima had any power under O. 38, R. 1 to issue the warrants. But as the learned Advocate-General points out, the warrants recite that Gupteswarnath Tewari has proved to the satisfaction of the Court that the persons named in the warrants are about to abscond in order to avoid service of process, so that under O. 38, R. 1 (a) (ii) the Munsif had jurisdiction to issue the warrants. Under S. 136, Civil P. C., the warrants had to be addressed to the District Court and the warrant against Bansropan Singh was properly endorsed to the District Judge of Shahabad. The warrant against Ramraj Singh however was endorsed to the Munsif of Buxar ; and although it ultimately found its way to the District Judge of Shahabad who issued it for execution, Mr. Sri Narain Sahay argues that the District Judge had no power thus to execute a warrant which was not properly addressed to him under S. 136 of the Code. The learned Advocate-General concedes that the warrant against Ramraj Singh was thus defective in form and he does not defend it as a good warrant.

It appears to us that when a Court exercises the extraordinary powers conferred on it by S. 136, Civil P. C., the provisions of that section must be strictly observed ; and the warrant must be endorsed to the District Court outside the jurisdiction of the issuing Court, in which the warrant is to be executed. The warrant against Ramraj Singh was therefore defective and Mr. Sri Narain Sahay argues that as that was the warrant which was actually executed which led to the rescue, Ramraj Singh cannot be treated as having been in lawful custody and no offence was therefore committed under S. 225-B of the Code by anybody concerned. If the matter ended there, the petitioners who have been convicted of the offences of rescuing or escaping from lawful custody and of rioting with the common object of effecting the rescue or escape would apparently be entitled to acquittal on those charges, although this defect in the form of the warrant was manifestly not known to them at the time.

But, as the learned Advocate-General points out, the petitioners have been convicted not merely for the rescue of Ramraj Singh but for that of Bansropan Singh also. Bansropan Singh was actually under arrest for the reason that he had wounded a constable, and had committed in the presence of the two constables, an offence punishable under S. 324, I. P. C., for which the police officers had powers to arrest him under Cl. 1 of S. 54, Criminal P. C., so that he was in lawful custody and the persons rescuing him actually committed the offence punishable under S. 225 of the Code. If he is regarded as having been in custody in execution of the warrant issued under O. 38, R. 1, Civil P. C., the persons concerned in the rescue were guilty of the offence punishable under S. 225-B of the Code, since there was no defect in the warrant against Bansropan, so that in any view of the matter the persons resisting the arrest of Bansropan and rescuing him from custody were rightly convicted. Ramraj Singh merely escaped from the custody of the peon who had arrested him on a warrant which was defective. So far as he is concerned, the finding and sentences of the trial Court must be set aside, and he must be acquitted and discharged from his bail.

Bansropan cannot properly be convicted of the offence punishable under S. 148 of the Code when he was disarmed before the unlawful assembly was formed. But for the rest, he was properly convicted and we set aside the finding under S. 148; we sentence him to one year's rigorous imprisonment under S. 324 of the Code to run concurrently with his other sentence. For the rest of the petitioners, I find no reason to interfere with the findings or sentences of the Court below, and I would dismiss their application.

Madan, J.—I agree.

S.C./R.K. *Order accordingly.*

A. I. R. 1937 Patna 605

COURTNEY-TERRELL, C. J.

Badri Narayan Singh and *others* —
Petitioners.

v.

Ganga Singh and *others* —
Opposite Party.

Civil Revn. Petns. Nos. 626 and 627 of 1936, Decided on 20th August 1937, from order of Dist Judge, Monghyr, D/- 2nd July 1936.

(a) Limitation — Construction of statute — Vested rights can be destroyed by Legislature — But that intention must be expressed in specific words — Otherwise change of limi-

tation is to be looked at only as matter of procedure.

It is undoubtedly in the power of the Legislature to take away a vested right of any subject, but it is a recognized rule of construction that in order to hold that the Act has had this effect, it must be necessary to find the indication of such an intention in the plain words of the Act. Where the Legislature has however not expressly stated such an intention, criterion of construction is that the new period of limitation is to be dealt with as a matter of procedure only : *17 C W N 889*; *A I R 1914 Cal 806* and *A I R 1936 Pat 173*, *Rel. on*; *35 All 227 (P C)*, *Expl.* [P 606 C 2]

(b) Bihar Tenancy Act (8 of 1934, as amended by Amending Act of 1934), Sch. 3, Para. 2 (b) (ii) — Vested rights not affected.

The new period of limitation provided by the Amending Act of 1934 does not affect the vested rights of parties. [P 607 C 1]

J. C. Sinha — for Petitioners.

Order. — These are two applications in civil revision against a decision of the District Judge of Monghyr summarily dismissing appeals out of suits in which the facts in so far as the point which I have to determine were precisely similar.

The suits were instituted to recover arrears of bhaoli rent in respect of the years 1340 and 1341 Fasli and the suits were instituted in the month of September 1935. No question arises as to the correctness of the decision of the Munsif as affirmed by the dismissal of the appeal by the District Judge that the decree of the bhaoli rent claimed in respect of the year 1341 is entirely correct. In respect however of the year 1340, the Munsif had decided that by reason of the period of limitation instituted by Sch. 3, Bihar Tenancy Act as amended by the Amending Act of 1934, Para. 2 (b) (ii), the claim in respect of the year 1340 was barred, the suit having been begun more than one year from the last day of the agricultural year in which the arrear fell due. The last day of the agricultural year 1340 was in September of 1933. Therefore if the Munsif were right, the last day for bringing the suit fell in September 1934.

The Bihar Tenancy Act was published on 14th November 1934 and on 4th June 1935 a Notification appeared in the Bihar and Orissa Gazette, stating that the Act would be enforced as and from 10th June 1935. By the time the Act was published and certainly by the time it came into force—the last day of limitation as prescribed by the Amended Act had already expired and therefore if the view is correct that the limitation set forth in the Act was to be applied in this particular suit, the effect of the Act would have been to destroy the vested right of action in respect of the year 1340 which was possessed by the plaintiff up to the time of the Act.

It is undoubtedly in the power of the Legislature to take away a vested right of any subject, but it is a recognized rule of construction that in order to hold that the Act has had this effect, it must be necessary to find the indication of such an intention in the plain words of the Act. Where the Legislature has however not expressly stated such an intention, the criterion of construction is that the new period of limitation is to be dealt with as a matter of procedure only. It is perfectly true as stated by the learned Munsif that the decision of the Privy Council in 35 All 227[1] enunciates a broad proposition that the period of limitation applicable to a suit is to be judged by the law in force at the time of the institution of the suit and it is true that the suit in this particular case was instituted at a time when the law was that suits in respect of bhaoli rent must not be instituted more than one year after the last day of the agricultural year in respect of which the rent is recoverable. But that by no means disposes of the matter. As a broad proposition it is true, but this does not affect the canon of construction to be applied to any Act for the purpose of finding out whether it was the intention of the Legislature to take away a vested right. The principle applicable to such circumstances is as I have stated above.

The destruction of a vested right if such has been enacted must be discoverable as the intention of the Legislature from the express words of the Legislature, otherwise the period of limitation is to be taken as a matter of procedure. This I gather to have been the principle laid down in the elaborate judgment in 17 C W N 889.[2] The decision of the Privy Council has effected no alteration of the law as therein stated and that the proper way only in which to view the Privy Council decision was laid down by a Full Bench of the Calcutta High Court in 41 Cal 1125.[3]

1. Soni Ram v. Kanhaiya Lal, (1913) 35 All 227 =19 I C 291=40 I A 74=11 A L J 389 (P C).
2. Manjhoori Bibi v. Akkel Mahmud, (1913) 17 C W N 889=19 I C 793=17 C L J 316.
3. Gopeshwar Pal v. Jiban Chandra Chandra, A I R 1914 Cal 806=24 I C 37=19 C L J 549=41 Cal 1125=18 C W N 804 (F B).

The principle involved is also to be illustrated by the decisions of this Court firstly in 8 P L T 397,[4] where the learned Judges deal with the two cases reported in 17 C W N 889[2] and 41 Cal 1125[3] referred to above and more recently in 16 P L T 782.[5] Fazl Ali, J. delivering the judgment of a Bench of this Court pointed out that a new law ought to be construed so as to interfere as little as possible with vested rights and a statute is therefore not to be construed to have a greater retrospective operation than its language renders necessary, so that when the Legislature alters the rights of parties by taking away or conferring any right of action, its enactments, unless in express terms they apply to pending actions, do not affect them. Applying these principles of construction of the Bihar Tenancy Act to the facts of this case, it becomes manifest that the period of limitation prescribed has not affected the vested right of the plaintiff who formally proceeded to sue in respect of the year 1340; and indeed upon general principles of justice this view has the further justification that by the time the Act was published, that is to say on 14th November 1934, the period of limitation which the Judge has held to be applicable would have already expired, with the result that the plaintiff's right of action would have been destroyed without notice to him.

In my opinion the decision of the learned Judge was erroneous. The plaintiff is entitled to a decree not only for the year 1341 Fasli but also for the arrears of bhaoli rent due in respect of the year 1340. No one has appeared on behalf of the tenant. The revision applications succeed but there will be no order for costs.

B.D./R.K. *Application allowed.*

4. Chote Lal Nandkishore v. Tula Singh, A I R 1926 Pat 561=97 I C 608=8 P L T 397.
5. Shiya Janki v. Kirtyanand Singh, A I R 1936 Pat 173=160 I C 606=16 P L T 782.

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* A. I. R. 1937 Patna 607

WORT AND VARMA, JJ.

Akhori Ramsewak Prasad — Appellant.

v.

Saran Singh and *others* — Pro forma Respondents.

Appeal No. 322 of 1936, Decided on 16th August 1937, from appellate order of Dist. Judge, Gaya, D/- 9th September 1936.

*** Civil P. C. (1908), O. 21, Rr. 10 and 16— Joint family consisting of father and sons — Partition effected amongst them by decree based on arbitration award — Father obtaining decree in respect of joint family debt — Execution application by one son — O. 21, R. 16, held not applicable — Execution application held in accordance with law.**

A joint Hindu family consisted of father and sons. Partition was effected by metes and bounds between the father and sons by a decree based on an arbitration award. The father subsequently obtained a decree against the judgment-debtor in respect of a joint family debt. Subsequently one of the sons filed an application for execution of the decree :

Held : that as there was no assignment in writing, the provisions of O. 21, R. 16 did not apply and no notice was necessary. [P 608 C 2]

Held also : that as the debt on which the decree was based was a debt due to joint family, the sons had interest in the decree and they were the holders of the decree within the meaning of O. 21, R. 10. The fact that no mention of the decree was made in the arbitration award was immaterial. The application was therefore in accordance with law. [P 609 C 1]

Baldeo Sahay and *Phulan Prasad Varma* — for Appellant.

Sarju Prasad and *Thakur A. D. Sinha* — for Respondents.

Wort, J.—The only question in this case is whether the application to execute a certain decree, which application was taken out in the year 1935, was barred by limitation. This depended on the question whether a previous application was a step-in-aid of execution. So far as it is necessary to state the facts, the position is that the father of the present applicant obtained a decree for rent. Subsequently an application was made by one of the brothers of the present petitioner-appellant against one Saran Singh, one of the judgment-debtors. After that a second application was made by one other of the brothers against another of the judgment-debtors, namely, Azim Khan ; and it will be seen by the observations which I shall make that one of the main questions, if not the only question in the case, is whether that application was in accordance with law. A third application, that is, the application with which we are dealing in this case, was made by Akhori Ramsewak Prasad ; the parties to this application were the same parties as those to the first application.

Now, prior to these applications, and indeed prior to the obtaining of the decree by the father, there had been admittedly certain events which brought about disruption in the family, the father having

separated from his sons. Certain proceedings in the nature of an arbitration were taken by the parties for the purpose of dividing the property by metes and bounds, but those proceedings became abortive. I purposely avoid mentioning any details with regard to those proceedings as it is not necessary for the purposes of the argument in this case to do so. Then further proceedings of a similar character were taken which were likewise abortive. Then it became necessary for one of the brothers to bring a regular action in partition. The properties were eventually divided by metes and bounds by the arbitrators and their award was made the subject matter of a decree.

Those are shortly the facts in this case, and it was contended successfully in the Court below, and the contention is again made in this Court, that the present application is barred by limitation by reason of the fact that the second application was made on 10th October 1931 whereas this application was made at a period of more than three years after the second application to which I have already made reference. I do not think there can be any dispute that the actual date which is to be treated as the date of the second application is 10th November 1932 by reason of the fact that certain claim proceedings were brought and were finally allowed and the execution proceedings dismissed. Taking it from that date, the present application, it is conceded, is within three years. The question is whether the proceedings in the claim case which gave rise to the dismissal of the execution proceedings, a fact to which I have already referred, were in accordance with law. Without dealing with unnecessary contentions and arguments the whole matter resolves itself into one question, viz., whether it was necessary in the circumstances of the case to comply with O. 21, R. 16, Civil P. C. O. 21, R. 16 deals with that class of case in which there has been a decree jointly in favour of two or more persons and the interest of one has been transferred by assignment in writing or by operation of law. The Proviso to that Rule is important. Under this Proviso in certain circumstances it becomes necessary to allow certain objection to be raised if desired.

It is contended by Mr. Sarju Prasad on behalf of the respondents that not only did O. 21, R. 16 apply but notices required under O. 21, R. 16 were not given, and consequently the second application as I have described it was not in accordance with law and that threw the decree-holder or the person making an application for execution back upon the first application made in execution which was clearly beyond the period of limitation.

It is contended by the Advocate-General on the other hand on behalf of the appellant that this is not a case falling within O. 21, R. 16 but one under O. 21, R. 10. That is to say, although the present applicant is not a decree-holder, he is holder of a decree within the meaning of R. 10 of O. 21. That there is an intermediate position between a decree-holder and a person who is an assignee under assignment in writing is clearly indicated by O. 21, R. 16 itself, as it deals with those cases in which there has been an assignment by operation of law and, as pointed out by the learned Advocate-General, it is only in cases where there is an assignment in writing that notices required by O. 21, R. 16 are necessary. Now, I do not think it can be seriously contended, although I believe Mr. Sarju Prasad at one moment did contend, that there was an assignment in writing. I think it must be conceded that there was not an assignment in writing.

To recapitulate the facts, there were the arbitration proceedings and then the decree was founded upon the award. That was not an assignment in writing. An assignment in writing takes place by the act of the parties themselves although it may be true that there would have been no decree even though the parties took some action. That gives us a very different position from what arises under an assignment in writing to use the words of the Order we are considering. It was contended by Mr. Sarju Prasad on behalf of the respondents that this was a case of transfer by operation of law whereas as a matter of fact it really does not matter for the purposes of the appellant's case whether it was or not, as it is pointed out and is quite clear from a plain reading of the Order itself that it is only in the case of an assignment in writing that notices are necessary, and it could not be said, even though it was a transfer by operation of law that there has been non-compliance with the Rules and Orders which would

make the second application not in accordance with law.

Shortly stated, in my judgment the position is this. The decree when it was obtained was clearly a decree of the joint family which would in the ordinary course of events be partitioned by metes and bounds. The fact that the arbitrators omitted in their award to deal with this decree is neither here nor there; it makes no difference to the rights of the parties. They were under the impression possibly that the decree was in the names of the sons; again I say that makes no difference. The fact that the decree was obtained after the disruption of the family seems to have influenced the learned Judge in favour of the judgment-debtor; again that is irrelevant. The question that had to be considered was not whether the action was brought after the disruption of the family, but whether the debt which was the basis of the action was due to the joint family, and of that there could be no possible dispute or doubt.

There is one observation in one of the judgments with which we are dealing (I think the judgment of the Appellate Court) that there is nothing to show that this decree was a separate property. The learned Judge was clearly in error on that point. If this or any like contention was raised by any one, the burden would be upon him to establish that fact and the absence of evidence to show that it was not separate property, of course, would not meet the point. In my judgment, the decision of the learned Judge in the Court below was clearly wrong. This was a case in which the parties could come forward and say that they had an interest in the decree; that it was their property; that they were holders of the decree; and that the second application was therefore an application in accordance with law. That being so and as that application was dismissed within a period of three years from the date upon which this application was made, this application is clearly within time and is not barred by limitation contrary to the decision of the learned Judge in the Court below.

In my opinion the appeal must be allowed, the judgment of the lower Appellate Court must be set aside and the judgment of the trial Court restored with necessary consequences including costs.

Varma, J.—I agree.

K.B./R.K. *Appeal allowed.*

1937 P/77 & 78

A. I. R. 1937 Patna 609

WORT, J.

Srimati Kedarwati — Plaintiff — Appellant.

v.

Radhey Lal and *another* — Defendants — Respondents.

Appeal No. 732 of 1934, Decided on 19th October 1936, from appellate decree of Sub-Judge, Second Court, Gaya, D/- 18th May 1934.

(a) Civil P. C. (1908), S. 64—Scope—'Claim enforceable under attachment' explained—Transaction necessary for claim to arise under attachment—Person proposing to purchase property attached in execution sale cannot have such claim till he makes such purchase.

A claim enforceable under the attachment is a claim which would be made by a person purchasing the property attached and sold in execution of a decree including claims for rateable distribution. A claim can only arise under an attachment when some sort of transaction has taken place. A person who proposes to purchase in a sale in execution of a decree a property which had been attached cannot be said to have a claim under the attachment until he had purchased. [P 610 C 2]

(b) Civil P. C. (1908), S. 73—Assets—Right to rateable distribution is conditional upon there being assets held by Court — Property attached, purchased by decree-holder privately—No right to rateable distribution arises.

A right to rateable distribution is conditional upon there being assets in the hands of the Court. Where the decree-holder who attaches the property of the judgment-debtor in execution of his decree but before the sale of the same by the Court purchases the same by private treaty with him in satisfaction of the decree and the decree is thus satisfied, there are no assets held by the Court in such a case and consequently no right to rateable distribution arises in such a case: *A I R 1916 P C 238, Rel. on.* [P 610 C 2]

(c) Transfer of Property Act (1882), S. 53—Preference—Intention to defeat one creditor by transfer—Such transfer is not contemplated by S. 53—Adequacy of consideration is one ground to hold transaction valid—It is not necessary for Court to find consideration to be 'grossly inadequate' for application of S. 53.

If the intention of the transfer is to defeat one of the creditors, that is not the transaction contemplated by S. 53 of the T. P. Act. But it by on means follows that because a transfer is for the purpose of defeating one of the creditors, the intention of transferor is not to defeat all the creditors. [P 611 C 1, 2; P 612 C 1]

One of the points which is necessary to find in order to hold that the transaction is a valid one, is that it is for adedquate consideration. In the absence however, of a finding as to the adequacy or otherwise of the consideration, it does not necessarily follow that the finding should be one way or the other. It is not necessary for the Court to find that the consideration is 'grossly inadequate'

in order to come to a conclusion that S. 53 of the Act applies : *A I R 1915 P C 115* and *A I R 1916 P C 238, Rel. on* ; *A I R 1928 Pat 199, Ref.*
[P 611 C 2]

A. B. Mukharji and *D. C. Varma* — for Appellant.

Rajkishore Prasad — for Respondents.

Judgment.—There are two main questions in this appeal. One is whether the alienation is void under S. 53, T. P. Act, and the other is whether the defendant has got any title under S. 64, Civil P. C. I use the expression 'title' not in its strictest sense. The Proviso to S. 64 of the Code states :

> For the purposes of this section, claims enforceable under an attachment include claims for the rateable distribution of assets;

and S. 64 makes void all transfers which are carried out in respect of a property under attachment in execution of a decree, and these transfers are void against all claims enforceable under the attachment. It is obvious in the first instance that a claim enforceable under the attachment is, for instance, a claim which would be made by a person purchasing the property attached and sold in execution of a decree, and as I have already pointed out, including those claims as claims for rateable distribution.

Now, what happened was that on 13th November 1931 the decree-holder in the earlier suit purchased the property which he had attached in execution of his decree for a sum of upwards of Rs. 500, and having purchased it from the judgment-debtor, the judgment-debtor satisfied the decree. Then came the attachment of the defendant, which was apparently an abortive one, being made in October of 1931 in the Small Cause Court which had no jurisdiction in the matter; the application was ultimately transferred from that Court and made in the proper Court in the early days of 1932. At that time the attachment in the earlier suit had gone and it is not really seriously suggested that the defendant had any title other than that which had been given to him under the Proviso to S. 64 of the Code. I had some hesitation at first in coming to a conclusion in this matter; but it is impossible to come to any but one conclusion, having regard to the words of their Lordships of the Judicial Committee of the Privy Council in 44 Cal 662.[1] The observation to which I refer is to be found on p. 673 of the report. There, in entering into the consideration of the respective titles of the parties in that matter, Sir Lawrence Jenkins in delivering the opinion of their Lordships of the Judicial Committee of the Privy Council said :

> But it is unnecessary and inadvisable to deal further with this point, and more especially as there is another and surer answer to the decree-holder's plea.

He then refers to S. 295, Civil P. C., then in force which is S. 73 of the present Civil Procedure Code, and observes that a right to rateable distribution is conditional upon there being assets in the hands of the Court. To use the words of Sir Lawrence Jenkins :

> To bring S. 295 into play, certain conditions are necessary, and one of them is that there should be assets held by the Court.

Quite clearly, having regard to the circumstances of this case, it could not be held that there were any assets held by the Court; indeed the property had never been sold by the Court; it had been sold by private treaty and consequently no proceeds came into the hands of the Court. At first, having regard to the words used in the Proviso to S. 64, it might be supposed that so long as there was a claim made or a possible claim in existence to rateable distribution, the absence of the condition precedent to which I have referred, would not in any way affect the title of the party claiming rateable distribution; in other words, the only question to be determined would be whether the party had made an application to the Court for execution of the decree before the receipt of the assets. In my opinion, the observations of their Lordships of the Judicial Committee and the plain reading of the section itself are too strong to come to any such conclusion and it is consonant with the obvious intention of the Legislature which can be discovered by asking oneself one question: how does the claim arise under an attachment ? A claim can only arise under an attachment when some sort of transaction has taken place. A person who proposes to purchase in a sale in execution of a decree a property which had been attached could not be said to have a claim under the attachment; not until he had purchased would such a claim arise. If the construction of S. 64 read with S. 73 of the Code, which is sought to be placed on those two sections

1. Mina Kumari Bibi v. Rijoy Singh Dudhuria, A I R 1916 P C 238=40 I C 242=44 I A 72 =44 Cal 662 (P C).

by the learned advocate appearing on behalf of the defendant, were the correct construction, then the person who has a claim to rateable distribution would be in a better position than a person whose claim is based on the actual purchase in the execution sale. But as I have already observed, I think the decision of their Lordships of the Privy Council is final with regard to this point.

The only other question that remains is the question of S. 53, T. P. Act, and this raises a difficulty not by reason of any question of law but by reason of the judgment of the Judge in the Court below. He holds that the intention of this sale on 13th November 1931 to the plaintiff was to defeat the defendant, one of the creditors. It is suggested that there is no other intention, but there is no evidence on that point and that matter has not been gone into. If that was the intention, then there is adequate authority for the statement that that was not the transaction contemplated by S. 53, T. P. Act. The decision of their Lordships of the Judicial Committee of the Privy Council in the well-known case in 43 I A 104[2] is a clear authority on this question. There Lord Wrenbury made this observation:

> So soon as it is found that the transfer here impeached was made for adequate consideration in satisfaction of genuine debts, and without reservation of any benefit to the debtor, it follows that no ground for impeaching it lies in the fact that the plaintiff who also was a creditor was a loser by payment being made to this preferred creditor, there being in the case no question of bankruptcy.

The decision reported in 44 Cal 662[1] to which I have already referred is also to the same effect if any further authority were required. But the learned advocate appearing on behalf of the defendant relies very strongly on the words of Lord Wrenbury "for adequate consideration" and it is said that in this case the Judge has found that the consideration was inadequate and that therefore the learned Judge in the Court below was entitled to hold that the transaction was void under S. 53, T. P. Act. The learned Judge expresses himself in this way: "The sale was not for the benefit of the minor and the price was inadequate". There were other facts which should have been mentioned. Of the consideration of upwards of Rs. 500 to which I have referred, approximately Rs. 170 was advanced or supposed to have been advanced for the purposes of a marriage. The learned Judges in the Courts below held that this sum was not advanced, but the only sum that was advanced, if any, was approximately Rs. 300. The trial Court came to the conclusion that no consideration passed. The Appellate Court is by no means emphatic on this question. It holds as I have said that the consideration was inadequate, but then proceeds on the assumption that a part of the consideration did in fact pass.

I am asked to say that the finding of the learned Judge in the Court below was influenced by his misdirecting himself on the meaning of S. 53, T. P. Act. I am rather in agreement with the argument that he has misdirected himself. It by no means follows that because a transfer was for the purpose of defeating one of the creditors, the intention of the transferor was not to defeat all the creditors. Having regard to the judgment of the trial Court and the judgment of the Appellate Court on this question, I find myself in very great difficulty in holding that as a matter of law the learned Judge was wrong. Lord Wrenbury in the case to which I have referred, has definitely stated that one of the points which it is necessary to find in order to hold that the transaction was a valid one was that it was for adequate consideration. I do not mean to say by that that by the absence of such a finding it necessarily follows that a decision should be one way or the other, but I take it to be an indication given by their Lordships of the Judicial Committee of one of the matters which is to be taken into consideration in coming to a conclusion on this question.

I may refer to the words of Ross, J. in a decision to which I was a party, the decision in 9 P L T 5,[3] which are: "This was not a voluntary transfer and it was not suggested that a consideration of Rs. 1,200 was insufficient", and then in another part of the judgment in relation to the consideration he says it was "grossly inadequate". I do not think that it can be gathered from the judgment that it was necessary for a Judge to find that the consideration was grossly inadequate in order to entitle him to come to

2. Musahar Sahu v. Hakim Lal, A I R 1915 P C 115=32 IC 343=43 IA 104=43 Cal 521 (PC).

3. Deoki Nandan Singh v. Jawad Hussain, A I R 1928 Pat 199=106 I C 356=9 P L T 5.

the conclusion that S. 53, T. P. Act applied. As I said at the commencement of my observation, my real difficulty in this case, and my only difficulty, is to discover exactly what the intention of the learned Judge was in the Court below in expressing himself in the manner he has expressed himself, and on the whole I come to the conclusion that it was a judgment which perhaps, although to some extent moderating the decision of the trial Court, in substance confirmed it.

There was another point which was raised but which in the circumstances of the case I do not think it necessary to decide and that is whether the guardian who is described a guardian ad hoc in contradiction to guardian de facto had any right to enter into a contract on behalf of the minor. I have already said that in the circumstances of this case it is unnecessary to enter into this question. In the result I am of the opinion that the decision of the learned Judge in the Court below cannot be interfered with, and the appeal therefore fails and must be dismissed with costs.

A.L./R.K. *Appeal dismissed.*

A. I. R. 1937 Patna 612

COURTNEY TERRELL, C. J. AND MADAN, J.

Devji Narayanji—Plaintiff—Appellant.

v.

Ratanshi Hirji Bhojraj and *others* — Defendants — Respondents.

Appeal No. 376 of 1936, Decided on 12th August 1937, from appellate decree of Dist. Judge, Manbhum, D/- 19th May 1936.

Abatement—Death of one of two respondent brothers—Suit against brothers not as representing family—Surviving brother not karta of family—Appellant living close to respondents and having dealings with them—Appellant without making inquiries substituting wrong person—Heirs not brought on record within time—Surviving brother held did not represent entire family—Appeal held abated as a whole.

D filed a suit against two brothers. The plaint did not show that the two brothers were impleaded as representing the joint family. After the filing of the appeal by *D*, he applied for substituting the widow of the younger brother as his heir as he had since died. The surviving brother respondent filed an affidavit on the date of hearing stating that the widow was not the heir but the deceased died joint with him and so he, his two minor sons, the minor sons of the deceased and his adult nephew were the real heirs. He further contended that as they were not substituted within time, appeal abated as a whole. *D* lived close by to the respondents and had dealings with their family :

Held : that under the circumstances even though *D* could not be said to have any motive for applying to substitute a wrong person as the heir of the deceased, still when he was in a position to know who the real heirs were on making inquiries which he failed to make, his application to substitute a wrong person as the heir of the deceased could not be of any use to him to avoid the abatement. The appeal therefore abated as a whole : *A I R 1925 Pat 551, Disting.* [P 613 C 2]

Held further : that as the suit was not against the brothers as representing the family and as no contention was raised that the surviving brother was the karta of the family, the surviving brother could not be said to be representing the entire family, in the presence of the adult nephew. Substitution was therefore necessary and it not being made, the appeal abated : *A I R 1936 Pat 548, Disting.* [P 613 C 2 ; P 614 C 1]

A. K. Ray, N. N. Ray and *S. K. Ray*— for Appellant.

Sir Manmatha Nath Mukherji, S. M. Mullick and *R. S. Chatterji* — for Respondents.

Madan, J.— This is an appeal against an order of the District Judge of Manbhum, declaring that an appeal preferred by the plaintiff has abated. The suit was filed by the appellant at Dhanbad under the provisions of O. 21, R. 63, Civil P. C., against three brothers residing in Bombay, in which locality the appellant also resides. Before the trial began, the Court was informed that the eldest of the three brothers Keshabji had died in the year 1924 and he was therefore struck out from the suit. The trial Court dismissed the suit on its merits as against the two surviving brothers, and an appeal was preferred to the District Judge.

On 12th February 1936 the appellant informed the Court that Nanji, the younger of the two surviving brothers, had died on 16th November 1935 and applied for the substitution of his widow, whose name was unknown to him, as his heir. On that day the Court ordered that the widow should be substituted. On 27th March 1936 the surviving brother, Ratanshi, filed a petition to the effect that he was joint with Nanji, that the widow was not the heir, and that the real heirs were six surviving members of the joint family, namely himself, his two minor sons, the two minor sons of the

deceased and an adult nephew of the deceased. He claimed therefore that the appeal had abated for want of substitution, the period of ninety days having expired. On 8th April 1936 the appellant filed an application for setting aside the abatement after substituting the persons named in the petition filed by Ratanshi. The District Judge rejected this application on the ground that the appellant had shown no sufficient cause for failing to substitute the legal heir within the statutory period. He held that in the circumstances the appeal had abated as a whole, and not merely against the heirs of the deceased respondent.

Mr. A. K. Ray for the appellant did not dispute that the appeal had abated through failure to substitute the legal heirs within the period of ninety days, but he contended that this was a proper case for setting the abatement aside. It is true that it does not appear that the appellant had any motive for applying to substitute a wrong person, but it has not been explained either before the District Judge or in this Court what reason he had for doing so.

Ratanshi, in the affidavit filed by him, asserted that the appellant was in the employment of his family in Bombay and was fully aware of the true facts; the appellant in a counter-affidavit admitted that he lives close to Bombay and had business dealings with the respondents' family; he nowhere stated that he was not aware of the death of the respondent on or about the date when it took place, namely 16th November 1935. The ninety days' period expired on the 14th February, and it was not till the 11th February that the appellant served a notice on the respondents' pleader at Dhanbad of his petition for substitution which he filed on the following day. The appellant has nowhere explained what inquiries he made prior to that date or how he was led to believe that the widow was the real heir, and Mr. Ray admitted that he was unable to furnish any information on this point. Rather, from the fact that the appellant had not even troubled to find out the name of the widow when he applied for substitution, and that in his petition for setting aside the abatement he admitted that he did not know who were the heirs, it is clear that he had made no inquiries at all.

In 4 Pat 320[1] the appellant had applied bona fide and within time for the substitution of two heirs of the deceased respondent in ignorance of the fact that there were other heirs. Having heard of the existence of those heirs he filed a further application for their substitution and it was held that the appeal had not abated. The circumstances of the present case are different, and the appellant can derive no benefit from his application to substitute a wrong person, when he has not shown that he had made any inquiries as to who the real heirs were. In the circumstances the learned District Judge rightly held that the appeal had abated, and that no cause had been shown for setting the abatement aside.

Mr. Ray further contended that in the circumstances of this case it was not necessary to substitute the heirs of the deceased because they were already on the record. It has been held by this Court in 15 Pat 326[2] and in other cases that when one member of a joint family dies and all the other members are already on the record, no substitution is required. In this case only one member of the family remained on the record and one adult member and four minor members were not on the record. It is suggested that it was not necessary to bring these persons on the record, as they were sufficiently represented by the surviving respondent as karta of the joint family. This contention was not put forward in the lower Court which had no opportunity of investigating it.

It is true that it has been held that there are cases when a karta may so effectively represent a joint family for the purpose of a particular litigation as to bind all the members of the family by the decree. It is suggested that as in this case the decree was obtained in the year 1922 by the three brothers alone and execution was taken out in 1933 by the two surviving brothers, the appellant was therefore entitled to treat those brothers as representing the family. The plaint, however, does not show that the two brothers were impleaded as representing the joint family; the suit was brought for

1. Shib Dutta Singh v. Sheikh Karim Baksh, A I R 1925 Pat 551=89 I C 280=4 Pat 320=7 P L T 186.
2. Sankru Mahto v. Bhoju Mahato, A I R 1936 Pat 548=165 I C 612=15 Pat 326=17 P L T 584.

a declaration that the appellant was not bound by a purchase in execution which had been made by the two brothers. In the circumstances I am not able to assume that those persons represented the entire family, including another adult male coparcener, for the purpose of this litigation and that no substitution was required. These contentions must also fail and the order of abatement must be upheld. The District Judge was right in holding that in the circumstances the entire appeal had abated, as otherwise, if the appeal succeeds, there will be contrary decisions of the lower and Appellate Courts in respect of the same property.

For these reasons, I am unable to interfere and would dismiss this appeal with costs.

Courtney-Terrell, C. J.—I agree.

A.L./R.K. *Appeal dismissed.*

A. I. R. 1937 Patna 614

COURTNEY TERRELL, C. J. AND
MANOHAR LALL, J.

Babu Tarapada Ganguly and *others* — Plaintiffs — Petitioners.

v.

Babu Jitindra Nath Ghosh, Defendant and *another*—Opposite Party.

Civil Revn. Petn. No. 63 of 1937, Decided on 9th August 1937, from Addl. Sub-Judge, Darbhanga, D/- 7th September 1936.

Civil P. C. (1908), O. 26, R. 15—Pleader of standing and experience appointed Commissioner—Commissioner's fees not mentioned—Previous direction by District Judge not to allow more than Rs. 8 per day to Commissioners in ordinary cases—Held there was no implied contract to work on Rs. 8.

The parties to a suit had agreed to the appointment of a particular pleader of standing and experience as a commissioner to investigate certain accounts. No mention however was made of the scale of remuneration in his order of appointment. The Commissioner charged a rate of Rs. 16 per day as his fees. Previous to his appointment the District Judge had directed not to allow a charge of more than Rs. 8 per day to the Commissioner in ordinary cases :

Held : that there was no implied contract on the part of the Commissioner to work on Rs. 8 per day and the rate claimed by him was proper.

[P 614 C 2]

S. K. Mitra — for Petitioners.

Janak Kishore — for Opposite Party.

S. N. Banarji and *K. K. Banarji* — for Pleader Commissioner.

Courtney-Terrell, C. J.—This is an application in revision by the plaintiffs in a suit before the Subordinate Judge. A Pleader Commissioner was appointed to investigate certain facts including a complicated series of accounts as between the plaintiffs and the defendant. The Commissioner ultimately sent in his bill, and the learned Subordinate Judge proceeded at the invitation of the plaintiffs to review that bill in respect of the Commissioner's services. As a result, he made a reduction in the bill striking out certain items as excessive and not necessary for the duty entrusted to the Commissioner. Not satisfied with that reduction, the plaintiffs have now come to this Court requesting this Court to revise the order of the Subordinate Judge.

The matter might simply be disposed of by the observation that the learned Judge had in acceding to the plaintiffs' request to revise the bill of the Commissioner done nothing more than the plaintiffs themselves requested, and in reducing the amount of the bill he had not exceeded his jurisdiction. Therefore there is no reason to interfere with the order that he has made.

But one point was raised by the plaintiffs in support of their application, namely, that the Commissioner had priced his time at the rate of Rs. 16 (Rupees sixteen) per diem. It was contended that the price allowed to the Commissioner should be limited to Rs. 8 a day. It would appear that the District Judge had sometime before this commission was entrusted to the Commissioner given notice to the effect that in taxing the costs as a rule, having regard to the financial condition of the country at that time, he would not be prepared to allow a charge of more than Rs. 8 a day in ordinary cases. The parties however had agreed to the appointment by the Subordinate Judge of the particular Pleader Commissioner who is a person of standing and experience, and in securing his services no mention was made of the particular scale of remuneration. The Commissioner in the circumstances was perfectly entitled to say that having regard to his standing in the profession, a fee of Rs. 16 a day was within what I may call the ordinary market rate for persons of his standing and that it cannot be held to be anything in the nature of an implied contract on his part to work for Rs. 8

only. This is the main point urged by the applicants before us, the plaintiffs, which in my opinion fails.

The defendant has apparently been given notice of these proceedings by the plaintiffs and has come here to support the plaintiffs in attacking the Pleader Commissioner's bill. It is suggested on his behalf that the matter may be reasonably left until the suit itself reaches the appellate stage when the Appellate Court would be in a proper position to judge whether the charge is reasonable in point of rate or in point of time involved. On the other hand we have before us the plaintiffs' application and we have jurisdiction to entertain it and it is convenient that the matter should be dealt with at this stage. It is perhaps hardly necessary to remark that any order we may make in favour of the Pleader Commissioner that he is entitled to receive the sum awarded by the Subordinate Judge from the plaintiffs will not affect any contentions, if any, that the defendant may ultimately be put in a position to make before the Appellate Court as to the amount which he should be made to pay to the plaintiffs. The matters as between the defendant and the plaintiffs have got nothing whatever to do with the dispute between the Pleader Commissioner and the plaintiffs.

In my opinion the plaintiffs' application in revision fails and should be dismissed with costs: we assess the hearing fee at two gold mohurs.

Manohar Lall, J.—I agree.

K.B./R.K. *Application dismissed.*

A. I. R. 1937 Patna 615

COURTNEY-TERRELL, C. J. AND MANOHAR LALL, J.

Babu Gopal Bux Rai and *others*—Petitioners.

v.

Smt. Mankali Devi — Opposite Party.

Civil Revn. Petn. No. 273 of 1937, Decided on 16th August 1937, from order of Deputy Magistrate, Sub-Judge, Palamau, D/- 16th February 1937.

Execution—Decree for possession — Third person found bona fide in possession—Executing Court cannot decide question of title —Decree-holder has to file separate suit.

Where a decree-holder executes his decree for possession of certain property against the judgment-debtor but a third person is found bona fide in possession of the same, the executing Court can deal only with the question of bona fide possession and cannot deal with the question of title. The decree-holder has to file a separate suit for possession to decide the question of title.

[P 616 C 1]

B. C. De and *Ghulam Muhammad* — for Petitioners.

Sir Manmatha Nath Mukherjee and *P. Jha* and *M. N. Pal*—for Opposite Party.

Order.—This is an application for the revision of a decision by the Deputy Magistrate Subordinate Judge of Palamau in an execution case. The petitioner Babu Gopal Bux Rai sued certain persons on 8th March 1924 to recover possession of an estate. While this suit was pending, the predecessor-in-interest of the opposite party brought a suit against the person at that time in possession of the estate to recover the price of certain motor fuel supplied. He obtained a money decree and in execution of that decree he put up some of the property consisting of a village in the estate for sale and he bought the village at the sale, the sale taking place in the year 1933. The suit by the applicant for recovery of the estate itself went through various vissicitudes and ultimately the plaintiff was successful and obtained a decree for possession of the estate. When he attempted to take delivery of possession he found the opposite party in possession of the village which had been purchased in execution of the money decree and it is said on behalf of the opposite party that as a matter of fact the sale took place in execution proceedings to which the applicant was made a party and that therefore he is bound by the execution sale. The applicant then applied under O. 21, R. 35 for the process of the Court to oust the opposite party from possession and the opposite party put in an objection to delivery of possession on the ground that she was bona fide in possession.

It is contended on behalf of Gopal Bux Rai that the opposite party who has already obtained possession of the village was bound by the judgment ultimately obtained by him for possession of the village on the analogy of the doctrine of lis pendens. On the other hand, the point taken by the opposite party is that she is a person bona fide in possession on her own account and that as the question of title cannot be decided in execution pro-

ceedings, he the applicant should bring a suit. It is very clear that both sides have a bona fide claim to the property in question and that the opposite party is in possession. Therefore Gopal Bux Rai the applicant has no course but to bring a suit for the possession of the property when the question of title and the question of priority of his decree and the opposite party's title by reason of her purchase in execution sale may be properly adjudicated upon.

The executing Court has merely to deal with the question of bona fide possession, and the legal merits of the title must be left to a subsequent suit. For this reason the application in civil revision must fail, the decision of the Subordinate Judge being right. It is dismissed with costs which we assess at two gold mohurs.

K.B./R.K. *Application dismissed.*

A. I. R. 1937 Patna 616

ROWLAND, J.

Sheo Charan Das — Petitioner.

v.

Chhakowri Sao and *another* —

Opposite Party.

Civil Revn. Appln. No. 204 of 1937, Decided on 17th August 1937, from order of Small Cause Court Judge, Gaya, D/- 23rd December 1936.

Limitation Act (1908), S. 19 — Acknowledgement—Reference to arbitration implying promise to pay in event of liability—Reference will not amount to acknowledgement unless something is found to be due by arbitrator.

A reference to arbitration implying a promise to pay in the event of the arbitrator deciding that there is a liability is not an unconditional promise but it is at the most a promise to pay coupled with a condition and unless that condition is fulfilled, i. e. unless something is found to be due by the arbitrator, it will not operate to give a fresh start of limitation within the meaning of S. 19, Limitation Act : *33 Cal 1047, Rel. on ; A I R 1928 Sind 45* and *A I R 1932 Lah 470, Disting. ; 31 Cal 195, Ref.* [P 617 C 1]

Sarjoo Prasad — for Petitioner.

Raj Kishore Prasad —

for Opposite Party.

Order.—This is an application by the defendant in a Small Cause Court suit which has been decreed against him and the application is presented on the ground that the suit should have been dismissed as barred by limitation.

The claim is based on a hand-note dated 11th March 1930 and the suit was instituted on 20th June 1936. In the interval between these dates, it is alleged that payments were made of Rs. 100 on 20th April 1930 and again of Rs. 25 on 18th April 1933. The second payment is still more than three years before the date of suit, and the point for decision is whether a new start to limitation is given under S. 19, Limitation Act, by an abortive agreement to refer the differences between the parties to arbitration on 1st January 1936.

The parties were at variance over another matter. There had been an All India Mutual Financing Corporation at Patna in which both the plaintiffs and the defendant had deposited money. When the corporation failed, the plaintiffs considered that the defendant was in some way liable for the loss they had suffered as having induced them to deposit the money in the concern. This claim appears to have been principal matter referred to arbitration. The recital of the reference to arbitration alludes to a hand-note of 11th March 1930 and this is construed by the Subordinate Judge as an acknowledgment of liability relying on the decisions in A I R 1928 Sind 45=104 I C 572[1] and in A I R 1932 Lah 470=137 I C 840.[2] Neither of these cases is on all fours with the matter before us and the learned Subordinate Judge would have done well to bear in mind what was said by Maclean, C. J. in 31 Cal 195[3] that :

> Unless the language of the document be identically the same, a decision upon the construction of one document is not of much assistance to the Court in construing another.

What the Court should do in each case is to apply its mind to the language used in the document actually before it and then see whether the language used in fact amounts to an acknowledgment of liability within the meaning of S. 19. What is necessary to constitute such an acknowledgment of liability has been discussed by the Privy Council in the leading case in 33 Cal 1047.[4] Their Lordships have said :

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1. Hukumat Singh v. Nenumal Rejhumal, A I R 1928 Sind 45=104 I C 572=22 S L R 117.
2. Kanshiram-Banshi Ram v. Arjan Das A I R 1932 Lah 470=137 I C 840=33 P L R 940.
3. Jogeshwar Roy v Raj Narain Mitter, (1904) 31 Cal 195=8 C W N 168.
4. Mani Ram v. Seth Rupchand, (1906) 33 Cal 1047=33 I A 165=2 N L R 130=10 C W N 874=4 C L J 94 (P C).

In a case of very great weight the authority of which has never been called in question, Mellish, L.J. laid it down that an acknowledgement, to take the case out of the statute of limitations, must be either one from which an absolute promise to pay can be inferred, or secondly an unconditional promise to pay the specific debt, or thirdly there must be a conditional promise to pay the debt, and evidence that the condition has been performed. An unconditional acknowledgement has always been held to imply a promise to pay, because that is the natural inference, if nothing is said to the contrary.

The cases referred to by the Subordinate Judge and cited to me on behalf of the opposite party appear to be cases of mutual, open and current account or partnership account and the acknowledgments to be acknowledgments of the right to have an account taken. But this is not such a case. The relations between the plaintiffs and the defendant appear to have been the ordinary relations of creditor and debtor and no question of mutual account or of partnership account arose at all. As between a creditor and debtor, what we have to see is whether there is any acknowledgment of the existence of a liability. Assuming that a reference to arbitration implies a promise to pay in the event of the arbitrator deciding that there is a liability, that is not the same thing as unconditional promise to pay. It is, if anything, a promise to pay coupled with a condition, and unless that condition is fulfilled, that is to say unless something is found by the arbitrator to be due, it will not operate to give a fresh start to limitation on the principles stated by the Privy Council in 33 Cal 1047.[4]

Now, the words used in the recital portion of Ex. 3 merely say that there have been transactions of money lending between executants Nos. 1 and 2 and the executant No. 3 by means of a hand-note dated 11th March 1930 and verbally and in cash and in kind, namely by ornaments etc. It then goes on to refer to the affairs of the All India Mutual Financing Corporation and other matters and the desire of the parties to avoid litigation. For the opposite party, reliance is placed on a later passage in which the arbitrator is directed to make such enquiries as he thinks fit regarding the matters above mentioned concerning the debt claimed as due, principal and interest, to executant No. 1 and 2 against executant No. 3. In my opinion the language used falls short altogether of being a definite acknowledgment of any liability to pay any amount. In fact the arbitration fell through and in the circumstances there was never anything which could operate to save limitation. The result should have been that the suit should have been dismissed by the Court of first instance as barred by limitation. The application will be allowed and the order under revision set aside and the suit dismissed with costs. Hearing fee one gold mohur.

K.B./R.K. *Application allowed.*

A. I. R. 1937 Patna 617

COURTNEY-TERRELL, C. J.
AND MANOHAR LALL, J.

Qazi Syed Mohammad Afzal —
Defendant — Appellant.
v.
Salahuddin Ahmad and *others* —
Plaintiffs — Respondents.

Appeal No. 48 of 1933, Decided on 23rd July 1937, from original decree of Sub-Judge, Patna, D/- 17th March 1932.

Succession Act (1925), S. 214 — Mortgagor to remain in possession — Mortgagee to receive yearly certain sum as profits of land — Successor-in-interest of mortgagee can bring suit for recovery of such amount without succession certificate.

Where a mortgagor remains in possession of mortgaged property in pursuance of a lease back from the mortgagee in consideration of his paying yearly certain sum as the profits of the land to the mortgagee, the successors-in-interest of the mortgagee can bring a suit for recovery of the money without a succession certificate as the claim is not in the nature of a demand for a debt but is in the nature of rent due to the mortgagee. [P 618 C 1]

B. P. Sinha and *S. S. Prasad Singh* — for Appellant.

S. M. Hasan Jan—for Respondents.

Manohar Lall, J.—This is an appeal by the defendant against a decree passed against him in an action brought by the plaintiffs who are successors-in-interest of certain mortgagees for recovery of Rupees 5,112, a sum arrived at by including five sums of Rs. 600 each payable in 1332, 1333, 1334, 1335, 1336 and 1337 Fasli, that is to say a sum of Rs. 3,000 and the balance is interest and compound interest at the rate of 1 per cent. per mensem from the date of each accrual.

The defence was that the bond in suit which was in the nature of a mortgage bond and lease back could not be made the foundation of this action inasmuch as

the plaintiff has not asked for recovery of possession, and also objection was taken to the interest and compound interest charged by the plaintiff in his plaint. We have looked into the document and it is clear that the plaintiff is entitled to a sum of Rs. 600 each year as the profits of the land which would have been his, had he been allowed to remain in possession as a rehandar ; it follows that there is no substance in the first contention.

It was faintly argued that a succession certificate was necessary before the action was maintainable ; but the claim made is not in the nature of a demand for a debt but is in the nature of rent due to the previous mortgagee whose successors the present plaintiffs are. On the question of interest however we find that there is no stipulation whatsoever in the bond for payment of any interest but inasmuch as a certain date is fixed for the payment of a certain sum, it attracts the operation of the provisions of Act 32 of 1839; and in our discretion we order that the defendant should pay interest at the rate of 6 per cent. from the date of each accrual of the Rs. 600 for each year. An account of the amount due will be drawn up in this manner and the sum so found due will carry interest at 6 per cent. from the date of suit to the date of payment. Subject to this variation the appeal stands dismissed. The appellant will pay half the costs of this appeal to the respondents.

Courtney-Terrell, C. J.—I agree.

K.B./R.K. *Appeal dismissed.*

A. I. R. 1937 Patna 618

COURTNEY-TERRELL, C. J. AND MANOHAR LALL, J.

Babu Chhuni Lal and *others* — Appellants.

v.

Sia Chaudhury and *others* — Respondents.

Appeal No. 181 of 1936, Decided on 18th August 1937, from original order of Sub-Judge, Muzaffarpur, D/- 2nd June 1936.

(a) Execution—Decree binding.

The duty of an executing Court is to execute a decree as it stands, whether right or wrong, unless the decree is passed without jurisdiction. [P 619 C 1]

(b) Practice—Duty of Court—Court must decide all points in controversy in appealable cases.

Subordinate Courts in appealable cases must pronounce their opinion upon all matters in controversy between the parties to prevent an order of remand : *10 M I A 476 (P C)* and *A I R 1933 P C 33, Rel. on.* [P 619 C 1]

S. K. Mitra and *R. Misra* — for Appellants.

S. N. Ray — for Respondents.

Manohar Lall, J.—This is an appeal by the decree-holder against an order of the learned Subordinate Judge of Muzaffarpur dated 2nd June 1936, setting aside a sale held at the instance of the decree-holder in execution of a money decree which he had obtained on 5th June 1933.

It appears that the decree-holder filed a suit on the basis of a hand-note being Suit No. 151 of 1931 against the widow and daughter of the executant as well as certain other defendants 3 to 7, who were the agnates of Ram Sunder Chaudhury. Defendants 3 to 7 were expressly made defendants because it was uncertain whether the assets of Ram Sunder would come into the hands of defendant 1 or her daughter or in the hands of defendants 3 to 6. The learned Subordinate Judge in the judgment which he gave expressly had in his mind that if as a result of the suit which was then pending between defendant 1 and her daughter on the one hand and defendants 3 to 6 on the other, Ram Sunder and defendants 3 to 6 are held to be joint, then the plaintiff's decree against the defendants first party would become infructuous and therefore the learned Subordinate Judge proceeded, as he expressly mentions "to safeguard the interest of the plaintiffs in this suit", by directing :

It is proper to order that in case the assets left by Ramsunder legally come into the hands of defendants 3 to 6 after the passing of this decree, plaintiff will be entitled to execute the decree against defendants 3 to 6 so far as those assets are concerned.

Accordingly the decree which was prepared practically in the same terms directed :

That the plaintiffs will be entitled to execute the decree against defendants 3 to 6 so far as the property left by Ramsunder came into the hands of defendants 3 to 6 by right of survivorship.

Now, interpreting the decree with aid of the judgment, it is clear to our minds that the learned Subordinate Judge did expressly intend to fasten the liability of the money decree against the properties which may, be loosely called, the properties left by Ramsunder. In this view of the matter we think it was not open to the

learned Subordinate Judge now in the execution department to hold that this decree was wrong. The duty of an executing Court is to execute a decree as it stands whether right or wrong, unless the decree was passed without jurisdiction.

The result is that the appeal is allowed, the order of the learned Subordinate Judge is set aside and he is directed to deal with the application under O. 21, R. 90 on its merits. In the circumstances there will be no order as to costs.

The attention of the learned Subordinate Judge is drawn to the well-known observations of the Privy Council that it is a serious evil to the parties litigant, when the Courts below in appealable cases forbear from deciding on all the issues joined: 10 M I A 476[1] at p. 488. To the same effect is the observation of Sir George Lowndes in 37 C W N 321[2] at page 324:

> It has been repeatedly pointed out by this Board that it is the duty of the Courts below to pronounce their opinion on all the important points in an appealable case, and that a failure to do so not infrequently necessitates a remand with the consequences of heavy additional costs.

It is much to be desired that subordinate Courts in appealable cases must pronounce their opinion upon all matters in controversy between the parties to prevent an order of remand as we are forced to do in this case. Had the learned Subordinate Judge dealt with the application on its merits, we would have been able to dispose of this litigation finally which has now to be prolonged for some time more.

Courtney-Terrell, C. J.—I agree.

K.B./R.K. *Case remanded.*

1. Tarakant Bannerjee v. Puddomoney Dossee, (1866) 10 M I A 476=5 W R 63=2 Sar 184=1 Suther 631 (P C).
2. Jagannath Rao Dani v. Rambharosa, A I R 1933 P C 33=141 I C 520=60 I A 49=29 N L R 94=37 C W N 321 (P C).

A. I. R. 1937 Patna 619

COURTNEY-TERRELL, C. J. AND MANOHAR LALL, J.

Chaudhury Jamuna Prasad Singh — Appellant.

v.

Ram Padarath Singh and *another* — Respondents.

Misc. Appeals Nos. 78 and 79 of 1937, Decided on 19th August 1937, from order of Dist. Judge, Darbhanga, D/- 19th January 1937.

Hindu Law—Widow—Accretion — Widow purchasing property from her savings—Execution of money decree against widow against such property—Objection by reversioners—Onus lies upon them to show that property was accretion to estate and not widow's own.

Where certain property is purchased by a Hindu widow from her own savings and the money decree obtained against the widow after her husband's death is tried to be executed against such property, the onus lies upon the reversioners who object to execution and allege accretion to show that the property purchased by widow from her savings was not her own but was intended to be an accretion to her husband's estate: *10 Cal 324 (P C)*; *20 Cal 433*; *A I R 1936 Pat 200* and *A I R 1927 Cal 868*, *Rel. on.* [P 620 C 1]

Baldeo Sahay and *G. P. Shahi* — for Appellant.

A. B. Mukherji and *R. Misra* — for Respondents.

Manohar Lall, J. — This appeal is directed against an order of the learned District Judge of Darbhanga dismissing an appeal of the reversioners from an order passed against them by the learned Munsif refusing their objection under S. 47, Civil P. C., to the execution of a decree under the following circumstances.

It appears that the opposite party obtained a money decree against one Mt. Manrup Kuer after the death of her husband and proceeded to execute the decree against certain properties of the husband. This execution was resisted by the reversioners on the plea that the debt which was the foundation of the decree did not bind the estate. The executing Court upheld the objection and dismissed the execution then levied on the ground that the decree was a personal decree against the widow and did not bind the estate of the husband. Thereupon the decree-holder started another execution (which has given rise to this appeal) against a certain house on the allegation that this house was the personal property of the widow. The reversioners appellants again objected by means of an application under S. 47, Civil P. C., alleging that this house, although purchased by the widow from the earnings of the husband's estate in her possession, was an accretion to the husband's estate and therefore could not be seized in execution. The learned Munsif who first heard the objection has held upon a consideration of all the evidence adduced in the case that the Musammat was

over-anxious to show to the world that the property was her own and was quite unconnected with the corpus of her husband's estate,

and he concluded that:

I cannot but infer that the property in question was kept quite separate and distinct by Mt. Manrup Kuer from the corpus of her husband's estate, that it was her intention that it should be so kept and that she never intended that it should form an accretion to her husband's estate.

The learned District Judge of Darbhanga in disposing of an appeal from this order has arrived at exactly the same findings. He has given convincing reasons to hold that:

There was hence a clear intention on her part to have this house as her personal property and it cannot, after her death, merge in the reversionary estate, simply because she left it as her house and did not assign it in her lifetime to anybody else.

In second appeal it has been contended by Mr. G. P. Shahi in a clear argument that the learned Judge was in error in coming to this conclusion, because in his submission the onus was upon the decree-holder to prove that the lady showed some clear intention of treating this property as her own. He points out the fact that the lady took the land upon which the house was built in the benami name of her pujari and thereafter transferred it in her own name and this, he contends, shows that she intended to treat this property in exactly the same way as she was bound to treat the property of her husband. We think that the matter is now concluded by high authority. The Privy Council has pointed out in two cases, 10 Cal 324[1] and 20 Cal 433,[2] that the onus is upon the party who alleges accretion to show that this property which was purchased by the widow from her own savings is not her own but was intended to be an accretion to the estate. This matter was fully discussed by this Court in 14 Pat 518[3] and a recent decision of the Calcutta High Court in 55 Cal 269[4] is to the same effect. I am of opinion that the learned Judge has correctly applied the law and this appeal is concluded by clear findings of fact. The appeal therefore fails and must be dismissed with costs.

1. Ishri Dut Koer v. Hansbutti Koerin, (1884) 10 Cal 324=10 I A 150=13 C L R 418=4 Sar 459 (P C).
2. Saodamini Dassee v. Administrator-General of Bengal, (1893) 20 Cal 433=20 I A 12=6 Sar 272 (P C).
3. Parbati Kuer v. Baijnath Prasad, A I R 1936 Pat 200=155 I C 213=14 Pat 518=16 P L T 713.
4. Nirmala Sundari Dasi v. Deva Narayan Das, A I R 1927 Cal 868=104 I C 284=55 Cal 269.

For the reasons given above, Miscellaneous Appeal No. 79 of 1937 also fails and must be dismissed with costs.

Courtney-Terrell, C. J.—I agree.

S.C./R.K. *Appeals dismissed.*

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* A. I. R. 1937 Patna 620

COURTNEY-TERRELL, C. J. AND MANOHAR LALL, J.

Pahlad Maharaj and *others* —
Appellants.

v.

Gauri Dutt Marwari and *another* —
Respondents.

Appeal No. 22 of 1935, Decided on 19th August 1937, from appellate decree of Sub-Judge, 1st Court, Monghyr, D/- 5th October 1934.

*** Civil P. C. (1908), S. 91—Encroachment on public thoroughfare causing nuisance and inconvenience to public—Person living in immediate neighbourhood is entitled to have encroachment removed without proving special damage.**

A person in the immediate neighbourhood and entitled to use a local public thoroughfare has a special cause of action in respect of any encroachment upon it, irrespective of whether he has proved special damage or not. The real principle is that a person of an immediate community or section of the public who is deprived of the amenity provided for that particular section may be deemed to have suffered loss without proof of such loss. Hence, a person living on the opposite side is entitled to have the encroachment removed without proving any special loss as he must be deemed to have suffered the loss from the inconvenience and nuisance caused by the encroachment. [P 621 C 1]

S. N. Bose and *S. Mustafi* —
for Appellants.

S. A. Khan and *S. Barmeshwar Prasad* — for Respondents.

Courtney-Terrell, C. J. — This is a second appeal from a decision of the Subordinate Judge of Monghyr, reversing a decision of the Munsif and decreeing a suit for the removal of an encroachment on a public thoroughfare. The plaintiff and the defendant live on opposite sides of a narrow road through a village and the defendant has built on the thoroughfare a structure containing a platform and a privy, and the thoroughfare being of very narrow proportions, this must naturally give rise to nuisance to persons not only passing through the thoroughfare but particularly to the plaintiff who lives on the opposite side of the road. Now it is immaterial to consider whether or not

the suit was brought in a representative capacity. The simple point is that the person living on the opposite side of the road, that is to say the plaintiff, suffers special damage.

The Court of first instance seemed to be under the impression that the plaintiff had to prove special damage in the matter of financial loss ; but the Court of first instance nevertheless finds, and its view has not been dissented from by the Appellate Court, that the defendant had encroached on the public road and had erected the platform, privy and drains and steps upon it and that such structure had caused inconvenience to the public. The finding is that the plaintiff being a person living on the opposite side of the road has suffered the particular inconvenience referred to which is held generally as having been suffered by the public. In such circumstances the right to bring a suit on the part of the plaintiff is indisputable.

It is perfectly true that in the case of public thoroughfares generally a mere stranger to a district cannot on the ground that he is a member of the general public bring a suit for the removal of an obstruction unless he can prove some particular damage, if for example smoke is emitted in undue quantity in the streets of Calcutta, it will hardly lie in the power of an inhabitant of Patna to say that whereas he is a member of the public and pays occasional visits to Calcutta he is interested as of right to bring a suit for the removal of the nuisance. But as has been recognized in principle and confirmed by the Privy Council, a person in the immediate neighbourhood and entitled to use a local public thoroughfare has a special cause of action and that irrespective of whether he has proved special damage or not. The real principle is, as I have said, that a person of an immediate community or section of the public who is deprived of the amenity provided for that particular section may be deemed to have suffered loss without proof of such loss. The plaintiff here was in a particular position to suffer loss and must be deemed to have suffered the loss from the inconvenience and nuisance committed by the defendant.

In the result the order of the learned Subordinate Judge is right and the appeal must be dismissed with costs.

Manohar Lall, J.—I entirely agree.

K.B./R.K. *Appeal dismissed.*

A. I. R. 1937 Patna 621

JAMES AND DHAVLE, JJ.

Bhagwat Prasad—Auction-purchaser—Appellant.

v.

Sudersan Bhagat, Objector and *another*, Judgment-debtor and *others*, Decree-holders—Respondents.

Appeal No. 147 of 1936, Decided on 23rd August 1937, from appellate order of J. C., Chota Nagpur, Ranchi, D/- 20 May 1936.

(a) Chota Nagpur Tenancy Act (6 of 1908), S. 213 — Half share of tenure held by widow and other half by reversioner—Such reversioner cannot be called 'owner in possession immediately before sale' in respect of widow's share.

Where a half share of a tenure is held by a widow and the other half by the reversioner of widow's husband, the right of the reversioner over the half share in possession of the widow is mere spes successionis and such reversioner cannot be regarded as "owner in possession immediately before sale" in respect of widow's share within the meaning of S. 213, Chota Nagpur Tenancy Act.

[P 623 C 2]

(b) Chota Nagpur Tenancy Act (6 of 1908), S. 213 — Partition of tenure by metes and bounds — Owner of one patti is not owner of other even if there may be joint liability for rent — Owner of one patti cannot object to sale of other after sub-division of tenure and apportionment of rent.

When partition of tenure has been made by metes and bounds, whether by Civil Court or by private arrangement, the owner of one separate patti is no longer the owner of the other, even though there may be a joint liability for rent. Owner of one patti can hardly object to the sale of other patti after sub-division of the tenure and apportionment of the rent on the ground that the property described in what would have been hawalgi lagan khewat, if apportionment of rent had been made before the preparation of the Record of Rights, must also be brought to sale.

[P 623 C 2 ; P 624 C 1]

G. C. Mukharji — for Appellant.

Mahabir Prasad and *L. K. Choudhury* — for Respondents.

James, J. — This is a second appeal under S. 224, Chota Nagpur Tenancy Act, from the appellate order of the Judicial Commissioner made under S. 215 (3) of the Act. On 10th May 1895 the zamindar of Palganj granted a thika of mouza Manjhiladih for a term of 47 years to two brothers, Kali Charan Bhagat and Ram Prasad Bhagat at an annual rent with cesses of Rs. 115.4.0. When the Record of Rights was prepared in 1915 the tenure

was in possession of Ram Prasad Bhagat and the widow of Kali Charan, holding equal shares in severalty, for which separate khewats were prepared, with a shamilat khewat for lands which were then waste which had not been divided. Under S. 13, Chota Nagpur Tenancy Act, the landlord was not obliged to recognize the sub-division of the tenure : and it would appear that in 1915 no such recognition had been made.

In 1931 the landlord jointly sued Sudersan Bhagat and his brothers, sons of Ram Prasad Bhagat with Mt. Mankumari, widow of Kali Charan Bhagat, for the rent of the tenure. Sudersan Bhagat defended the suit, denying that he was liable for more than half the rent and alleging that he had paid Rs. 57-10-0 for his half share of the tenure to the landlord. That suit did not reach the stage of decree as the claim was settled out of Court. In 1933 the landlord sued Sudersan Bhagat and Mt. Mankumari separately for their shares in a collective suit under S. 140, Chota Nagpur Tenancy Act, when it appears that Mt. Mankumari in respect of her share was in arrears for only one kist of 1340 Fs. to the extent of Rs. 28-13-0 ; while Sudersan Bhagat was in arrears for the whole of 1339 and a kist of 1340, so that the total claim against him was Rs. 87-7-0. The suit was decreed ; and it appears that in due course the landlord's claim was satisfied.

In 1935 the landlord again sued the pattidars separately for arrears of rent ; and in execution of his decree against Mt. Mankumari he brought to sale her patti which was described in khewat No. 2/2 of the Record of Rights. The sale was confirmed on 31st October 1935. On 10th December Sudersan Bhagat preferred an objection under S. 214, Chota Nagpur Tenancy Act, on the ground that he should have been a necessary party to the proceeding. The objection was disallowed by the Deputy Collector who found no substance in it. Sudersan Bhagat appealed to the Judicial Commissioner who allowed the appeal and set aside the sale. The learned Judicial Commissioner remarked that there was no documentary evidence of division of the tenure and that the half share had been sold for an inadequate price to the detriment of the appellant whose reversionary interest had thus been destroyed.

Mr. G. C. Mukharji on behalf of the appellants argues that there is no documentary evidence whatever nor any evidence at all of the existence of the tenure otherwise than as divided by partition into two defined pattis. He also argues that in any view of the matter, the order of the Judicial Commissioner setting aside the sale could not be justified, because the right, title and interest of Mt. Mankumari would have passed to the purchaser and that the Deputy Collector had no jurisdiction to entertain the application under S. 213, unless he found that the application was made within the period of limitation prescribed by the section. There is no such finding in the decision of the Judicial Commissioner.

On the question of whether the right, title and interest of Mt. Mankumari passed by the sale under S. 208, Chota Nagpur Tenancy Act, Mr. Mukharji addressed the Court at some length; and it must be admitted that the question is one of some difficulty. The learned Judicial Commissioner relied upon the decision of the Judicial Committee in 14 P L T 289[1] in which it was held that in order that a purchaser might be empowered to annul the encumbrances under S. 208, it was necessary that every cosharer in the tenure must be joined as defendant in the proceeding. That decision was followed by this Court in 14 P L T 670,[2] when it was regarded as implying that unless the whole of the interests in the tenure were represented before the Court, an order for sale of the tenure under S. 208 was ultra vires, and the right, title and interest of the parties to the proceeding could not be conveyed by the sale. In delivering the decision of the Privy Council in the earlier suit, Lord Thankerton referred with approval to the decision in 18 C W N 170[3] for the purpose of considering whether the purchaser in the case before the Judicial Committee could annul incumbrances.

In 18 C W N 170[3] it was held that a decree against persons who did not represent the entire tenure could not be executed under S. 208, Chota Nagpur Tenancy

1. Jagdishwar Dayal Singh v. Dwarka Singh, A I R 1933 P C 122=142 I C 781=60 I A 176=12 Pat 626=14 P L T 289 (P C).
2. Jyoti Prasad Singh v. Tarasankar Chattarji, A I R 1933 Pat 537=148 I C 168=12 Pat 799=14 P L T 670.
3. Chandra Nath v. Protap Udai Nath, A I R 1914 Cal 611=23 I C 105=18 C W N 170.

Act, but it could be executed as a money decree in the civil Court ; and the citation of this case together with Lord Thankerton's remark that the sale of the tenure was ultra vires of the revenue Court, would appear to give justification for the decision of this Court in the later case. Mr. Mukharji draws attention to Lord Thankerton's remark that the decree is thus only apt to attach the interest of the defendants in the tenure, and is no sufficient warrant for a sale of the whole tenure under S. 208 as implying that the interest of those tenure-holders who had been parties to the suit was liable under the decree. On the principle of *Chandra Nath Tewari's case*[3], that interest was liable under the decree, but it could not pass by a sale under S. 208, Chota Nagpur Tenancy Act. It did in fact pass as a result of the decision of this Court in 14 P L T 289[1]; but the question of whether the right, title and interest of those defendants would pass by the sale did not come under consideration because there was no contest on that point.

In 14 P L T 289[1] the superior landlord had granted a khorposh tenure, which was in the hands of four cosharers, three of whom, defendants 2, 3 and 4 of the suit, held an eight annas share, while Mt. Shiva Kumari Kuer, defendant 5 held the remaining eight annas share. One of the villages of the khorposh grant had been settled by the khorposhdars with the family of Dwarka Singh. The khorposh tenure was brought to sale under S. 208, Chota Nagpur Tenancy Act, and purchased by the superior landlord who proceeded to annul the mokarrari tenure of Dwarka Singh's family. The mukarraridars instituted a suit in which the ultimate decision was that reported in 14 P L T 289[1] praying for an injunction against the superior landlord restraining him from attempting to take possession of any part of mauza Maran which formed the plaintiff's mukarrari grant. The khorposhdars were joined as defendants in the suit, but none of them contested it, so that the only contest was between the encumbrancer and the superior landlord. It was held that since all the tenure-holders were not impleaded in the rent suit, the sale of the tenure was not a valid sale under S. 208, Chota Nagpur Tenancy Act, and so the proprietor when he purchased in execution had no power to annul the khorposhdar's mukarrari grant. But the plaintiff's suit was decreed without any modification, and one of the reliefs claimed was that the Court might hold that by virtue of the purchase made at auction sale, the superior landlord had acquired no right but the share and interest of defendants 2 to 4 in respect of receiving the mukarrari rent. It would therefore appear that as between the mukarraridar and the defendants of that suit, he is obliged to pay rent, half to the auction-purchaser and half to Mt. Shiva Kumari Kuer, so that the actual effect of the decree in the suit was that the right, title and interests of the actual defendants in the rent suit passed by the sale under S. 208, subject to encumbrances created by the tenure-holders; and it cannot be said that the sale was completely annulled by the final decree in the suit. But the question, as I have said, did not come under consideration, because defendants 2 to 5 of the suit did not enter appearance; and if defendants 2 to 4 did not object to the plaintiff's paying half the mukarrari rent to defendant 1, there was no reason why anybody else should object.

The question actually does not arise in the present appeal. It was necessary in order that Sudersan Bhagat should be entitled to prefer an objection under S. 213, Chota Nagpur Tenancy Act, that he should demonstrate that he was the person who owned the property sold immediately before the sale, and also that his application was not barred by limitation. The finding of the Judicial Commissioner is to some extent contradictory, because he finds that the half share was sold, ignoring the appellant's reversionary right; but if his right in respect of this half share is merely that of a reversioner, then he could not be regarded as the owner in possession immediately before the sale. A right of succession as reversioner to the husband of a Hindu widow is merely a spes successionis and the expectant reversioner has no vested interest so long as the widow lives, so that he could not be regarded as the owner of the half tenure in that capacity. When partition has been made by metes and bounds, whether by the civil Court or by private arrangement, the owner of one separate patti is no longer the owner of the other, even though there may be a joint liability for rent; and in the present case the joint liability for rent continued only so

long as the landlord refused under S. 13, Chota Nagpur Tenancy Act, to recognize the sub-division of the tenure between the families of the two brothers. That sub-division was recognized in 1933 and Sudersan Bhagat no longer had any present interest in Mt. Mankumari's patti. The view of the Deputy Collector was correct that the holders of the patti described in khewat No. 2/1 were not necessary parties in a suit for rent against the holder of the patti described in khewat No. 2/2 and the sale held under S. 208 of the Act was valid.

Mr. Mahabir Prasad on behalf of the objector Sudersan Bhagat suggests that the sale under S. 208, Chota Nagpur Tenancy Act, cannot be held to be valid, because only part of the tenure was put up for sale, since the shamilat area contained in khewat No. 2/3 was omitted. In 1 Pat 750[4] a part of the holding was illegally exempted from sale; but there objection was taken by the decree-holder that the Court had no power arbitrarily to exempt from sale a portion of a tenure or holding. Sudersan Bhagat can hardly object to the sale of Mt. Mankumari Kuer's patti after sub-division of the tenure and apportionment of the rent on the ground that the property described in what would have been the hawalgi lagan khewat, if apportionment of rent had been made before the preparation of the Record of Rights, must also be brought to sale.

The appeal is allowed with costs, the order of the Judicial Commissioner is set aside and the order of the Deputy Collector is restored.

Dhavle, J.—I agree.

D.S./R.K. *Appeal allowed.*

4. Kumar Ramyad Singh v. Chhedia Barhi, A I R 1923 Pat 64=71 I C 345=1 Pat 750=4 P L T 439.

A. I. R. 1937 Patna 624

COURTNEY-TERRELL, C. J.
AND MANOHAR LALL, J.

Chamroo Singh and *another* —
Appellants.

v.

Ragho Singh and *others* —Respondents.

Appeal No. 176 of 1936, Decided on 17th August 1937, from original order of Dist. Judge, Monghyr, D/- 1st June 1936.

(a) Practice—High Court—Unprinted document.

The High Court will not look at a copy of a document not printed in the paper-book, offered by a party during hearing of the appeal. [P 624 C 2]

(b) Civil P. C. (1908), O. 41, R. 19—Appeal summarily dismissed—Restoration application rejected without stating reasons and investigating merits—Order held must be set aside.

Courts exist not for the purpose of imposing discipline on practitioners or parties but for the purpose of administering justice. [P 624 C 2]

Where an appeal was summarily dismissed and an application for restoration was rejected on the ground of 'Court discipline' :

Held : that the order should have stated the reason for rejecting the petition and its merits should have been investigated by the Court. Even if the order gave reason, it was not sufficient and the order must be set aside. [P 624 C 2]

G. Sharma — for Appellants.

B. N. Rai — for Respondents.

Judgment.—This is an appeal from an order of the District Judge of Monghyr refusing to restore an appeal which seems to have been summarily dismissed. We have not before us the petition praying for the restoration of the appeal. It was not included in the documents printed in this paper-book, and the learned advocate for the respondents strongly objected to our looking at a copy which the appellants proposed to offer to us. We supported the objection and we have no means therefore of knowing the contents of the petition for restoration.

The order of the learned District Judge, however, speaks for itself. He refused the restoration of the appeal noting in the order sheet :

Heard pleader for the appellant. In the general interest of Court discipline I see no real reason to restore the appeal. Petition rejected.

The order should have stated the reason for rejecting the petition and its merits should have been investigated by the learned Judge. As has been pointed out more than once, Courts exist not for the purpose of imposing discipline on practitioners or parties but for the purpose of administering justice, and the reason, if it be so intended by the District Judge, cannot support his refusal of the petition for restoration.

The order of the learned District Judge is, therefore, set aside and the appeal is allowed. The application for restoration of the appeal will be re-heard by him and disposed of in accordance with law. Costs of this appeal will abide the result.

S.C./R.K. *Appeal allowed.*

*** A. I. R. 1937 Patna 625**

ROWLAND, J.

Ramkhelawan Singh — Defendant — Petitioner.

v.

Ganga Prosad — Plaintiff — Opposite Party.

Civil Revn. Petn. No. 224 of 1937, Decided on 19th August 1937, against order of Munsif, 1st Court, Arrah, D/- 3rd April 1937.

(a) Civil P. C. (1908), O. 32, Rr. 12-14— Liberty given under O. 32, Rr. 12-14 to minor plaintiff to repudiate act of his guardian cannot be given to minor defendant.

Under O. 32, Rr. 12-14, Civil P. C., a plaintiff or applicant, on attaining majority, is given by the Statute an option to abandon the suit or to proceed with it, and it would not be anomalous if some similar liberty to ratify or to repudiate the act of guardian on his behalf is not given to a minor defendant. The reason is that the plaintiff suing through a next friend is put in a different position from a defendant against whom a suit is brought through a guardian ad litem. The next friend of a minor plaintiff, unless he happens to be a certificated guardian under the Guardians and Wards Act or the Court of Wards Act, takes upon himself the responsibility of instituting a suit in the name and for the benefit of the minor. But a guardian ad litem for a minor defendant is a person appointed to act as such by the Court. [P 625 C 2]

*** (b) Civil P. C. (1908), O. 8, R. 9 and O. 6, R. 7—Provisions of O. 8, R. 9 and O. 6, R. 7 apply to minors also — Guardian ad litem representing minor defendant filing written statement—Minor attaining majority during pendency of suit cannot claim to file fresh written statement so as to supersede that filed by guardian ad litem.**

Except for the special provisions in O. 32, Rr. 12-14 which govern the relations between minor and his next friend, the Civil Procedure Code does not make any difference between minors and others so far as general rules of pleadings are concerned. The provisions of O. 8, R. 9 and O. 6, R. 7 apply to minors also. Hence, where a guardian ad litem representing the minor defendant files a written statement and the minor attains majority during the pendency of the suit, he cannot claim to file a fresh written statement so as to supersede that filed by his guardian ad litem : *A I R 1935 Mad 117, Rel. on.* [P 626 C 1, 2]

Mahabir Prasad and *Tarkeshwar Nath* — for Petitioner.

D. N. Varma — for Opposite Party.

Order.—The petitioner is the defendant in money suit. At the time of its institution, he was a minor and his mother was appointed as guardian ad litem. She appeared and acted as such and filed a written statement on his behalf. When the suit was nearly ready for hearing, the defendant attained majority and informed the Court of the fact. The Court permitted him to appear and defend the suit as major. He then tendered a fresh written statement on 3rd February 1937, apparently intended to supersede the written statement filed by his guardian as far back as 3rd January 1936. The Court declined to accept this written statement at that late stage. About six weeks later the defendant followed it up with a petition asserting that the previous written statement was a forgery got up by dismissed servants of the defendant. The Court rejected this version thinking that if it had been the fact the defendant would have disclosed it at the time of filing his fresh written statement.

In revision it is contended that a minor defendant on attaining majority is entitled as of right to amend any pleading that may have been put in on his behalf. Mr. Mahabir Prasad for the petitioner has referred to O. 32, Rr. 12-14, Civil P. C. and pointed out that a plaintiff or applicant, on attaining majority, is given by the statute an option to abandon the suit or to proceed with it, and he says it would be anomalous if some similar liberty to ratify or to repudiate the act of his guardian on his behalf were not given to a defendant. Now it is not difficult to think of reasons why the plaintiff suing through a next friend is put in a different position from a defendant against whom a suit is brought through a guardian ad litem. The next friend of a minor plaintiff, unless he happens to be a certificated guardian under the Guardians and Wards Act or the Court of Wards Act, takes upon himself the responsibility of instituting a suit in the name and for the benefit of the minor. But a guardian ad litem for a minor defendant is a person appointed to act as such by the Court. Therefore Mr. Mahabir Prasad's argument of the supposed anomaly does not impress me.

Then reference was made to English cases and text books. But what is there said has reference to a different procedure from that followed in India. In England, it is an established rule that an infant is not bound by decree of a Court of equity but must have a reasonable time after he comes of age to show cause against it : (1727) 2 E R 230.[1] The procedure appears to be based on the legal fiction that a decree obtained against a minor is a decree

1. Effingham v. Napier, (1727) 4 Bro. P C 340= 2 E R 230.

obtained against an absent person. Therefore, when he is capable of appearing and pleading his own cause, he is to be given an opportunity of moving to have the decree set aside and the case re-heard. In conformity with this rule it was held in (1834) 39 E R 1000,[2] that where a decree has been made against an infant defendant, the general rule is that such defendant on coming of age has the privilege of putting in a new answer stating a different case and going into evidence in support of that case. The Lord Chancellor found this privilege to exist on the basis of old practice and precedent. The Lord Chancellor said :

I know it to be the opinion of some eminent practitioners that the right does not exist, and that they have been in the habit of advising parties appearing for infants to proceed as if no such privilege existed. It may further be safely said that, if it does exist, no privilege can be more fit to be taken away ; for it is at once hurtful to others and in the majority of cases would prove, if resorted to, injurious to the infants themselves.

In India we have to see what rules have been laid down by the Code of Civil Procedure. But the observations I have quoted from (1834) 39 E R 1000[2] are enough to indicate that if the privilege claimed for the infant in this case is not found to have any basis or ground in the Statute, it is not a privilege of a nature that one would be anxious to create in favour of minors on general principles of equity and good conscience. Now it seems to me that except for the special provisions in O. 32, Rr. 12-14, which really govern the relations between a minor and his next friend, and the redress which the former can get from the latter in case he has recklessly embarked on a wasteful litigation, the Code does not make any difference between minors and others so far as the general rules of pleadings are concerned. A minor must be properly represented by a guardian and if there be no representation, the decree may be void or voidable. But if the minor is properly represented, then all proceedings in the suit are as good and as binding on the minor as if he had been a major and the proceedings taken in his presence. Now the Code has laid down rules regarding the pleadings both generally and with special reference to the plaintiff and defendant respectively. O. 8, R. 1 provides for the presentation of a written statement of the defence by the defendant and questions of fact which are to be raised as issues are specifically to be pleaded (O. 8 R. 2) and allegations in the plaint which are denied must be denied specifically and not generally or evasively (Rr. 3 and 4), and so on. Rule 9 says that :

No pleading subsequent to the written statement of a defendant other than by way of defence to a set-off shall be presented except by the leave of the Court and upon such terms as the Court thinks fit but the Court may at any time require a written statement or additional written statement from any of the parties and fix a time for presenting the same.

In other cases it would appear that O. 6, R. 7 applies:

No pleading shall, except by way of amendment, raise any new ground of claim or contain any allegation of fact inconsistent with the previous pleadings of the party pleading the same.

In my opinion these provisions of the Code apply to minors and do not cease to apply to a minor merely because during the pendency of the suit he comes of age. I am fortified in this opinion by the decision in A I R 1935 Mad 117,[3] where Walsh, J. said :

In India we are governed by the Civil Procedure Code and if this has not made special rules in the case of minor defendants, it seems to me that they all fall under the general provisions of O. 8, R. 9 in the matter of putting in additional written statements. Under O. 8, R. 9 such an additional written statement otherwise than by way of defence to a set-off shall only be presented by leave of the Court and on such terms as the Court thinks fit. Consequently the refusal of the Court to grant permission, except in the one instance named, which does not apply to the present case, would not be a matter with which this Court could interfere in revision.

The application fails and is dismissed with costs. Hearing fee two gold mohurs.

D.S./R.K. *Application dismissed.*

2. Kelsall v. Kelsall, (1834) 2 My & K 409 = 39 E R 1000.

3. Venkataswami Naidu v. Uppilipalayam Vamana Vilasa Nidhi Ltd., A I R 1935 Mad 117=153 I C 453=68 M L J 155.

A. I. R. 1937 Patna 626

COURTNEY-TERREL, C. J. AND MANOHAR LALL, J.

Motijha — Appellant.

v.

Jowala Prasad Marwari — Respondent.

Appeal No. 195 of 1936, Decided on 22nd July 1937, from original order of Sub-Judge, Monghyr, D/- 29th May 1936.

Civil P. C. (1908), O. 21, R. 57 and O. 38, R. 11 — "Attached in execution" in O. 21, R. 57 does not cover "attachment before judgment" — Dismissal of execution applica-

tion for default does not terminate attachment before judgment.

There is nothing in O. 38, R. 11, Civil P. C., to give colour to the view that for the purposes of O. 21, R. 57, "attached in execution" is a phrase that covers "attachment before judgment". The word "attachment" in the sentence "attachment shall cease" in O. 21, R. 57 must mean the attachment in execution of the decree. Hence the dismissal of the decree-holder's application for execution for default does not terminate the attachment before judgment : *A I R 1929 Cal 465, Foll.*; *A I R 1921 Mad 163 (F B)*; *A I R 1924 Mad 494 (F B)* and *A I R 1931 Bom 550, Ref.* [P 627 C 2]

A. P. Upadhaya and *K. P. Upadhaya* — for Appellant.

S. Mustafi — for Respondent.

Judgment. — This is an appeal by the judgment-debtor against an order of the Subordinate Judge of Monghyr, dated 29th May 1936 passed in Misc. Cases Nos. 15 and 49 of 1936 in an execution matter. It appears that the property of the judgment-debtor has been sold for a sum of Rs. 10,000 for recovery of balance of a decree that was passed against him some time ago. It also appears that during the pendency of the money suit which resulted in this decree under execution, the plaintiff applied for and obtained attachment before judgment against the defendant-judgment-debtor, but this attachment was raised on the objection that certain idol was involved whose shebait the defendant was. The plaintiff having lost his rights which he had secured by attachment before judgment, instituted a suit under O. 21, R. 63, Civil P. C., which was decided in his favour with the result that the attachment before judgment was revived. After this revival, the decree-holder proceeded to execute his decree in the year 1933 when the execution in that year proceeded on part satisfaction. For the remaining portion of the decree another execution was started by the decree-holder on 30th November 1934 but in this execution the decree-holder simply proceeded to realize his decree by asking for the arrest of the judgment-debtor and did not make any prayer for execution of the decree by selling any immoveable property of the judgment-debtor. This execution we are told was dismissed for default on 22nd November 1935 and the present execution was then lodged on 6th December 1935 in the course of which the properties were sold for a certain sum which is said to be inadequate in consideration of the real value of those properties.

Mr. A. P. Upadhaya in presenting this appeal before us has argued that the sale must be held to be void inasmuch as there was no attachment in these execution proceedings of the properties which were actually sold. His argument further is that inasmuch as the decree-holder allowed his previous execution of 1934 to be dismissed for default in November 1935, it must be held in law that the attachment before judgment which had once failed by reason of an adverse decision in the money suit and which was revived by a decision in a regular suit under O. 21, R. 63, came to an end. He relies upon two cases of the Madras High Court reported in 44 Mad 902[1] and in 47 Mad 483[2] and also on a decision of the Bombay High Court in 55 Bom 693.[3] The decision of the Calcutta High Court reported in 56 Cal 416[4] has been brought to our notice. In that Calcutta case Sir George Rankin has clearly laid down after an examination of the very rulings relied upon by the learned advocate before us that

> there is nothing however in R. 11 of O. 38, to give colour to the view that for the purposes of R. 57 of O. 21, "attached in execution" is a phrase that covers "attachment before judgment".

We respectfully agree with this exposition of law. The very language of R. 57 of O. 21 is abundantly clear when it enacts :

> Where any property has been attached in execution of a decree but by reason of the decree-holder's default the Court is unable to proceed further with the application for execution . . . . . Upon the dismissal of such application the attachment shall cease.

It is to be noticed that the Legislature has used the words "the attachment shall cease". In our opinion the words "the attachment" must mean the attachment referred to above, that is to say the attachment in execution of the decree. Another argument presented to us was that there has been some prejudice by reason of the fact that the properties had been sold for a lesser sum than could reasonably have been realized by any kind of sale. We are satisfied upon a consideration of the evidence in the case that the appellant

1. Arunachalam Chetty v. Periasami Servai, A I R 1921 Mad 163=70 I C 439=44 Mad 902=41 M L J 252 (F B).
2. Meyyappa Chettiar v. Chidambaram Chettiar, A I R 1924 Mad 494=83 I C 91=47 Mad 483 =46 M L J 415 (F B).
3. Hari Sabaji v. Srinivas Vithal, A I R 1931 Bom 550=134 I C 972=55 Bom 693=33 Bom L R 1130.
4. Shibnath Singh v. Saberuddin Ahmad, A I R 1929 Cal 465=119 I C 113=56 Cal 416.

can have no real grievance upon this score. The result is that the appeal fails on both points and is dismissed with costs.

R.W./R.K. *Appeal dismissed.*

A. I. R. 1937 Patna 628

WORT, AG. C. J. AND DHAVLE, J.

Isri Prasad Singh and *others* — Defendants — Appellants.

v.

Jagat Prasad Singh, Plaintiff and *others*, Defendants — Respondents.

First Appeals Nos. 187, 165 and 196 of 1932, Decided on 6th May 1937, from decision of Sub-Judge, Gaya, D/- 19th May 1932.

(a) Transfer of Property Act (1882), S. 82 —'Contract to contrary' in S. 82 includes contract between mortgagor and purchaser — Mortgage of properties T and M to *R* — Subsequently sale of property T to *G*—Consideration of sale left with *G* for paying previous mortgages including *R*'s—*G* not paying off *R* though money left by mortgagor sufficient—Decree for *R* on his mortgage — Plaintiff, successor of *G*, paying decretal money to save property T from sale in execution—Suit for contribution against defendants, subsequent purchasers of M—Defendants purchasing property free from encumbrance held not liable under S. 82.

No extraneous principle to modify the liability to contribution imposed by S. 82, T. P. Act, can be introduced. [P 629 C 2]

The expression " contract to the contrary " in S. 82 refers not only to a contract between the mortgagor and the mortgagee but also to a contract between the mortgagor and a purchaser : *A I R 1936 Mad 106* and *A I R 1936 All 258*, *Rel. on.* [P 630 C 2]

B mortgaged properties T and M to *R*. Subsequently *B* sold the property T to *G*. The consideration of the sale was left with *G* to pay off six previous mortgages including the mortgage to *R*. As the mortgage to *R* was not satisfied by *G*, even though he had sufficient money left with him, the mortgagee brought a suit and obtained a decree. In order to avoid sale of property T in execution, plaintiff, the successor in interest of *G*, paid the decretal amount and brought a suit for contribution against defendants who had purchased the property M from the mortgagor free from encumbrance, after the sale of T property to *G* :

Held : that it could not have been either in the contemplation of the mortgagor or of the purchasers of M properties that the properties subsequently purchased should be subject to any contribution under S. 82, as the mortgagor had received the value not of the equity of redemption in the property but of the properties themselves. It was a case not of "contract to the contrary" within S. 82, but of contract between the mortgagor and *G*, the benefit of which had passed to the defendants. Hence they were not liable to pay any contribution under S. 82 : *14 I C 179*, *Rel. on.* [P 630 C 2]

(b) Civil P. C. (1908), O. 41, R. 33 — O. 41, R. 33 is not limited to one cause of action — Suit for contribution—Power under O. 41, R. 33 should be used freely.

The applicability of O. 41, R. 33, Civil P. C., is not confined to cases where there is but one cause of action. In a suit for contribution it is so necessary that all the parties should be before the Court that the powers of the Appellate Court under R. 33 read with R. 20 of O. 41 should be used without any hesitation. [P 631 C 1, 2]

(c) Interest—Pendente lite — Discretion of lower Court.

The discretion exercised by the lower Court regarding interest pendente lite cannot be interfered with by the Appellate Court in the absence of sufficient reason : *A I R 1933 Pat 207*, *Ref.* [P 632 C 2]

A. B. Mukherji and *U. N. Banerji* (in No. 187), *N. K. Prasad* and *K. N. Lal* (in No. 165), *Manohar Lal*, *Sarjoo Prasad*, *B. K. Prasad* and *R. K. Sinha* (in No. 196) — for Appellants.

Manohar Lal, *N. K. Prasad II*, *K. N. Lal*, *Sarjoo Prasad*, *B. K. Prasad*, *S. N. Ray*, *Syed Ali Khan* and *Rai Pranath* (in No. 187), *Manohar Lal*, *A. B. Mukherji*, *S. N. Ray*, *Sarjoo Prasad*, *B. K. Prasad*, *U. N. Banerjee*, *Syed Ali Khan*, *R. K. Sinha* and *Rai Parasnath* (in No. 165), *A. B. Mukherjee*, *U. N. Banerjee*, *N. K. Prasad II*, *K. N. Lal* and *Syed Ali Khan* (in No. 196) — for Respondents.

Dhavle, J. — These appeals arise out of a suit for contribution. Baijnath Prasad Singh, defendant 70, the owner of (certain shares in) mauzas Tungi Hasanpur and Latawar Faridpur, mortgaged them on 25th October 1905, and again on 21st November 1905, along with the first thirteen properties mentioned in Sch. 3 of the plaint, to Rai Sahib Surju Lal, defendant 71, Babu Sri Lal, ancestor of defendants 1 to 6, and another Sri Lal, adoptive ancestor (father) of defendant 7. On 23rd December 1907, the mortgagor sold the two villages Tungi Hasanpur and Latawar Faridpur to Gendan Singh, a money-lender (since deceased), from whom the plaintiff derives his title. On the same date Baijnath Prasad Singh executed a mortgage in favour of the same Gendan Singh. The consideration of the kobala and the mortgage (Exs. 5 and 7) was left with Gendan Singh to pay off six mortgages including those of 25th October and 21st November 1905. These two mortgages were however

not paid off on the ground of the insufficiency of the money left in the hands of Gendan Singh, and the mortgagees brought a suit in 1914 to enforce them, and obtained a preliminary decree in 1915 and the final decree in 1918. In 1926 and 1927 the plaintiff had to pay Rupees 23,065.6.15 dams to save the two mauzas from sale in execution of the mortgage decree. In 1929 he brought the suit out of which these appeals arise, asking for contribution from defendants 1 to 58 as parties to whom the thirteen other mortgaged properties had passed. Contribution was also sought from defendants 59 to 67 for other reasons. Defendants 59 to 65 are descendants of Jagannath, a brother of Gendan, and defendants 66 and 67 are descendants of Gendan. There was a third brother Fagu Singh, to whom the mauzas Tungi Hasanpur and Latawar Faridpur were allotted at a partition of the family in 1916, the ekrarnama (Ex. 2) providing, in view of the decree already obtained by the mortgagees upon the mortgages of October and November 1905, that in case the properties be brought to sale in execution, the other two branches of the family would indemnify Fagu to the extent of two-thirds of Rs. 25,000, the value fixed for these properties at the partition. Plaintiff is Fagu's daughter's son, and received the two mauzas under a will executed by Fagu. He sought contribution from defendants 59 to 67 (along with the owners of the other properties) as the quondam part-owners of the two mauzas, and in the alternative, i. e. if the other defendants should be held to be free from liability, as persons bound by the special arrangement of the ekrarnama at the partition.

The principal grounds on which the suit was contested were that Gendan Singh had sufficient money left in his hands by the mortgagor to pay off the two mortgages and that therefore the plaintiff was entitled to no contribution at all from those defendants into whose hands the other 13 properties had passed, and that several of these defendants were under no obligation to contribute, because the properties had been conveyed to them free from encumbrance. The learned Subordinate Judge came to the conclusion that Gendan did have enough money to pay off the two mortgages, but that plaintiff was nevertheless entitled to contribution under S. 82, T. P. Act, from the present owners of seven out of the 13 properties. He found the other owners not liable for contribution on various grounds—and more particularly defendants 8 to 10 (owners of properties Nos. 3 and 4) and defendant 11 (owner of properties Nos. 8 and 9) on the ground that these (four) properties had been conveyed to them free from encumbrance. As against defendants 59 to 67, the learned Subordinate Judge passed a decree for the whole of the money that plaintiff had had to pay minus the amounts found due from the owners of the seven properties and minus also one-third of the rateable share of the two mauzas of Tungi Hasanpur and Latawar Faridpur. Of the three appeals before us, the one that has raised the most serious questions is First Appeal No. 187, which was preferred by defendants 59 to 67. The contentions advanced on their behalf were (1) that it was really immaterial to the liability under S. 82, T. P. Act, whether or not Gendan had enough money left with him by the mortgagor to pay off the two mortgages, but that in any case the lower Court was wrong in holding that he had enough, (2) that defendants 8 to 10 and defendant 11 should not have been exempted because what they took was only the equity of redemption, and (3) that the liability of the appellants has been wrongly calculated. (After considering the documentary as well as oral evidence the judgment proceeded.) In my opinion, the learned Subordinate Judge was quite correct in holding that Gendan had enough in hand on the mortgagor's account to pay off the bonds of October and November 1905, and that Gendan was not entitled to withhold payment merely on account of the extra Rs. 1,425 which may well have been due to him from Baijnath. On the question of law raised by Mr. Mukherji, the present case is not distinguishable in principle from 14 I C 179[1] which, as the learned Subordinate Judge has said, "was not overruled or disapproved" but explained by their Lordships of the Judicial Committee in 52 All 358=57 I A 189.[2] It is unquestionable that we cannot introduce any extraneous principle to modify the liability to contribution imposed by S. 82,

1. Shah Muhammad Abbas v. Muhammad Hamid, (1912) 14 I C 179=9 A L J 499.

2. Ganeshi Lal v. Charan Singh, A I R 1930 P C 183=124 I C 911=52 All 358=57 I A 189 (P C).

T. P. Act. But, as Lord Tomlin further said in 52 All 358,[2] the decision in 14 I C 179[1]

may be justified on the footing that in that case there passed to the party, from whom the contribution was sought, the benefit of the contract by which the money was to be applied, so that he could say 'I have a contract which frees me from the liability to contribution which the section would otherwise impose on me'. No such plea is available to the appellants in this case. They were not parties to the contract of 9th May 1914, nor has the benefit of that contract passed to them in law or in equity.

The facts in 14 I C 179[1] were that the purchasers of Mauza Bangaon who had contracted with the mortgagors to make a certain payment towards a mortgage of 1898, and to pay off a mortgage of 1899, on certain shares in mauza Jamalpur as well as Bangaon, had brought a suit for contribution against defendants who had subsequently purchased mauza Jamalpur "free from encumbrances". Contribution was in fact allowed, but the plaintiffs were debited with the amounts payable by them under their agreement or agreements with the mortgagors. The defendants were not parties to these agreements but Chamier, J. had found that the plaintiffs had been supplied with funds for the express purpose of making payments towards those mortgages and that it was not the intention of any of the parties concerned, after the purchase of the plaintiffs, that Jamalpur and Bangaon should contribute rateably to the mortgage debts. The benefit of the contract between the plaintiffs and the mortgagors, by which the money was to be applied by the plaintiffs, was thus regarded by their Lordships of the Judicial Committee as having passed to the defendants who had purchased Jamalpur "free from encumbrances" and to free them (pro tanto) from the ordinary liability to contribution under S. 82. In the present case defendants 8 to 10 and defendant 11 have been found by the lower Court to be in the same position as the defendants in the case in 14 I C 179.[1] They purchased free from encumbrance, and as Gendan is found to have had enough money in hand to pay off the bonds of October and November 1905, their liability to contribution would be nil. Mr. Mukherji has argued that the "contract to the contrary" referred to in S. 82, T. P. Act, must be a contract between mortgagor and mortgagee and not, as in the present case, a contract between the mortgagor and a purchaser from him, and has relied upon 24 Mad 85[3] in support. The learned Judges did observe in this case that:

The words 'contract to the contrary' were intended to apply to contracts between mortgagor and mortgagee—contracts for example, under which some of the mortgaged properties were to be liable in the first instance, and others only to be liable in the event of the security of the properties liable in the first instance being insufficient.

But the question for actual decision before them was whether or not the plaintiff, who had purchased a part of the quarter share that had been taken by his vendor on a family partition between his father and three sons, together with one quarter of the mortgage debt, "was only entitled to contribution in respect of moneys paid by him in excess of his own liability for one quarter of the mortgage debt," or whether he could claim rateable contribution from defendant 18, a purchaser from the father, who had raised the point. As to this, the learned Judges said:

The proportionate liability of the members of the family inter se for the amount of the mortgage debt existed apart from any express contract which they may have chosen to make. The contract as between the parties, the owners of the equity of redemption, is of course binding, but it is not a contract which binds their assignees.

This shows that notwithstanding their observation regarding 'contracts to the contrary', the learned Judges would have given effect to a contract, if there had been any, which was binding between the plaintiff and the defendant from whom rateable contribution was claimed: *see also* 59 Mad 121[4] and 58 All 548.[5] In any event, having regard to what was said in 52 All 358=57 I A 189[2] about the case in 14 I C 179[1], the present must be regarded as a case, not indeed of a 'contract to the contrary' within S. 82, but of a contract between the mortgagor and Gendan, his transferee, the benefit of which has passed to the defendants who made subsequent purchases free from encumbrance. Mr. Mukharji has argued that defendants 8 to 10 and defendant 11 could not but have known that the properties they were purchasing were in fact not free from the encumbrances of October and November, 1905. This may be conceded. For, the

3. Ramabhadrachar v. Srinivasa Ayyangar, (1901) 24 Mad 85.
4. Muthiah Bhagavathar v. Venkatrama Ayyar, A I R 1936 Mad 106=163 I C 977=59 Mad 121=69 M L J 303.
5. Karim Khalesan-fi-Allah Sabil v. Narendra Nath, A I R 1936 All 258=162 I C 117=58 All 548=1935 A L J 1273.

earliest of the sale deeds of these defendants is Ex. A, which appears from the evidence of the recitals in Exs. 5 and 7—we have not before us the recitals in Ex. A, though we have been told that they are on the same lines—to have been part of the same transaction as these two deeds of Gendan; and defendants 8 to 10 made their purchase in 1921 long after the decree obtained by the mortgagees on the mortgage bonds of October and November 1905. As against the mortgagees, they clearly took only the equity of redemption; but it is equally clear that as against the mortgagor and his representatives in interest they paid for and were to have the properties free from encumbrance. After Baijnath's arrangements with Gendan for the payment of the mortgages of October and November 1905, it could not have been either in his contemplation, or in the contemplation of any of his purchasers, that the properties subsequently purchased should be subject to any contribution under S. 82, having regard to the fact that they paid and he received the value not of the equity of redemption in the properties, but of the properties themselves.

The appellants sought to fasten liability upon defendants 8 to 10 and defendant 11 because of their liability under the ekrarnama (Ex. 2) to make good the loss that would fall on the plaintiff to the extent of two-thirds of Rs. 25,000. Mr. Manohar Lal who appears for defendants 1 to 11 argued in limine that the appellants were not entitled to raise the question of the liability of defendants 8 to 10 and defendant 11 as the plaintiff who has preferred Appeal No. 165 is content with the decision of the lower Court in their favour and has not appealed on that point. He also contended that defendants 1 to 7 have been unnecessarily dragged to this Court. But the suit was a suit for contribution, and in such suits it is so necessary that all the parties should be before the Court that the powers of the Appellate Court under R. 33 read with R. 20 of O. 41 will be used without any hesitation. Upon this, Mr. Manohar Lal contended that O. 41, R. 33 is not intended to apply to cases which, like the present case, are brought on more than one cause of action—the liability of the purchaser defendants arising under S. 82, T. P. Act, and the alternative liability of the appellants under the ekrarnama. But suits on such alternative grounds are specifically provided for in O. 1, R. 3 : *see also* (1921) 2 K B 1,[6] referred to by my learned brother during the arguments, and 55 Cal 164,[7] where the law on the subject was elaborately discussed. Appeals in such suits have been dealt with under O. 41, R. 33 in several reported decisions, nor is there anything in the Rule or in the illustration to it to confine its application to cases where there is but one cause of action or ground of liability against the defendants. In my opinion, defendants 1 to 6 were necessary parties to the appeal, and defendant 7 a proper though not a necessary party; and the appellants were entitled to raise the question resisted by Mr. Manohar Lal.

Much need not be said regarding another point raised by Mr. Manohar Lal, who argued that the lower Court was wrong in holding that the mortgagor and Gendan had not assured defendant 11 that the properties purchased by him were free from all encumbrances and that the suit was not barred as against defendant 11 by estoppel. As I have already observed, the first sale deed of defendant 11, Ex. A, appears to have been part of the same transaction as the sale deed and the mortgage bond of Gendan. It was no doubt executed a couple of days later, but was registered at the same time as the other two deeds; and all the three deeds bear the attestation of Gendan or defendant 11 as the case may be. The oral evidence that Gendan had brought defendant 11 into the transaction is not very satisfactory by itself, but is strongly supported by the recitals in the deeds in favour of Gendan. At the same time, the case is one not so much of estoppel grounded on the conduct of Gendan as of a covenant by Baijnath in favour of defendant 11 that the properties sold were free from encumbrance. Except as against the mortgagees, defendant 11 clearly purchased not the equity of redemption in the properties but the properties themselves.

The only point that remains to be dealt with in this appeal (No. 187) relates to the calculation of the liability of the appellants. In calculating the rateable shares of the 15 mauzas, the learned Subordinate Judge had to take into account no less

6. Payne v. British Time Recorder Co., (1921) 2 K B 1=90 L J K B 445=124 L T 719=37 T L R 295.
7. Harendra Nath v. Purna Chandra, A I R 1928 Cal 199=109 I C 755=55 Cal 164=32 C W N 885.

than 12 other mortgages to which one or more of those properties were subject, and his calculations on this point have not been assailed before us. He found that the rateable share of the seven properties that were liable to contribution under S. 82, T. P. Act, was Rs. 8,882.4.0, and that of Tungi Hasanpur and Latawar Faridpur Rs. 3,112.1.0. Deducting one-third of this last amount as plaintiff's own share of contribution, the learned Judge held that plaintiff was entitled to receive Rupees 22,028.1.1 dam; and out of this sum, he ordered the purchasers of the seven properties to contribute Rs. 8,882.4.0, and defendants 59 to 65 and defendants 66 and 67 to pay the balance in equal shares. It has been contended for the appellants that under the ekrarnama plaintiff's liability was not limited to one-third of the rateable share of Tungi Hasanpur and Latawar Faridpur but extended to one-third of the entire loss that would fall on the plaintiff as the owner of those mauzas. The learned advocate for the plaintiff endeavoured to meet this by urging that it was conceded by defendants 59 to 67 in the lower Court that plaintiff was entitled to receive from these defendants so much of the sum he had had to pay "as is dismissed out of the claim made against defendants 1 to 58". The judgment of the lower Court on issue 8 shows that some kind of concession was made, but it is quite clear that it has not been very correctly expressed because the actual order of the lower Court leaves the plaintiff to bear one-third of the rateable share of his two mauzas, which is inconsistent with the concession as put by the learned Judge. In any case it was not a concession of fact. On the terms of ekrarnama, it seems clear that plaintiff must bear one-third of the amount that he is found not entitled to recover from defendants 1 to 58; and it has not been argued before us that the liability of the mauzas bound to contribute should be re-calculated after leaving out the other mauzas. Deducting Rs. 8,882-4-0 from Rs. 23,065-6-15 dams, we get Rupees 14,183.2-15 dams. The share of plaintiff, defendants 59 to 65 and defendants 66 and 67 each, out of this balance is Rupees 4,727.11.12 dams, and this should have been the amount awarded to the plaintiff against these two sets of defendants instead of Rs 6,572-14.6 dams, the figure adopted by the lower Court. To the extent indicated in the last paragragh F. A. 187 succeeds. I would allow the appellants costs of this Court in proportion to their success.

F. A. 165 of 1932 was preferred by the plaintiff on the ground that he should have been allowed interest pendente lite. The learned advocate for the appellant has cited 14 P L T 133.[8] Interest pendente lite is however a matter of discretion; and in the present case there were various circumstances, though the learned Judge below has not referred to them, which may well have led the Court to say nothing about such interest. In the first place interest up to the date of suit was allowed at 9 per cent per annum with annual rests not only as against defendants 59 to 67 but also against the owners of the seven properties, even though there was no written contract making them liable to pay interest and it was not proved that any demand of payment had been made from them in writing. Secondly, the interest claimed by the plaintiff was 2 per cent. per month, and though this is the rate given in the ekrarnama, it was plaintiff's own case, and it was admitted by Ramdeo Singh for defendants 59 to 67, that he had paid off the mortgage decree by raising a loan at 9 per cent. per annum. In my opinion, the plaintiff has failed to make out any sufficient reason for our interfering with the order passed by the lower Court in this respect.

One cross-objection was filed in this appeal by defendant 8, and another by defendant 11, claiming that the lower Court had erred in not awarding costs to them against the plaintiff. The suit was dismissed as against them, but the question of costs was apparently overlooked. There does not appear to be any reason why they should be deprived of their costs. I would modify the decree of the lower Court in this respect. It appears from the decree that their costs were calculated as if they were among the defendants who had lost and that these costs included a pleader's fee on the whole amount claimed in the suit. In calculating their costs, the pleader's fee must be computed on the amount claimed from them by the plaintiff. There is also an expert's fee put at Rs. 1,040 included in the "costs of defendants No. 11 lost". This was apparently the fee of a handwriting expert, whose evidence we

8. Bank of Behar, Ltd. v. Ramghulam Singh, A I R 1933 Pat 207=143 I C 49=14 P L T 193.

find printed in the third appeal before us, No. 196. It is clear from the judgment of the lower Court that little enough turned on the evidence of this expert, and the fee paid seems grossly out of proportion to the standing of the expert or the importance of the evidence. I would reduce it to Rs. 100. I would therefore dismiss this Appeal No. 165, with costs, and allow the cross-objections, defendants 8 to 10 and defendant 11 getting their costs in both Courts in proportion to their success.

The third appeal before us, No. 196, is preferred by defendants 13 to 27 who were impleaded as owners of properties Nos. 6 and 7 in Sch. 3 of the plaint. The learned advocate for these appellants has urged that there should have been no decree against defendant 13 because, as stated in para. 2 of his written statement (at p. 19 of Parts 1 and 2 of the paper book), he had made a gift of the properties to defendant 16 in 1901. Neither the deed of gift nor the deed of sale that preceded it was produced. The evidence of Rajeshwar Lal, which has been printed for the purposes of this appeal, appears from his cross-examination to be mere hearsay. The appeal therefore fails and I would dismiss it with costs.

The only other matter that requires to be referred to is an application put in on behalf of defendant 56 in Appeal No. 187 that the decree should be "made clear," as the learned advocate put it, by providing that as against this petitioner the plaintiff is to realize his decree by the sale of the property No. 13 of Sch. 3, with which he is concerned. It is true that there was a prayer in the plaint regarding the sale of the properties in the schedule in case of default in payment by the purchasers. But this prayer was evidently given up during the trial. It was at any rate not allowed by the lower Court and the plaintiff had not appealed on the point. If the applicant was really aggrieved by the refusal of the lower Court to confine the plaintiff to a sale of the property, he should have appealed. The matter is not one of mere amendment, nor has the plaintiff even now asked for this particular relief. I would therefore dismiss the application.

Wort, Ag. C. J.—I agree.

K.B./R.K. *Order accordingly.*

A. I. R. 1937 Patna 633

ROWLAND, J.

Dukhan Sahu — Petitioner.

v.

Emperor.

Criminal Revn. Petn. No. 359 of 1937, Decided on 20th August 1937, against order of Judicial Commissioner, Chota Nagpur, D/- 9th July 1937.

(a) Penal Code (1860), S. 186 — Sufficient indication that force would be used constitutes obstruction.

Sufficient indication that any attempt to effect attachment by peon having warrant of attachment would be resisted by force is quite enough to constitute obstruction. [P 634 C 1]

(b) Penal Code (1860), S. 186 — Officer entrusted with warrant of attachment satisfying himself that property belongs to person concerned—Warrant in order and attaching officer not going beyond instructions — Resistance constitutes offence under S. 186.

When an officer is entrusted with a warrant to attach the property of certain persons, his first duty is to ascertain by all means possible what property belongs to that person which is liable to be attached. Having satisfied himself that certain property belongs to that individual, it is his duty to attach that property unless some objection is raised which raises in his mind a reasonable doubt that the property does not belong to the person against whom the warrant has been issued. [P 635 C 2]

Where the warrant of attachment is in order and the officer executing it does not go beyond fulfilment of the instructions given to him in the writ, then a resistance to the public servant is an offence punishable under S. 186, I. P. C. [P 635 C 1]

Where therefore a peon having a proper warrant of attachment against *J* for attaching the goods from his shop went to the shop with two men of decree-holder who stated that the shop belonged to *J* and seeing *J* in the shop regarded in good faith that the property belonged to *J* and attempted to effect attachment but was obstructed and threatened by *J's* son who claimed that the shop belonged to him :

Held : that *J's* son committed an offence under S. 186, I. P. C., by obstructing the peon whose duty it was to attach the property. [P 635 C 2]

R. S. Chattarji and *K. K. Banarji* — for Petitioner.

Advocate General — for the Crown.

Order. — The Lohardaga Municipality obtained a money decree against Jhalu Sahu for arrears of municipal taxes and a writ of attachment was issued by the Court against the goods of Jhalu supposed to be in Jhalu's shop in Lohardaga. The peon went to the place indicated, accompanied by two employees of the Municipality who pointed out the shop and goods

as being the property of Jhalu who was found present there. When the peon wished to attach the goods pointed out, the petitioner who is son of Jhalu said that the shop and the goods did not belong to Jhalu but to himself and he refused to permit the attachment to be made. The peon and the two employees of the Municipality have said that the petitioner threatened the peon with assault, thereby indicating that any further attempt to effect the attachment would be resisted by force. The peon gave up the attempt to execute the warrant on Dukhan, writing an endorsement on the writ to the effect that "The things are mine, I shall not allow them to be attached". The peon then returned the writ to Court reporting the reason why it could not be executed and the Munsif laid a complaint against the petitioner in pursuance of S. 195, Criminal P. C., for his prosecution for an offence under S. 186, I. P. C. The petitioner was convicted and the conviction has been affirmed on appeal.

The findings of the Courts below as to what happened at the shop are findings of fact. The prosecution case as above outlined has been accepted. Neither the Magistrate nor the Judicial Commissioner on appeal has come to a definite finding as to whether the shop and the goods in it are the property of Jhalu or of the petitioner. It is argued that in the absence of a finding that the goods are the property of the person whose property the peon was authorized to seize, it cannot be held that the peon was acting in the discharge of his public functions or that the petitioner was committing any offence in preventing him from effecting the attachment. It was suggested also that the act of the petitioner did not amount to an obstruction because physical force was not proved to have been used. I do not find any substance in this point. There was sufficient indication that force would have been used if the peon had persisted and that to my mind is quite enough to constitute obstruction. The other point, however, requires more examination.

Mr. R. S. Chattarji for the petitioner has drawn my attention to a number of decisions in which convictions under S. 186 or similar sections have been set aside. These cases, the Advocate General would explain, as being cases in which either the warrant is bad or the instructions in the warrant are exceeding. He contends that where the warrant is a lawful warrant and the public servant is acting within the instructions contained in the warrant, he is a public servant in the discharge of his public functions and resistance to him is criminal. If, however, he exceeds his instructions, he has been in some cases regarded as not engaged in the discharge of his public functions and in such cases it has been held that resistance to him is not an offence. There is a class of cases also where the authority under which a public servant is acting is found on examination not to extend to the doing of the act on which he was engaged. Here obstruction or resistance is not itself an offence, but if the public servant at the time in good faith believed himself to be within his authority and was acting in good faith under colour of his office, though the act he did may not be strictly justified by the law, then S. 99 gives him this much protection that there is no right of private defence against his act and a person who not only resists him but further commits an assault or causes hurt to him can be punished for so doing.

The class of cases in which warrants were found defective can be illustrated from 51 Cal 902;[1] similarly 55 All 985[2] and 7 P L T 30.[3] Then again cases in which the warrant was in order but the officer executing it went beyond the instructions and the authority by doing something that the warrant had not directed him to do may be found in 11 P L T 31[4] and 11 Pat 493.[5] In the former of these cases an officer had been entrusted with the execution of a search warrant directing him to search in a particular place. The officer in fact searched in other places and it was held that resistance to him and escape from his custody was not an offence. In 11 Pat 493[5] the warrant was a Civil Court attachment and the property of the judg-

1. Jogendra Nath v. Hiralal Chandra, A I R 1924 Cal 959=83 I C 481=26 Cr L J 2=51 Cal 902=39 C L J 452.
2. Emperor v. Tohfa, A I R 1933 All 759=1933 Cr C 1324=146 I C 183=34 Cr L J 1211=55 All 985=1933 A L J 952.
3. Badri Gope v. Emperor, A I R 1926 Pat 297=93 I C 146=27 Cr L J 418=5 Pat 216=7 P L T 30.
4. Chepa Mahton v. Emperor, A I R 1928 Pat 550=113 I C 578=30 Cr L J 175=11 P L T 31.
5. Nagarmal Marwari v. Emperor, A I R 1932 Pat 279=1932 Cr C 723=139 I C 834=33 Cr L J 883=11 Pat 493=13 P L T 689.

ment-debtor was found to have been placed in a godown belonging to a third party. The bailiffs sealed the whole of that godown which contained not only goods belonging to the judgment-debtor but the property of other persons. It was held that resistance to him was not an offence because they had exceeded what they had been directed by the warrant to do. Where however the warrant is in order and the officer does not go beyond fulfilment of the instructions given to him in the writ, then a resistance to the public servant is the offence punishable under the section that we are considering. It was so held in 13 P L T 480.[6] Courtney Terrell, C. J. said in that decision that :

If a public officer does no more than act upon the official instructions he has received and if those official instructions are not of such a kind as to be obviously and patently illegal, then he acts properly in carrying out such orders and resistance to a public officer carrying out orders which upon the face of them are not open to objection and are in proper form is an offence against the statute.

The trial Court in that case had passed an order of acquittal and his Lordship observed as regards the trial Court's duty :

He should have treated the argument very summarily and merely looked at the warrant of attachment and seen whether the officer was doing something which was not contained in the writ of attachment which would have justified reasonable resistance.

In Special Bench case in 16 P L T 295[7] the facts were somewhat similar but unfortunately the decision is not directly in point on the question whether a conviction under S. 186 can be had because in the particular case it was found that there had been no complaint of the offence under S. 186 which was necessary under S. 195, Criminal P. C., before cognizance could be taken of, of the offence. But there was also a conviction under S. 353, I. P. C., and the question whether the public servant concerned was acting in the discharge of his public functions was examined. Apparently the warrant was for attachment of property of one Dhanukdhari Singh and the Chaukidar who went as identifier, pointed out certain cattle as the property of Dhanukdhari. At a later stage it was said that the property was not Dhanukdhari's own property but the joint family property of himself and others and ought not to have been and could not be attached. What the Court said was :

When an officer is entrusted with a warrant to attach the property of certain persons, his first duty is to ascertain by all means possible what property belongs to that person which is liable to be attached. Having satisfied himself that certain property belongs to that individual, it is his duty to attach that property unless some objection is raised which raises in his mind a reasonable doubt that the property does not belong to the person against whom the warrant has been issued.

In the present case, it is true that Dukhan did at the time prefer the objection that the property sought to be attached was his own; but the peon had the statements of the two municipal employees that the shop was Jhalu's and the peon in fact found Jhalu present at the shop. I do not feel any doubt that the peon in good faith regarded the property as that of Jhalu and it was therefore his duty to make the attachment and the petitioner in obstructing him from doing so committed the offence of which the Courts below have found him guilty. I would, therefore, dismiss the application and discharge the Rule.

S.C./R.K. *Rule discharged.*

A. I. R. 1937 Patna 635

MANOHAR LALL, J.

Syed Mohammad Zakiruddin — Petitioner.

v.

Mohammad Nasem — Opposite Party.

Civil Revn. Petn. No. 225 of 1937, Decided on 20th August 1937, from order of Munsif, Jamui, D/- 15th March 1937.

Bengal Tenancy Act (8 of 1885), S. 174—Decree-holder admitting that he has received amount due to him outside Court within thirty days—Deposit within same period by judgment-debtor of compensation money due to auction-purchaser—Sale must be set aside.

The object of the law is that in a summary proceeding for setting aside the sale under the provisions of S. 174, Bengal Tenancy Act, the Court should not be required to embark upon an inquiry whether the amount due had in fact been paid to the decree-holder. [P 636 C 2]

Where it is established either by an admission of the decree-holder or by an application made by him to the Court that the amount due to him has been received by him outside the Court within thirty days and the judgment-debtor puts in a petition to set aside the sale within thirty days thereof and deposits the compensation money due to the auction purchaser also within the same time, the Court is bound to set aside the sale,

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6. Birdhi Chand Jaipuria v. Darbari Jayaswal, A I R 1932 Pat 276=142 I C 144=34 Cr L J 263=13 P L T 480.
7. Ram Singh v. Emperor, A I R 1935 Pat 214 =1935 Cr C 577=155 I C 421=36 Cr L J 714=16 P L T 295 (S B).

because there is a substantial compliance with the provisions of S. 174, Bengal Tenancy Act, there being nothing on that date which the judgment-debtor can deposit as "the amount recoverable under the decree with costs for payment to the decree-holder" : *A I R 1937 Pat 537, Dissent ; Case law discussed.* [P 639 C 1]

M. Rahman — for Petitioner.

A. H. Fakhruddin—for Opposite Party.

Order. — This is an application in revision by one Zakiruddin who in execution of a money decree against the tenant judgment-debtor purchased the holding of that tenant after the same was sold and purchased by one Nasem in execution of a rent decree by the landlord against the same judgment-debtor on 23rd November 1936. The petitioner paid the amount recoverable under the decree with costs to the decree-holder out of Court within thirty days of the date of sale and on 21st December 1936, that is to say, just within two days before the expiry of thirty days from the date of sale he applied to the executing Court to be allowed to deposit the compensation money due to the auction purchaser Mohammad Nasem and upon that the learned Munsif ordered the issue of a chalan on 22nd December 1936, but on an objection filed later by Mohammad Nasem that the deposit was not in accordance with the provisions of S. 174, Bengal Tenancy Act (the money due to the decree-holder not having been deposited in Court), the learned Munsif "on seeing the case law in 6 P L T 795[1] and onwards" decided by his order dated 15th March 1937 that the deposit was not in compliance with the above provisions of the Bengal Tenancy Act and he therefore ignored it and proceeded to confirm the sale. The present revision is against this order.

A large number of authorities have clustered round the question whether the Court has jurisdiction to set aside the sale where the provisions of S. 174, subs. (2) have been substantially (though not strictly) complied with. Various authorities have been considered at great length in a recent decision of this Court in 18 P L T 409[2] by my brother Rowland and he has come to the conclusion that the Court has no jurisdiction to set aside the sale unless the amount of the decree with costs have been actually deposited in Court along with the compensation to the auction purchaser. With the profoundest respect to the learned Judge, I do not agree with his conclusion for the reasons given below.

Section 174 (1) contains the provision which enables the judgment debtor to have the sale set aside on his depositing in Court for payment to the decree-holder the amount recoverable under the decree with costs, and for payment to the purchaser a sum equal to five per cent. of the purchase money. It is to be noticed that the words used are "the amount recoverable under the decree with costs" and not "the amount of the decree including the costs decreed" as are to be found in S. 170 (2). Again, the deposit is to be made for payment to the decree-holder and not for any other purpose. Where the decree-holder puts in a petition or tells the Court orally that he has received the amount due to him under the decree and for which the sale was held, in my opinion it will be taking a very narrow view of the section, if the judgment-debtor was still required to deposit that money; and, if the money was indeed deposited by the judgment-debtor, it could not be withdrawn by the decree-holder because he has already received the money, and he has so stated to the Court and the result would be that the judgment-debtor would be forced to put in the money and then take it back himself, which appears to be a position which was never contemplated by the Legislature. The object of the law seems to be that in a summary proceeding for setting aside the sale under the provisions of S. 174 the Court should not be required to embark upon an enquiry whether the amount due had in fact been paid to the decree-holder. Where the decree-holder admits that he has received the amount due to him within 30 days of the date of sale, the requirements of the section which insist upon a deposit only "for payment to the decree-holder" are satisfied and then there is no "amount recoverable under the decree with costs."

I now proceed to consider the authorities. The earliest case upon the point is 18 Cal 481,[3] which was decided in 1891. In that case a suit was brought by the plaintiff against the defendant for setting aside the sale on the ground that the

1. Raghunandan Pandey v. Garju Mandal, A I R 1925 Pat 525=91 I C 217=4 Pat 718=6 P L T 795.
2. Hanuman Singh v. Baijnath Prasad, A I R 1937 Pat 537=18 P L T 409.
3. Kabilaso Kuer v. Raghu Nath, (1891) 18 Cal 481.

plaintiff was entitled to have it set aside under the provisions of S. 174, Ben. Ten. Act, he having made the necessary deposit within the meaning of that section. The learned Chief Justice decided that such a suit was not maintainable, because S. 174 provided the only means by which such sales can be got rid of after they had been concluded. Having so decided, the learned Chief Justice proceeded to consider that the provisions of S. 174 had not been sufficiently complied with so as to entitle the plaintiff to the relief claimed. With great respect it was not necessary to decide this second question and these remarks must be treated as obiter, because the suit of the plaintiff was already held to be not maintainable on the ground that the provisions of S. 174, Ben. Ten. Act, provided the only means to obtain a relief and not by an independent action. The learned Chief Justice however used this language :

> The amount of the debt has not been deposited; but some person comes who says that he is the decree-holder, and admits that he has received the money.

It seems to me from the language so used, that the Court was in doubt whether the decree-holder had in fact received the money or not. Now, if that was the correct position, then obviously there was no compliance with the provisions of section 174 of Ben. Ten. Act, because as has been stated by me already, the Court is not required in a summary proceeding under S. 174 to embark upon an enquiry whether in fact the money due to the decree-holder has been received by him or not. In 6 P L T 795 [1] the case in 18 Cal 481 [3] was followed by this High Court. Ross, J. delivered the leading judgment in that case. In this case in execution of a decree for rent, the tenant's holding was sold and was purchased by a third party. Within 30 days of the date of sale the deposit of compensation to the auction-purchaser was made in Court and also a petition was filed signed both by the judgment-debtor and the decree-holder that the amount recoverable under the decree had been paid to the decree-holder ; but the learned Munsif holding that there was no compliance with the provisions of section 174 refused to set aside the sale ; the District Judge however in appeal, holding that there had been substantial compliance with the terms of S. 174, set aside the sale. Ross, J. held that the learned District Judge had no jurisdiction to set aside the order of the learned Munsif because no appeal lay before him, inasmuch as the question was not between the decree-holder and the judgment-debtor but between the judgment-debtor and the auction purchaser, and therefore the case did not fall within the provisions of S. 47, Civil P. C.; and the learned Judge then proceeded to rely upon the decision of the Calcutta High Court, referred to above, and held that S. 174 had not been sufficiently complied with. Ross, J. must be taken to have adopted the same reasoning of the Calcutta High Court, namely that it was not established before him whether the person who professed to pay the money as the decree-holder was really the decree-holder or not.

The next case which I proceed to consider is 7 P L T 25.[4] In this case in execution of a decree, the properties of the judgment-debtors were attached and sold and purchased by the decree-holder on 15th March 1924. After an expiry of 16 days the decree-holder was alleged to have filed a petition stating that he had made a compromise with the judgment-debtor and prayed that the sale might be set aside. But this was rejected and the sale was confirmed. It was argued in the High Court that the Subordinate Judge should be directed to set aside the sale or that he should be directed to make further enquiry whether the decree-holder had in fact filed the application of 31st March 1924. It should be noticed that on 2nd April 1924 the decree-holder appeared in Court and repudiated the petition which had been made on 31st March stating that he had not compromised with the judgment-debtor and that he had never filed any petition to set aside the sale. On these facts it was clear that the Court could not be asked to enter into an investigation in the summary proceeding before him as to whether the decree-holder had in fact compromised with the judgment-debtor or not. Regarding the case in 7 P L T 25[4], Ross, J. himself remarked sitting with Kulwant Sahay, J.* on 26th March 1926 as follows :

> The facts in that case were very different from the facts of the present case There an application to set aside a sale purporting to be filed on behalf of the decree-holder himself had been put in and immediately afterwards the decree-holder

4. Sham Narayan Singh v. Basdeo Prasad Singh, AIR 1925 Pat 702=88 IC 537=7 P L T 25.
* *See* A I R 1928 Pat 40 (Ref. No. 6) at p. 43 Cols. 1, 2.

had put in an application saying that his thumb impression had been taken forcibly on a blank piece of paper. Criminal proceedings had been taken in the matter, and it was alleged that the earlier application was a forgery. The sale was upheld. There may be some expressions in the judgment which are too broadly stated; but the decision must not be taken to be intended to limit the powers of the Court in a proper case such as, for example, that referred to by Sir Lawrence Jenkins, C. J. in 27 I C 601[5] where the learned Chief Justice thought that it would certainly be open to the Court not to confirm the sale and to treat the sale as being of no effect where that was the concurrent wish of the parties and the obvious requirement of the case. There may be circumstances in which the Court is bound to exercise its inherent power in order that justice may be done.

In 1927 in a Division Bench of this Court in A I R 1928 Pat 40=104 I C 753[6] James, J. in delivering the leading judgment observed as follows:

It would certainly appear to be unreasonable to hold that where, after a sale has taken place, the purchasers and the decree-holders being the same persons, certify that the decree has been settled out of Court and pray that the sale may be set aside, the Court must nevertheless confirm the sale unless the owner of the property goes through the form of filing an application under O. 21, R. 89 and depositing the money due under the decree in Court. In the matter of setting aside a sale the only persons interested, besides the owner of the property are the decree-holder and the purchaser, and if these two persons agree that the sale shall not be confirmed, it does not appear to be reasonable to hold that the Court must confirm the sale whether the purchaser and the decree-holder like it or not.

In my opinion, it must be held that where the decree-holder agrees that he has received the money which was due to him under the decree within the time fixed by the statute for making deposit, then the only persons left are the judgment-debtor and the auction-purchaser; and as between them, the only claim of the auction-purchaser that remains is that the sale shall not be confirmed unless the compensation money has been given to him, and if this is done within 30 days of the date of the sale, the Court must set aside the sale because this brings about the situation "in which the Court is bound to exercise its inherent power in order that justice may be done". A similar case has been decided by their Lordships of the Privy Council in 35 C W N 381=58 I A 50.[7] This was a case under O. 21, R. 90 where the judgment-debtor before the sale was confirmed put in a petition to set aside the sale on the ground of fraud and irregularity in the conduct of the sale. After this application was presented and objections were raised by the auction-purchaser, a number of issues were framed including issue 6, which was:

Has the Court no jurisdiction to confirm the sale in view of the fact that the decree-holder has admitted satisfaction of the decree?

The satisfaction alleged was after thirty days had expired from the date of the sale and the satisfaction put forward was not by means of a payment to the decree-holder but was stated to be an adjustment within the meaning of O. 21, R. 2. Their Lordships pointed out that O. 21, R. 2 had no application to the facts of the case before them because the provisions of that Rule only apply to a stage in the execution proceedings when the matter lies only between the judgment-debtor and the decree-holder but not where a third party had acquired an intervening interest after the sale had been effected, in which case the only means by which the judgment-debtor can get rid of the sale are those embodied in R. 89 and "this remedy can only be pursued within 30 days of the sale". I read the above quotation from Sir George Lowndes' judgment to mean that the remedy is open to the judgment-debtor only if he comes within thirty days of the sale and if he actually deposits the money for payment to the decree-holder and also the compensation to the auction-purchaser, but this is not a decision on the point that where the decree-holder admits that he has received the money within thirty days of the sale outside Court, the judgment-debtor is still required to deposit the money in Court. The next case to be noticed is the case in 97 I C 306=A I R 1926 Cal 1236.[8] The identical point before me in the present case was the point agitated before a Division Bench of the Calcutta High Court. In this case Cuming, J. who delivered the judgment of the Court stated as follows:

I do not think that it is of any consequence that the money was actually deposited in Court when the decree was satisfied by an arrangement come to between the parties. S. 174, Bengal Tenancy Act, provides that on the judgment-debtor depositing in Court for payment to the decree-holder the amount recoverable under the decree with costs and for payment to the purchaser a sum equal to five per centum of the pur-

5. Ram Prasad v. Ram Charan Singh, A I R 1916 Cal 64=27 I C 601.
6. Shivram Sand v. Manulal Khemka, A I R 1928 Pat 40=104 I C 753.
7. Nanhelal v. Umrao Singh, A I R 1931 P C 33=130 I C 686=58 I A 50=27 N L R 95=35 C W N 381 (P C).
8. Hemanta Kumari Debi v. Rajendra Kishore Nath, A I R 1926 Cal 1236=97 I C 306.

chase money at any time within 30 days from the date of the sale, the Court shall set aside the sale. It seems to me that it would be playing with words to say the petition did not come under the words of S. 174, Bengal Tenancy Act, because instead of actually depositing the money in Court for the satisfaction of the decree, the decree was satisfied by an arrangement come to between the parties. If there was no money recoverable under the decree, because that money had been paid by an arrangement between the parties, what was still necessary for the judgment debtors to do was what they did, namely to deposit in Court a sum equal to five per centum of the purchase money for payment to the auction purchaser. I am therefore of opinion that the present application did fall under S. 174, Bengal Tenancy Act.

With the utmost respect I agree with this observation of the learned Judge. In 16 P L T 709[9] Dhavle, J. has in a case under O. 21, R. 90 apparently accepted the correctness of the decision in 97 I C 306.[8] Upon a review of the case-law, in my opinion, it follows that where it is established either by an admission of the decree-holder or by an application made by him to the Court—and this fact is not challenged or repudiated by the decree-holder—that the amount due to the decree-holder has been received by him outside the Court within thirty days and the judgment-debtor puts in a petition to set aside the sale within thirty days thereof and deposits the compensation money due to the auction-purchaser also within the same time, the Court is bound to set aside the sale, because there is a substantial compliance with the provisions of S. 174, Bengal Tenancy Act, there being nothing on that date which the judgment-debtor can deposit as "the amount recoverable under the decree with costs for payment to the decree-holder".

In the present case I asked the learned advocate for the respondent that if I required the petitioner before me to deposit the decretal amount (which admittedly has already been paid to the decree-holder) "who would be entitled to withdraw this deposit? The only answer which the learned advocate could and did give was that this money would be withdrawn by the petitioner himself. This shows the absurdity of the position that the Court is enforcing the deposit of money which is to be paid back to the very man who makes the deposit the very moment the deposit is made. I, therefore, direct that the sale be set aside on the petitioner's depositing in this Court on or before 1st September 1937 a consolidated sum of Rs. 75 being five per cent. as compensation for the opposite party Mohammad Nasem and his costs for the hearing of this application (which are included in this sum of Rs. 75). If the petitioner has deposited any sum in the Court below as compensation for the opposite party, the petitioner will be entitled to withdraw it. If the above sum is not deposited within the time fixed by me, the application will be dismissed with costs. Hearing fee one gold mohur.

D.S./R.K. *Order accordingly.*

9. Inderdeo Tiwari v. Ram Ran Bijay Prasad Singh, A I R 1936 Pat 164=161 I C 714=16 P L T 709.

A. I. R. 1937 Patna 639

WORT AND MANOHAR LALL, JJ.

Babu Badri Narain Singh and *another* — Plaintiffs — Petitioners.

v.

Hari Lal Singh and *another* — Defendants — Opposite Parties.

Civil Revn. Petns. Nos. 546 to 581 of 1936, Decided on 13th September 1937, from order of Dist. Judge, Monghyr, D/- 29th May 1936.

Civil P. C. (1908), O. 41, R. 11—No error of jurisdiction in dismissing appeal under O. 41, R. 11 of the Code—No right of second appeal to High Court—Order to re-hear appeal cannot be made in revision.

Where there is no error of jurisdiction involved in the decision of the Appellate Court dismissing an appeal summarily under O. 41, R. 11, Civil P. C., the mere fact that it would have come to different conclusion had the respondent been heard, is no ground for ordering the Court in revision to re-hear the appeal in a case where no second appeal lies to the High Court. [P 640 C 1]

B. C. De and *J. C. Sinha* — for Petitioners.

B. N. Rai — for Opposite Party.

Wort, J.—This rule is directed against the order of the learned District Judge dismissing an appeal summarily under O. 41, R. 11, Civil P. C. It is perhaps a little inaccurate to say summarily as the learned Judge has written a very long judgment dealing with number of points arising, but expressing the view he had already held regarding the question of limitation in rent suits, he was of opinion that no useful purpose would be served in the circumstances in hearing the appeal in presence of the respondents. It is against that order as I have stated that the rule is directed. There is no question that the learned Judge had jurisdiction to dismiss the matter sum-

marily, although a somewhat different view was expressed in the judgment to which I was a party in 17 P L T 607.[1] I must not be misunderstood when I say a different view was expressed, as that different view depended upon the circumstances present in that case. During the course of the judgment it was pointed out that difficult questions arose for consideration and it would not be doing justice to the parties in the circumstances to dismiss the case under O. 41, R. 11. But in this case, as I have already observed, the learned Judge had on a former occasion dealt with the question of law involved that being one of limitation, and saw no good reason for allowing the appeal to be admitted.

Mr. De who appears on behalf of the petitioners contends that had the learned Judge admitted the appeal and heard it in the presence of the respondents, he would have taken a different view having regard to the decision of the learned Chief Justice which was in his favour. But it has to be remembered that there has been a difference of opinion in this Court on that question. My reference is to the case in 18 P L T 193[2] where Rowland, J., after reviewing the authorities in this matter, has come to the conclusion that the shorter period of limitation and not the longer applies to rent suits, that is to say, that the Amending Act is retrospective. The only question which we have to decide in the circumstances is whether the learned Judge had jurisdiction to act in the manner in which he acted in this case. There is no question here (as this is one of the misfortunes from which the petitioners suffer) of any right of second appeal to this Court, but that does not give us jurisdiction to decide a point in favour of the petitioners when we are of the opinion that the learned Judge had jurisdiction to act in the manner in which he acted. The suggestion of Mr. De that the learned Judge might have come to a different conclusion had the appeal been admitted, if I may say so with respect, is quite irrelevant. There is no reason why the Judge in the circumstances should admit the appeal having regard to the fact that he had, as he himself says, already expressed a very different view on this question. In these circumstances the rule must be discharged, but there will be no order for costs. This decision will govern C. R. Nos. 546-581 of 1936.

Manohar Lall, J.—I agree. When I referred these cases to a Division Bench for disposal, I was not informed, as has been now pointed out to us by the respondent, that no appeal lay to the High Court in these cases by reason of the provisions of S. 153, Ben. Ten. Act, the value in each case being below Rs. 100. I considered that it was immaterial that the applications were treated as revision applications or as second appeals because, as pointed out by my learned brother in the case reported in 17 P L T 607,[1] the dismissal of an appeal summarily by a subordinate Court does not necessarily mean that no second appeal lies to this Court. The present applications being rightly headed as applications in revision falling under S. 115, Civil P. C., I agree that the applications should be dismissed for there is no error of jurisdiction involved in the decision of the learned Judge. In re-hearing the appeals he would either come to the same conclusion or even a different conclusion in law, but that is not a ground for ordering him to re-hear the appeal in a case where no second appeal lies to this Court.

S.C./R.K. *Application dismissed.*

1. Mahabir Das v. Sadho Choudhuri, A I R 1936 Pat 505=163 I C 142=17 P L T 607.
2. Rameshwar Prasad Singh v. Manger Kahar, A I R 1937 Pat 311=169 I C 78=18 P L T 193.

A. I. R. 1937 Patna 640

MADAN, J.

Rai Brindaban Prasad

v.

Gaya Municipality.

Criminal Ref. No. 21 of 1937, Decided on 26th July 1937, made by Sess. Judge, Gaya, D/- 21st May 1937.

(a) Calcutta Survey Act (1 of 1887), S. 22 —Scope—Plot in dispute recorded in name of Municipality during survey - Claimant not bringing suit within limitation prescribed by S. 22 — Subsequent suit to challenge title of Municipality is barred.

Where the plot in dispute is entered in the name of a Municipality during survey and the person claiming it as his own does not bring a suit to challenge such entry within limitation under S. 22, Calcutta Survey Act, subsequent suit by such person challenging the title of the Municipality to such plot is barred : *A I R 1937 Pat 516, Rel. on.* [P 641 C 1]

(b) Title—Acquisition of.

Title can only be acquired by a person under a proper title deed or by adverse possession. [P 641 C 2]

(c) Bihar and Orissa Municipal Act (7 of 1922), Ss. 196 and 197—Scope—Failure to take action under Ss. 196 and 197 is no bar to subsequent action for same.

The mere fact that the Municipal Commissioner failed in his responsibility to take action for the removal of an encroachment on the Municipal lands on a previous occasion is no bar to a subsequent action for the same at the instance of the Municipality under Ss. 196 and 197, Bihar and Orissa Municipal Act. [P 641 C 2]

Baldeo Sahay, K. Dayal and *Chaudhury Mathura Prasad* — for Reference.

S. N. Sahay and *Rajkishore Prasad* — against Reference.

Order.—This is a reference by the Sessions Judge of Gaya for setting aside an order passed by the Subdivisional Magistrate of Gaya under Ss. 196 and 197, Bihar and Orissa Municipal Act, requiring Rai Brindaban Prasad, who was the petitioner before the Sessions Judge, to remove an encroachment, namely a chabutra or platform, constructed by him on plot No. 11913 belonging to the Gaya Municipality. The proceedings were started at the instance of the Special Officer appointed by the Local Government to take charge of the affairs of the Gaya Municipality during the period of its supersession. The plot is said to be a public passage between a road known as the Halliday Road and a tank. The construction of a platform on the plot by the petitioner is not denied. Mr. Baldeo Sahay for the petitioner supported the reference on the following grounds. He suggested that the Municipality had not proved its title to plot No. 11913 on which the platform was situated. In or about the year 1914 the Municipality was surveyed under the Calcutta Survey Act which by S. 223-A, Bengal Municipal Act, had been extended to all the municipalities in this province. In that survey, the plot was recorded as belonging to the municipality, and no suit was brought to challenge that entry within one year as required by S. 22, Calcutta Survey Act. The result is that a subsequent suit to challenge the title of the Municipality is barred: 18 P L T 466.[1] This ground must therefore fail.

The next ground, which is the basis of the reference by the learned Sessions Judge, is that the matter in dispute had already been decided by the municipality in the petitioner's favour in the year 1931. It appears that the petitioner had applied to the Sub-divisional Magistrate for calling for papers in that connexion, and that certain papers were produced but not made part of the record. On the Sessions Judge's record I find a report made to the Chairman by a Municipal Commissioner who enquired into the matter in the year 1931. It appears that proceedings had been instituted as the petitioner had left some building materials on plot No. 11913, and it was reported that this plot belonged to the petitioner. There is a note from the office informing the petitioner to that effect, and that no further action was being taken. Even if these documents be accepted at their face value, the effect could not have been to pass title to the petitioner. Title could only have been acquired by the petitioner under a proper title deed or by adverse possession. Neither of these conditions is present in this case. The fact that on a previous occasion the Municipal Commissioners appear to have failed in their responsibilities in the matter is no bar to the action which has been taken by the Special Officer in the present proceedings. I find therefore that the municipality was entitled to have the obstruction removed.

Lastly it is suggested that the Special Officer has failed to prove the position or extent of the obstruction. A map which appears to be a copy from the survey map is on the record and gives the area of the obstruction as 1120 sq. ft. I do not think it necessary to go further into this matter as the order sheet shows that the Special Officer had reported to the Sub-divisional Magistrate that the obstruction had been removed by him after issue of the notice. So far as these proceedings are concerned, it is conceded that the Municipality is only claiming the area actually included within plot No. 11913. The result is that I find no reason to interfere with the order which has been passed and reject the reference.

A.L./R.K. *Reference rejected.*

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1. Municipal Commissioners of the Gaya Municipality v. Mt. Rupkali, A I R 1937 Pat 516 =18 P L T 466.

A. I. R. 1937 Patna 642

MANOHAR LALL, J.

Bindeswari Prasad and *others* —
Appellants.

v.

Lal Mungari Lal and *others* —
Respondents.

Appeal No. 666 of 1935, Decided on 2nd September 1937, from appellate decree of Dist. Judge, Darbhanga, D/- 21st June 1935.

Criminal P. C. (1898), S. 88 — Before sale under S. 88 accused mortgaging property — Government can sell only equity of redemption and cannot acquire higher rights than mortgagor — Suit on mortgage after sale of attached property by Government—The only necessary party is auction-purchaser and not Government.

Property which is sold under S. 88, Criminal P. C., is the property of the accused, and if he has before the sale transferred any interest in the property that interest cannot obviously be sold. The Government by attaching the property does not get any rights in its favour beyond what the section specifically provides. [P 642 C 2]

Where therefore the accused before sale under S. 88 has mortgaged the property, then the Government can sell nothing more than the equity of redemption, and the Government or its transferee cannot acquire any higher rights than the mortgagor. To a suit brought by the mortgagee for the mortgage decree after sale of the attached property by Government, the only necessary party besides the mortgagor, is the auction-purchaser and not the Government : *A I R 1930 Mad 1017, Rel. on.* [P 642 C 2; P 643 C 1]

R. S. Chatterji — for Appellants.

K. N. Lal — for Respondents.

Judgment.—This is an appeal by the plaintiff against an appellate decree of the learned District Judge of Darbhanga dismissing an appeal of the plaintiff against a decision of the learned Munsif who refused to pass a mortgage decree in his favour against the respondent who purchased the mortgaged property as a result of a sale by a Deputy Magistrate in July 1924 under the provisions of Ss. 87 and 88, Criminal P. C., the accused mortgagor Mungeri Lal having absconded. The defence in the action was, so far as the respondent auction-purchaser is concerned, that the Government should have been made a party to the action, being a necessary party, and also that the sons of the auction-purchaser were not party defendants and therefore it was contended that there was a defect in the suit.

The learned Court below has held that in this case there cannot be a mortgage decree without making Government a party and therefore the suit must fail. In my opinion the learned Judge has wholly misconceived the scope of S. 88, Criminal P. C. and the effect of sales by the Secretary of State through the Deputy Magistrate of the property of the accused who was the mortgagor in this case. The provisions of S. 88 of the Code have been enacted for the express purpose of compelling an accused to appear in obedience to a summons or a warrant issued by criminal Courts and this is a penalty which is sought to be enforced against him to coerce him to respond to the orders of the criminal Courts and take his trial and not avoid the reach of justice. For this reason, property which is sold is the property of the accused, and if the accused has before the sale under S. 88 transferred any interest in the property, that interest cannot obviously be sold. Applying this reasoning, it is clear to my mind that what the Government purported to sell and could sell in 1925 was nothing more than the equity of redemption which on that day was in the mortgagor, and Government or its transferee could not acquire any higher rights than the mortgagor had on that day. The Government by attaching the property does not get any rights in its favour beyond what the section specifically provides. This view is in accord with the observations of the learned Judges of the Madras High Court in A I R 1930 Mad 1017.[1] In that case it may be noticed that the Government had not sold the property which it had attached under S. 88, and in that view it was held that the Government ought to have been made a party; but it was also held that the absence of the Government from the category of defendants did not affect the rights of the Government and thereafter, when the defendants in that suit had derived their title from the Government, they also were entitled to redeem. The same remarks apply with equal vigour to the present case. In the present case the Government was not a necessary party because on the day of the mortgage action the Government had transferred its right to the respondent (it actually sold the property attached to the respondent auction-purchaser), and therefore in my opinion the only person who was a necessary party in this mortgage action was, besides the mortgagor,

1. Alagammal v. Sadasiva Padayachi, A I R 1930 Mad 1017=129 I C 47=60 M L J 72.

the person who was then in possession of the property as a subsequent purchaser of the equity of redemption, that is to say the auction-purchaser of 1925. I therefore overrule the decision of the learned District Judge on this point.

It was next argued by Mr. K. N. Lal for the respondents that the sons of the auction-purchaser were not made parties. Upon the findings of the trial Court that the karta was a party in this action, there is no merit whatsoever in this objection. Mr. K. N. Lal next argued that there was some kind of an estoppel against the mortgagee from bringing the present action inasmuch as the mortgagee as landlord had actually been receiving rent from the auction-purchaser who was in possession of this property before bringing the mortgage action. It is enough to state that no issue of estoppel was ever sought to be raised in the trial Court and the decision of such an issue would depend upon many questions of fact which are necessary to be investigated before the bar of estoppel can be raised by the defendant.

Lastly it was contended by Mr. K. N. Lal that the rate of interest in the mortgage bond was very excessive and that in the circumstances of this case the rate should be reduced to a reasonable rate. I agree with this submission. I reduce the rate of interest to simple interest at 1 per cent. per month from the date of the mortgage bond. Subject to this variation, the appeal is decreed in full. A fresh decree will be prepared by the office. The period of grace I fix at two months from this date. The appellant will be entitled to proportionate costs against the auction-purchaser throughout. The mortgagor has not appeared before us. Leave to appeal under the Letters Patent is refused.

D.S./R.K. *Appeal allowed.*

Advocate High Court
Jammu & Kashmir
Srinagar.

A. I. R. 1937 Patna 643

AGARWALA AND MADAN, JJ.

Shaikh Mohammad Yasin — Appellant.

v.

Shaikh Fateh Muhammad and *others* — Respondents.

Misc. Appeal No. 95 of 1935, Decided on 30th March 1937, against order of Addl. Dist. Judge, Muzafferpur, D/- 18th February 1935.

Provincial Insolvency Act (1920), S. 51— Part of insolvent's property attached in execution before admission of application for insolvency — Application by decree-holder purchaser for exclusion of property purchased subsequently from list of assets allowed —Other creditor held had no locus standi to appeal.

An application was made by a person for insolvency and before the application was admitted, one creditor attached a part of the insolvent's property in execution of his decree. The property was subsequently sold and purchased by the decree-holder creditor. The purchaser applied to the insolvency Court for amendment of the petition in insolvency by excluding from the list of the assets the property purchased by him. The amendment was allowed. The receiver was not appointed till after the sale. Another creditor preferred an appeal against the order allowing amendment :

Held : that the creditor not being the receiver had no locus standi to maintain an application under S. 51. [P 644 C 1]

A. P. Upadhya and *G. N. Mukharji* — for Appellant.

S. N. Basu, *S. N. Bose* and *Kameshwar Dayal* — for Respondents.

Agarwala, J.—This appeal arises out of the insolvency of one Shaikh Fateh Muhammad. The application for insolvency was made on 4th January 1934 and admitted on 22nd March 1934. In the meanwhile one of the creditors had attached a part of the insolvent's property in execution of a money decree. The applicant in insolvency applied for stay of execution of the sale. This was rejected. The present appellant, another creditor of the applicant for insolvency, then applied to the insolvency Court to direct the executing Court to sell the property and pay the sale proceeds to the insolvency Court for distributing amongst the insolvency creditors. This application was also rejected. The order sheet contains an order by the insolvency Court directing that notice of the application for insolvency should be given to the executing Court. The executing Court proceeded with the sale and the property was sold on 2nd July 1934, and purchased by the decree-holder for Rupees 2,675 which was applied in part satisfaction of the decree. Thereafter the decree-holder, opposite party purchaser, applied to the insolvency Court for amendment of the petition in insolvency by excluding from the list of assets the property which had been purchased at the execution sale. This amendment was allowed by the insolvency Court and it is against that order that the present appeal has been preferred.

So far as the crder of the Court below goes, it is, in my opinion, a correct order. At the time that it was made, the property purchased by the decree-holder creditor had already passed out of the estate of the insolvent and the sale proceeds had been applied in satisfaction of the decree. S. 51, Insolvency Act, however, declares that when execution of a decree has issued against the property of a debtor, no person shall be entitled to the benefit of the execution against the receiver except in respect of assets realised in the course of the execution by sale or otherwise made before the date of the admission of the petition. It was, therefore, open to the receiver who was not appointed until after the execution sale, to take steps to obtain the decision of the Court as to whether the sale proceeds should be made over to him or not. It is still open to the receiver to apply to the Court to re-amend the list of the insolvent's assets by including the proceeds of the execution sale and the Court has ample power under S. 4 of the Act to decide whether those proceeds are available to the receiver. The present appeal therefore fails, inasmuch as the appellant is not the receiver and has no locus standi to maintain an application under S. 51, and is dismissed, each party bearing his own costs. The cross-objection of the opposite party is not pressed and is also dismissed without costs.

Madan, J.—I agree.

S.C./R.K. *Appeal dismissed.*

A. I. R. 1937 Patna 644

JAMES AND DHAVLE, JJ.

Nitai Dutta — Defendant—Appellant.

v.

Ganesh Mahto and *others*, Plaintiffs and *another*, Defendant—Respondents.

Appeal No. 421 of 1933, Decided on 23rd August 1937, from appellate decree of Sub-Judge, Purulia, D/- 9th September 1932.

(a) Execution Sale—Setting aside—Difference between innocent auction purchaser and one tainted by fraud stated.

There is a difference between an innocent purchaser and one tainted by fraud which has brought about the execution sale. The question is, in the former case, which of two innocent parties shall suffer ; in the latter, whether he who has wronged the other party shall be allowed to enjoy the fruits of his wrongdoing. A Court exercising equitable jurisdiction may withhold its hand in the one case, and yet set aside the sale with or without terms in the other : *10 M I A 454 (P C), Foll.* [P 645 C 1]

(b) Chota Nagpur Tenancy Act (6 of 1908), S. 213-A — Applicability — Suit for setting aside decree on ground of fraud is not suit under Chota Nagpur Tenancy Act and hence S. 213-A does not apply.

Section 213-A, Chota Nagpur Tenancy Act, is confined to cases where a decree for rent is set aside under the Chota Nagpur Tenancy Act; but a suit for setting aside a decree on the ground of fraud, though saved by S. 258 of the Act, is no more a suit under the Act than a suit for a declaration that a sale held in execution of a rent decree has been fraudulently confirmed and for recovery of possession, which is saved by S. 214 of the Act. S. 213-A is therefore inapplicable to such a suit : *A I R 1926 Pat 401, Rel. on.* [P 646 C 1]

A. B. Mukharji — for Appellant.

James, J.—The suit out of which this appeal arises was instituted to set aside an ex parte rent decree, and the sale of a holding in execution under S. 208, Chota Nagpur Tenancy Act, on the ground of fraud. The trial Court and the lower Appellate Court have found that the suit was fraudulent ; that the rent had been deposited by the tenant to the knowledge of the landlord ; and that service of processes was fraudulently suppressed in the suit and in the execution proceedings. The sale has therefore been set aside and the plaintiffs have been restored to possession of their holding. On the question of whether the proceedings in the suit and in the sale were vitiated by fraud, the matter is concluded by the findings of fact of the learned Subordinate Judge.

Mr. Abani Bhusan Mukharji on behalf of the auction-purchaser argues that a suit cannot be instituted to set aside a sale held under S. 208, Chota Nagpur Tenancy Act, on the ground of fraud. He relies upon the decision of this Court in 8 P L T 688.[1] In that case an application had been made under S. 213, Chota Nagpur Tenancy Act, to set aside the sale on the ground of fraud, which had been decided against the person who subsequently attempted to institute a suit. It was held that after this had happened, a suit could not be instituted to set aside the sale on the ground of fraud, unless fraud or want of jurisdiction could be proved as affecting the proceedings under S. 213 of the Act. In the same way a person who applies under O. 9, R. 13 to set aside an ex parte decree, with the result that there is a definite finding against him that sum-

1. Gosain Das-Baishnab v. Gopal Singh, A I R 1927 Pat 382=106 I C 430=8 P L T 688.

mons has been properly served, will find that decision acting as res judicata to bar a subsequent suit based on the allegation that service of process has been fraudulently suppressed. In the present case, it appears that the proceedings in the suit and execution did not come to the knowledge of the plaintiffs until long after the period of limitation prescribed by S. 213 of Chota Nagpur Tenancy Act had expired. The right to institute a suit to set aside a sale on the ground of fraud or want of jurisdiction is expressly saved by the provisions of S. 214 of the Act. Mr. Abani Bhusan Mukharji argues that the innocent auction-purchaser ought not to be penalised by loss of his purchased property without compensation, since there is no finding of the lower Appellate Court that he was party to the fraud. In such cases the rule laid down by the Judicial Committee of the Privy Council in 10 M I A 454[2] at p. 473 will prevail. Sir James Colvile delivering the judgment of their Lordships observed in that case :

> The proposition that no difference is to be made between an innocent purchaser and one tainted by the fraud which has brought about the execution sale seems to them to be wholly untenable. The question is, in the former case, which of two innocent parties shall suffer ; in the latter, whether he who has wronged the other party shall be allowed to enjoy the fruits of his wrongdoing. A Court exercising equitable jurisdiction may withhold its hand in the one case, and yet set aside the sale with or without terms in the other.

I do not know that it can be said that where a fraud has been proved throughout the proceedings in the suit, and in the sale, the Revenue Officer can be said to have had any jurisdiction at all under S. 208, Chota Nagpur Tenancy Act, but if the Court had to choose between two innocent parties, I consider that there can be no doubt regarding the correctness of the decree of the Munsif in the present case. The learned Munsif was apparently considering this aspect of the case when he remarked with such scorn on the appellant's claim to consideration as to bona fide purchaser for value. The appellant purchased 15·91 acres for Rs. 150 in March 1930. He permitted the tenant to grow his crop on the land, taking delivery of possession exactly at the time when the crop was ready for harvesting. If the sale had been set aside on application under S. 212 of the Act, the auction-purchaser would have been entitled to be paid Rs. 157.8.0 ; but he must have realized far more than this immediately on taking possession of the holding. Any Court of equitable jurisdiction having to decide between these parties would properly have decided as the learned Munsif decided, that the innocent raiyat was entitled to be restored to his holding. There is no merit in this appeal which must be dismissed.

Dhavle, J.—I agree. In support of the contention that the appellant, against whom no participation in the decree-holder's fraud has been established, ought not to be penalised, Mr. Mukharji has cited 10 All 166[3] and 26 Bom 543.[4] The former was however a case in which there was no fraud either in obtaining the original decree or in the execution sale, so that it became unnecessary for Sir Barnes Peacock, who delivered the judgment of the Judicial Committee, to deal with (1868) Beng L R Sup Vol. 911[5] which had been cited by Mr. Cowie for the appellant and in which the judgment of the Full Bench had been given by Peacock, C. J. himself. In the case in 26 Bom 543[4] the ex parte decree was found to have been obtained by fraud, but the execution purchaser was not proved to have been a party to the fraud, and what was decided was that the sale could not be set aside merely on the ground of inadequacy of price fetched at the execution sale. That was not a case where, as in the present case, the execution sale was found to have been vitiated by fraud.

The distinction was elaborately considered by Mookerjee, J. in 27 C W N 587[6] where it was held that an execution which has been brought about by the fraud of the decree-holder is liable to be set aside on that ground even though it is not established that the auction-purchaser has participated in or has been cognizant of the fraud. If the sale is set aside, then the question arises whether or not the auction-purchaser who was not a party to

2. Lalla Bunseedhur v. Koonwur Bindeseree Dutt Singh, (1863-66) 10 M I A 454=2 Sar 167 (P C).

3. Zain-ul-Abdin v. Muhammad Asghar Ali Khan, (1888) 10 All 166=15 I A 12=5 Sar 129 (P C).

4. Chitamber v. Kristnappa, (1902) 26 Bom 543 =4 Bom L R 249.

5. Abdul Haye v. Nawab Raj, (1868) Beng L R Sup Vol. 911=9 W R 196 (F B).

6. Bireswar Ghose v. Panchcouri Ghose, A I R 1923 Cal 538=74 I C 975=27 C W N 587= 37 C L J 145.

the fraud is entitled to the return of the money paid by him. Mr. Mukharji has referred to S. 213-A, Chota Nagpur Tenancy Act, which provides for restitution to the auction-purchaser among others "where a decree for rent is set aside" with the consequence that any sale of immoveable property in execution of such decree is, according to that section, "deemed to be set aside." This section, however, seems to be confined to cases where a decree for rent is set aside under the Chota Nagpur Tenancy Act; but a suit for setting aside a decree on the ground of fraud, though saved by S. 258 of the Act, is no more a suit under the Act than a suit for a declaration that a sale held in execution of a rent decree has been fraudulently confirmed and for recovery of possession, which is saved by S. 214 of the Act : *see* 5 Pat 759.[7] S. 213-A is therefore of no assistance to the appellant, to say nothing of the difficulty caused by the fact that the section requires "the Court of first instance" to make restitution. The matter must therefore be dealt with on general principles and in the light of the consideration whether it will be in accordance with the principles of justice, equity and good conscience that the auction-purchaser should have his money paid back to him. I entirely agree with my learned brother that in the present case the auction-purchaser, though technically innocent, has no claim to consideration as against the judgment-debtor.

D.S./R.K. *Appeal dismissed.*

7. Rameshwar Narain Singh v. Mahabir Prasad, A I R 1926 Pat 401=96 I C 529=5 Pat 759 =8 P L T 124.

A. I. R. 1937 Patna 646

ROWLAND, J.

Basudeo Lal — Complainant — Petitioner.

v.

Bindeshri Prasad and *others* — Accused—Opposite Party.

Criminal Revn. Petn. No. 321 of 1937, Decided on 13th August 1937, from order of Sub-Deputy Magistrate, Beguserai, D/- 8th May 1937.

(a) Penal Code (1860), S. 427 — Mortgaged property (buildings with vats) sold in execution and purchased by mortgagee decree-holder — Mortgagors demolishing property and removing vats and materials before confirmation of sale—Offence held amounted to mischief.

Certain mortgaged property was sold in execution and purchased by the mortgagee decree-holder. Property consisted of land and buildings which contained vats for manufacturing indigo. Before the sale was confirmed, the mortgagors demolished the building and removed the vats and materials. The accused were acquitted of an offence under S. 427, Penal Code, on the ground that the sale was not confirmed and that as the vats were standing idle the manufacture being discontinued, there was no offence in destroying them :

Held: that the vats were also property sold and their destruction was an offence under S. 427. The fact that the sale was not confirmed made no difference in the legal position. [P 647 C 1]

(b) Criminal P. C. (1898), S. 439—Acquittal —Interference with.

The High Court does not ordinarily interfere in revision with judgments of acquittal unless there has been a gross error or grave injustice. (High Court did interfere in this case.) [P 647 C 1]

Kapildeo Narain Lal and *Ramanugrah Prasad*—for Petitioner.

D. C. Varma and *Kameshwar Dayal*—for Opposite Party.

Order.—The petitioner was the complainant who alleged that the opposite party had committed offences punishable under Ss. 206 and 427, Penal Code, and the opposite party, who are four in number, were put on their trial under S. 427, Penal Code, before a Sub-Deputy Magistrate with second class powers. They were not put on their trial for the alleged offence under S. 206 because the alleged offence was said to have relation with proceedings in a Civil Court and the Civil Court had not instituted any complaint. The complainant is the agent of a party who held from the opposite party mortgage of certain property and obtained a preliminary decree on his two mortgages in 1932 and a final decree in April 1936 for sale of the mortgaged properties in pursuance of which sale was held on 19th December 1936, and the petitioner's master became the purchaser. The properties were some land and buildings standing thereon, and it is said that on 10th January 1937 the opposite party with labourers were getting vats and pressing house demolished and materials removed. On protest by the petitioner, two of the opposite party threatened to beat him and chased him away. The Magistrate thought that as manufacture of indigo has been discontinued for some years and the vats had been standing idle, it was not an offence of mischief to destroy them. He was also influenced by the fact that the sale in favour of the petitioner's

master had not yet been confirmed and become final. He observed slight discrepancies in the prosecution evidence as to the particular acts to be ascribed to individual accused and he thought the prosecution case to be doubtful and acquitted all the accused. The learned Magistrate does not appear to have observed Illus. (d) to S. 425, Penal Code, which runs thus:

A, knowing that his effects are about to be taken in execution in order to satisfy a debt due from him to *Z*, destroys those effects, with the intention of thereby preventing *Z* from obtaining satisfaction of the debt, and of thus causing damage to *Z*. *A* has committed mischief.

It made no difference therefore that the sale had not been confirmed and indeed it would have made no difference to the legal position if the sale had not yet taken place. In fact the petitioner's master had acquired an interest in the property long ago at the very time when the mortgage in his favour was executed, for a mortgage is stated in S. 58, T. P. Act, to be the transfer of an interest in specific immoveable property. The sale proclamation shows that along with the land and the bungalow, the outhouses and vats were also sold, and it is not clear how anyone could imagine that the vats were not property and that demolition and removal of the vats was not destruction of the property.

The learned Magistrate seems to have made for the accused a defence which they did not set up for themselves at the trial. They in their written statement have nowhere denied their presence at the place where the alleged demolition of masonry was proceeding, and if they had, it would have been simple for the prosecution to examine as a witness (which ought in fact to have been done) Mr. N. N. Ganguli, Sub-Deputy Magistrate, who made a local inquiry on 14th January 1937, and found that some of the accused persons were in fact present and supervising the demolition and removal of these masonry vats by labourers in their presence. The Magistrate was quite wrong in his opinion that the dispute was only a civil one and has not appreciated the questions which it was for him to try. Although this Court does not ordinarily interfere in revision with judgments of acquittal, unless there has been gross error or grave injustice, I think this is a case in which I cannot allow the order of the Magistrate to stand. The acquittal is set aside and a retrial ordered. It would perhaps be as well if arrangements were made for the hearing to be before a more experienced officer, but I leave that to the discretion of the District Magistrate.

S.C./R.K. *Retrial ordered.*

A. I. R. 1937 Patna 647

WORT AND VARMA, JJ.

Phulchand Ram Marwari and *another* — Judgment-debtors — Petitioners.

v.

Naurangi Lal Marwari — Decree-holder — Opposite Party.

Civil Revn. Petn. No. 238 and Misc. Appeal No. 71 of 1937, Decided on 18th August 1937, from order of Sub-Judge, Bhagalpur, D/- 12th December 1936.

(a) Civil P. C. (1908), S. 151—Compensation —Maxim "caveat emptor" applies to Court sale—Decree against father and minor sons—Decree-holder purchasing property in execution—Subsequently decree against minor sons set aside and half property released—No compensation held could be given to decree-holder under S. 151.

A decree-holder purchasing the property of the judgment-debtor is in the same position as any other auction-purchaser. His position is not more favourable but less favourable than that of a third party, because the sale is held at his instance and presumably it is he who supplied to the Court the particulars of the property published in the sale proclamation. The principle is that, apart from the case provided by O. 21, R. 91, Civil P. C., and apart, of course, from fraud, a purchaser at an auction sale must abide by his bargain. What is sold and bought is the right, title and interest of the judgment-debtor in the property. The Court which sells the property does not guarantee the title and the maxim "caveat emptor" applies. [P 649 C 1]

A decree was obtained against father and minor sons. The joint property of the father and sons was sold in execution and purchased by the decree-holder and full satisfaction entered. The minor sons brought a suit claiming that the decree was not binding on them. The suit was decreed and half the property sold was released. The decree-holder purchaser applied under S. 151, Civil P. C., for compensation to the extent of half the amount of purchase money:

Held: that the maxim "caveat emptor" applied and the decree-holder was not entitled to compensation against the judgment-debtor: *A I R 1921 Cal 115, Rel. on*; *A I R 1933 All 218, Disting.* [P 649 C 1; P 650 C 2]

(b) Decree — Setting aside — Effect of.

When a decree is held not binding on a person, then it must be assumed that there is no such decree. [P 649 C 2]

(c) Civil P. C. (1908), S. 115—Error of law —Jurisdiction.

A decision on a point of law may be interfered with in revision if in fact the question of jurisdiction does arise. [P 651 C 1]

A. B. Mukharji and *S. N. Banarjee* — for Petitioners.

Dr. Dwarka Nath Mitra, *S. N. Sahay* and *K. P. Sukul* — for Opposite Party.

Wort, J.—The Subordinate Courts of this province seem inclined from time to time to interpret S. 151, Civil P. C., as giving them power which under the general law they do not possess; in other words, there is a tendency to do what is sometimes called, and erroneously called, 'substantial justice' though as a matter of fact it often amounts to injustice. In this case the learned Judge in the Court below has exercised what he believes to be his powers under the section in giving compensation to the decree-holder under the following circumstances. The decree-holder i. e. the respondent to this application, obtained a decree against the father and sons. I should have stated that the decree was a compromise decree. The conditions of the compromise not having been complied with, the decree-holder exercised his rights by putting the decree into execution, and in pursuance of that, put up for sale the joint property of the father and of the sons. In due course, the property was sold and the decree-holder respondent having had leave to bid purchased the property for upwards of Rs. 7,000. Then in due course, after the statutory period had elapsed, the sale was confirmed and full satisfaction was entered.

Then there started an action by the minors claiming that (for reasons which perhaps need not be gone into in this appeal) the compromise decree was not binding upon them. That action succeeded. The result of that was that their eight annas interest in the property which had been put up for sale was released. But the decree stood, that is to say the decree stood against the father as a joint and several decree and the sale stood as a whole; the sale itself was not affected—I use the expression 'sale' in contradistinction to 'property' although eight annas of the property was necessarily released. Then this application was made by the decree-holder respondent for compensation to the extent of half of the amount purchased by him. I should have stated, however, that before this application was made, an application had been made for execution which resulted in an appeal from the decision of the Subordinate Judge of Bhagalpur to this Court. The appeal came on for hearing before my Lord the Chief Justice and my learned brother Varma (Misc. Appeal No. 285 of 1934 reported in 16 P L T 906.[1]) There it was decided, to use the words of the head-note, that

> The decree-holder could not take out further execution of the decree which had already been satisfied. It was immaterial that in his capacity as auction-purchaser he had purchased the property of someone which was not liable under the decree.

I would add to my statement that there was an observation in that case which fell from the learned Chief Justice to the effect:

> It would be for the decree-holder, if he had some other remedy, to pursue that remedy as he might be advised.

Some reliance has been placed upon those words as if deciding that the decree-holder has now a remedy which he has successfully pursued in the Court of the Subordinate Judge. I have already stated that after the hearing of that appeal in this Court, this application under S. 151 for compensation was made. I must say that I had some difficulty in coming to a conclusion in this case having regard to what I believed to be the decision of the Allahabad High Court in 55 All 221.[2] Without referring at the moment to the facts, it was stated there that the decree-holder in circumstances not dissimilar from the present (although I shall point out in a moment that there were certain facts in that case which do not exist in the case before us) was entitled to compensation. Now I refer for the moment to the authority in 25 C W N 756,[3] upon which Mr. Mukharji, on behalf of the appellants, strongly relies. A statement of facts of that case would disclose the position in this case, unless it can be shown that on the facts there is any difference in principle between the cases, to put it more correctly, whether the facts of this case as compared with those of the case reported in 25 C W N 756 [3] in any way would modify the principle there laid down by the learned Judges. The action there which gave rise to the proceedings was a mortgage action. The property was put up for sale in execution of a mortgage decree. Certain persons claimed that certain property which was put up for sale in execution of the decree was not the property of the judg-

1. Phulchand Ram v. Naurangi Lal, (1935) 16 P L T 906=164 I C 1073.
2. Amba Lal v. Ramgopal Madhoprasad, A I R 1933 All 218=144 I C 492=55 All 221=1933 A L J 60.
3. Abinash Chandra Kar v. Bhuban Chandra, A I R 1921 Cal 115=63 I C 126=25 C W N 756.

ment-debtor, and it was so decided. The result was that the decree-holder who himself was the purchaser obtained, to state it briefly, less than what he thought he would obtain from the purchase which he had made. Richardson, J. in the course of his judgment makes a statement of the case which I think is valuable for the purposes of considering the argument advanced in this case. The learned Judge says :

> I apprehend, when a decree-holder has obtained leave to bid and has purchased the property of the judgment-debtor, he is, generally speaking, in the same position as any other auction-purchaser.

He then refers to 16 I A 107[4] :

> For the present purpose his position seems to me not more favourable but less favourable than that of a third party, because the sale was held at his instance and presumably it was he who supplied to the Court the particulars of the property published in the sale proclamation. The principle, as I understand, is that, apart from the case provided by R. 91, and apart, of course, from fraud, a purchaser at an auction sale must abide by his bargain. What is sold and bought is the right, title and interest of the judgment-debtor in the property. The Court which sells the property does not guarantee the title and the maxim caveat emptor applies.

Now it is not denied that if the facts of that case were the same as those in the case before us to-day, there could be no dispute that the principle laid down by the learned Judge in that case would apply to this one. But it is contended that although generally speaking the principle caveat emptor does apply to Court sales, the facts in this case are such as to make the principle inapplicable. Now the only fact which can be referred to as differentiating the case from 25 C W N 756 [3] is the fact that the property which has been released from sale is the property of the persons who were in the first instance parties to the action, and it is stated by Dr. Mitra and great reliance, as I understand his argument, is placed upon the statement that at the time of the sale there was a decree against these persons and therefore at that time it was right and proper that the property should have been put up for sale : to put it in other words, the property was the property of the judgment-debtors. Now I could appreciate the argument that if the statement of facts to which I have made reference is a statement of anything other than the mere history of the case, it may be possible to hold that the principle caveat emptor does not apply. But we must look at the case from the point of view of the facts as they stand at the present moment.

It is contended by Mr. Mukharji on behalf of the appellants that the original decree stands. I am not sure that I am altogether in agreement with that contention. So far as Mr. Mukharji's client, the father, is concerned, there is no doubt that the decree does stand ; but the effect of the judgment in the action which was brought by the minors is that the decree is not binding upon the minor defendants in that action. But it is quite clear, whether Mr. Mukharji's contention is valid or not, that at the present moment we must consider this case as if there had been no decree against the minor sons. And in my judgment, when that is stated, all that can be said about the facts relating to the action brought by the minors for the purpose of having a declaration to the effect that the decree is not binding on them, is mere history, and does not affect the principle caveat emptor. That being so, it is perhaps wise to lay down one or two principles to clear away the dealings in the authority which has been relied upon. It is quite clear in the first instance that had the decree-holder purchased property which eventually turned out to be less valuable than he had anticipated, then as Richardson, J. pointed out, in the absence of fraud there could be no claim for compensation. It is equally true that had the facts of the present case been similar to those in the case reported in 25 C W N 756,[3] and I understand Dr. Mitra to agree to the proposition that the principle laid down there would apply. Now having regard to that statement it seems to me that the only question one has to consider in this case is whether the fact that the minors, being originally parties to the action, in any way alters or modifies the principle which is to be applied. As I have already stated, that fact is nothing more than a part of the history of the case, and we are to deal, and indeed bound to deal, with the case as if no decree had ever been passed against the minors. If a decree is held not binding on a person, then it must be assumed that there is no such decree. That being so, the only question in my judgment to consider is the decision in 55 All 221[2] to which I have already referred. Glancing at the judgment it would appear at first sight that the

4. Mahabir Pershad v. Macnaghten, (1889) 16 Cal 682=16 I A 107=5 Sar 345 (P C).

learned Judges in that case in some way modified the principle which in that case had been held to be applicable to Court sales, namely, the principle caveat emptor, and there is some discussion which would perhaps to some extent bear that statement out. But the learned Judges at page 230 of the report make the statement:

> We are not unaware of the fact that the rule that the doctrine of caveat emptor applies to Court sales has been laid down in a series of cases, but we may point out that the application of that doctrine has undoubtedly the effect of negation of justice in many cases.

With great respect to the learned Judges I fail to see how the application of the doctrine caveat emptor can do injustice. If a person purchases a property under circumstances in which the principle caveat emptor applies, he does so at his own risk as the principle suggests, and if he suffers loss he has himself alone to blame. But one need not go into a very detailed discussion of that case, because on analysis it will be seen that the learned Judges there were dealing with a case which is almost entirely different from the case which we have before us to-day. Indeed, if any inference is to be drawn from the facts of the case, it is an inference against the respondent-decree-holder rather than in his favour. I will endeavonr to make myself clear on this point by stating the facts of that case. There the decree-holder had purchased certain properties which after various pieces of litigation were held to be the properties of persons other than the judgment-debtor. On the footing of the price which he paid for the whole of the property, rateable distribution had been made between him and other decree-holder who had decrees against the same judgment-debtor. The result of the litigation being what it was, that is to say that the person had successfully claimed certain of the properties which had been put up for sale, the decree-holder made a claim which was the subject matter of the case against the other decree-holders on the footing that a larger sum than they were entitled to, having regard to the events which had happened, had been distributed to them, and a refund was claimed and the question which the learned Judges decided there was whether S. 144, Civil P. C., was exhaustive and whether compensation could be made under S. 151.

I now come to the point which I stated before I referred to the facts of the case. The very fact that the decree-holder who had purchased in the Court sale was claiming against his fellow decree-holders is a suggestion that he could not have made the claim against the judgment-debtors. Now the case in 55 All 221[2] does not in any way affect the principle which is to be applied to the facts of this case. I have already stated and repeat that at first sight it did appear to be strongly in support of the respondent in this case. The learned Judges in that case made reference to an earlier decision of their own Court, namely, that in 53 All 496,[5] which was in substance the application of the principle laid down in the case reported in 25 C W N 756[3] to which I have already referred. It is sought of course in this case to apply S. 144, Civil P. C., by analogy. It is admitted that S. 144 does not apply, but it is said it gives some indication that the Court may in the exercise of its powers under S. 151, Civil P. C., give compensation in proper cases. But if S. 144 is to be treated in any way as an analogy, the compensation which the decree-holder would seek in this case should be against the sons and not against their father. On what principle, it may be asked, can the decree-holder be entitled against the judgment-debtors against whom he has already got a judgment and whose property he has sold. It seems very difficult to discover any principle upon which the decree-holder would be entitled to compensation against the present judgment-debtors. In no sense were the judgment-debtors at fault. They did not put the property up for sale. They had nothing to do with the sale proclamation, but the property had been sold by the Court. They have had the advantage which perhaps may work out in this case as an unjust advantage of the decree being entered as fully satisfied under the execution.

In my judgment, neither on principle nor on authority is the decree-holder entitled to compensation against the judgment-debtors and, as has been already held, the decree-holder is not entitled to take further execution against them. For those reasons, in my judgment, the decision of the learned Judge was erroneous and must be set aside. I would add that the application was under S. 115, Civil P. C., and it was contended by Dr. Mitra in the course of his

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5. Anand Krishna v. Kishan Devi, A I R 1931 All 377=132 I C 417=53 All 496=1931 A L J 228.

argument that what the learned Judge in this case has decided is a question of law. Speaking for myself, had I been satisfied that it was merely a question of law that the Judge had decided, certainly there would be one fate of this application, as the learned Judge had jurisdiction to decide a question of law rightly or wrongly. But the substantial question in this case is whether he had jurisdiction to make this order under S. 151, and, as their Lordships of the Privy Council have pointed out, a decision on a point of law may be interfered with if in fact the question of jurisdiction does arise. The proper order therefore to make is that the Rule nisi is made absolute, the judgment of the learned Judge in the Court below is set aside with costs, and we allow hearing-fee to the extent of five gold mohurs.

Varma, J.—I agree.

S.C./R.K. *Rule made absolute.*

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* A. I. R. 1937 Patna 651

WORT AND VARMA, JJ.

Debi Bux — Petitioner.

v.

Rameswar Prasad Narain Singh and *others* — Opposite Party.

Civil Revn. Petn. No. 74 of 1937, Decided on 1st September 1937, from order of Sub-Judge, Second Court, Gaya, D/- 15th January 1937.

*** (a) Civil P. C. (1908), S. 73—*X* and *Y* obtaining simple money decrees against *A*—*X* attaching preliminary mortgage decree obtained by *A* against *B* in execution—*X* thereafter continuing mortgage suit and selling mortgaged property — *Y* applying for rateable distribution — *Y* held entitled to rateable distribution.**

A obtained a preliminary decree against *B* in his mortgage suit. *X*, a creditor of *A*, attached the preliminary decree in execution of his money decree against *A*. Thereafter *X* joined in the mortgage proceedings and obtained a final decree against *B* and sold his mortgaged property in execution of the same. *Y*, who had also obtained a money decree against *A* at the same time as *X*, applied for rateable distribution :

Held : that the sale-proceeds of the property which was sold under the decree that was attached were the assets in the hands of the Court and *Y* was entitled to rateable distribution.

[P 652 C 2]

(b) Civil P. C. (1908), S. 115—Question of jurisdiction—Interference with question of law or fact (*Wort, J.*)

Wort, J. — The High Court has jurisdiction under S. 115, Civil P. C., to interfere in a question of law or fact where a matter of jurisdiction arises.

[P 652 C 1]

S. M. Mullick and *K. K. Banarji* — for Petitioner.

A. B. Mukharji and *Rajkishore Prasad* —for Opposite Party.

Wort, J.—This is an application under S. 115, Civil P. C., against the order of the Subordinate Judge allowing rateable distribution in the following circumstances. Mr. Sushil Madhab Mullick who appears on behalf of the appellant, has stated the facts in the following convenient way : *A* obtains a preliminary decree against *B*. *X* who is the appellant in this case obtains a money decree against *A*, and *Y*, the respondent represented by Mr. Mukharji, also obtains a money decree against *A*. *X* the appellant attaches the preliminary mortgage decree and presumably under O. 22, R. 10, Civil P. C., is allowed to proceed in the mortgage action and obtains a final decree against *B* for sale of the property. He proceeds to sell the property in execution of the final mortgage decree which he obtained. Then *Y* comes along with this application under S. 73, Civil P. C. asking for rateable distribution. We have listened to attractive arguments on both sides and it is a somewhat difficult matter to arrive at a conclusion. Mr. Mullick's argument shortly is that what is being sold here is not the preliminary decree which was attached, and the proceeds which will result from the sale of the mortgaged property are not the proceeds or assets within the meaning of S. 73 of the Code, as a result of the sale of the decree ; but what is being sold is the mortgaged property as the result of the final decree which Mr. Mullick's client (the appellant) obtained in pursuance of the attachment which I have already mentioned.

On the other hand it is contended on behalf of the respondents that what is being sold is the property of the judgment-debtor *A*, and the fact that the appellant was allowed to proceed to obtain a final decree is nothing more than the machinery which under the law he was allowed to adopt for the purpose of bringing the assets into the Court, and furthermore that the appellant, as a decree-holder in a simple money suit against *A*, cannot advance or strengthen his position by the procedure which he has adopted in this case in obtaining the final decree in the mortgage suit ; in other words, had he been—indeed it is argued that he did

remain as—a simple money decree-holder, there would have been no question about the respondents' right to rateable distribution and nothing has happened which prevents that right being exercised. Of the two views I am rather inclined to accept the second. One cannot lose sight of the fact that originally he had a simple money decree against *A* and in justice his right should depend upon the rights which he had as a simple money decree-holder against *A*, and not any rights which he may have now acquired.

But I propose to decide the matter on another ground. My view of S. 115, Civil P. C., is well known, and I cannot see that in this case any question of jurisdiction arises. Mr. Sushil Madhab Mullick has quoted a number of authorities and referred to a decision of their Lordships of the Privy Council in which they have held by inference that the High Court has jurisdiction to interfere in a question of law or fact where a matter of jurisdiction arises. Personally I have never doubted that position of law; but in my judgment the appellant here is confusing the right of the respondent to rateable distribution with the right of the Judge to decide the question. It would have been impossible for either side to put in a preliminary objection that the Judge had no jurisdiction to decide the question of rateable distribution, and certainly had the case been decided in favour of the appellant, we would have heard nothing more about the matter. The Judge in my opinion had jurisdiction to decide the question and I think, although it is obiter so far as my decision is concerned, that he decided the case rightly. In my view therefore the application is dismissed with costs : hearing fee five gold mohurs payable to respondent 1.

Varma, J. — I agree. The petitioner before the lower Court applied for rateable distribution in the following circumstances. Three persons, Baleswar, Basdeo and Rajkumar, filed mortgage suit No. 66 of 1927 and obtained a preliminary decree against one Mathura Prasad Singh and others on 20th January 1929. Debi Bux, the client of Mr. Mullick who was the creditor of Baleswar Basdeo and Rajkumar, got this preliminary decree attached. There was another set of creditors, Rekhchand and Ramanand, who also got the decree attached for their share. The decree-holders in the mortgage suit who had obtained a preliminary decree did not show enough enthusiasm to have a final decree passed and then at the request of the attaching creditors the decree was made final on 17th February 1936. Debi Bux executed his decree on 9th July 1936 and Rekhchand and his son were added as decree-holders also by the order of 15th September 1936. The sale proclamation was issued on 9th October 1936 and 8th January 1937 was fixed as the date for sale.

In the meantime Rameswar Prasad, Mr. Mukharji's client, who was a decree-holder in Execution Case No. 213 of 1936, applied on 19th December 1936 under S. 73, Civil P. C. The question here is whether he is entitled to apply for rateable distribution as against Debi Bux. Both of them are creditors of Baleswar, Basdeo and Rajkumar and the decree of the judgment-debtors was attached originally at the instance of Debi Bux. Now, that is an asset in my view held by the Court, but the argument of Mr. Mullick is that rateable distribution that is now being claimed is not by the sale of the decree obtained by Baleswar, Basdeo and Rajkumar but by sale of the property which was the subject matter of the mortgage on the basis of which the mortgage decree was obtained. The method by which Debi Bux came to execute the mortgage decree of his judgment-debtors is only a method of procedure. The question is whether the property which was sold under the decree that was attached can be considered to be an asset in the hands of the Court. If the decree is an asset, in my view its money-equivalent, after various processes of the Court have been taken recourse to, would also amount to assets which would still remain the property of the judgment-debtors. I am of opinion that the judgment of the Court below is right and I would dismiss this application with costs.

K.B./R.K. *Application dismissed.*

A. I. R. 1937 Patna 652

VARMA AND ROWLAND, JJ.

Emperor.

v.

Sheo Chandra Prasad — Accused.

Criminal Ref. No. 5 of 1937, Decided on 28th July 1937, made by Offg. Addl. Sess. Judge, Patna, D/- 28th May 1937.

Criminal Trial—Homicide or suicide—Body of deceased with face downwards and having one severe and other minor throat wounds — Case held of suicide.

Where the body of the deceased was found lying flat with its face downwards and having several throat wounds caused by razor but only one of them being severe :

Held : that the position of the body and the nature of the wound indicated that the wound was suicidal and not homicidal. [P 654 C 2]

Advocate General — for the Crown.

S. N. Sahay — for Accused.

Rowland, J.—This is a reference by the Additional Sessions Judge of Patna, under S. 307, Criminal P. C. The accused before him was Sheo Chandra Prasad a student of the XI or Matriculation Class, aged 18. The charges on which this accused had been committed to the Court of Session were that on 4th September 1936, he had murdered a fellow student Rajjan aged 15 or 16 years by cutting his throat with a sharp knife or razor, that on the night of 4th/5th September 1936, he had murdered another fellow student Ramlakhan aged about 20 years by cutting his throat in a similar manner and that at about the same time he had attempted to commit suicide by cutting his own throat. There were seven jurors and their verdict on the first charge was unanimous one of not guilty, on the second a verdict of not guilty by a majority of 5 to 2, and on the third a verdict of not guilty by a majority of 5 to 2. The learned Judge has referred the case, being of opinion that on the first charge the verdict of the jury was not unreasonable, and that on the second and third charges it is contrary to the plain weight and effect of the evidence and should not be supported. The accused and the two deceased students were, according to the evidence, on very friendly terms with each other and used to go about together. On the evening or late afternoon of 4th September 1936, they were seen all three in conversation together. Later Ramlakhan left the other two who went out together. After this Sheo Chandra returned alone and Rajjan was not again seen alive, his body was found next morning lying in a field with throat cut. That is practically all the material we have in respect of the first charge, namely, that Sheo Chandra was the last person seen in the company of Rajjan before his death and the finding of Rajjan with his throat cut. The doctor who examined the body of Rajjan was of opinion that the injury was homicidal. He has not elaborated his reasons for this view, and the question whether the injuries found on Rajjan could have been suicidal was not definitely put to him. But in the description of the injuries which we get from the medical evidence and the post mortem report, we have not been able to find anything inconsistent with their having been suicidal.

In Lyon's Medical Jurisprudence for India (Edn. 9th, p. 230 onwards) attention is directed to the methods by which homicidal and suicidal throat-wounds are ordinarily distinguished. It is said that if more than one severe wound is present, the case is usually one of murder; a suicide may make more than one wound but only one of these will be severe. Again, self-inflicted wounds are usually less severe and deep, and inference can sometimes be drawn from the position in which the body is found. It is said that an intending suicide seldom cuts his throat while lying in bed: he usually does so in the erect or sitting position, and on the supervention of unconsciousness, he collapses to the floor and probably turns over on his face. A body stretched out in bed with a wound on the throat suggests murder during sleep; one on its back on the floor makes one think of the possibility of homicide in which more than one person has had a hand; a body, face downwards, is almost certainly of a suicide. The position of the body is not of course an absolute indication of the nature of the case but must be considered along with other circumstances. The body of Rajjan was found lying on its face. There was a single incised wound about 5″ x 2″ x muscle deep on the right side of the neck cutting the trachea, larynx, oesophagus and the right cornea of the hyoid bone, grazing up to the vertebrae, and cutting the intervening muscles and the external carotid artery. Everything here is consistent with the injury which caused death being suicidal.

Turning to the next charge, the prosecution has rather more circumstantial evidence as to the movements of the accused and the deceased. It is proved by direct evidence that they both went to sleep in the same room, that three other students, Shamdeo, Kapildeo and Debendra were sleeping in the same room, that Debendra was roused about 3 in the morning by something touching his leg and he

raised an alarm of thief. This brought to the place the head master with a torch. No one was seen leaving the room and in face of the evidence that the doors were shut, it is difficult to imagine how any outsider could have got in or got out without leaving clear marks of his passage. It is true that the head master in laying his first information framed it as an information of murder against some one unknown, but the facts found as regards the state of the doors seem to me to exclude the possibility of this being the work of any outsider. The theory which the prosecution set up was that Sheo Chandra first cut the throat of Ramlakhan and then his own. Reliance is placed on medical evidence in the course of which the doctor has given his opinion that the injury on Ramlakhan was homicidal and that on Sheo Chandra suicidal. We have considered the descriptions of these injuries in the medical evidence in the light of the observations from Lyon's Medical Jurisprudence, which I have already cited. The inquest report on Ramlakhan Singh shows that his body was found lying flat with face downward on the floor of the room, so also we learn from the Sub-Inspector, was the position of Sheo Chandra himself. The two were lying close together. Ramlakhan besides a skin deep cut on the right middle finger had two incised wounds on the neck, one of these was 1" x $\frac{1}{4}$" x skin deep, and the other was the severe one which caused his death, i. e. an incised wound 5" x 1 $\frac{1}{2}$" x muscle deep on the right side of the neck cutting the larynx and trachea laterally muscles and platina of the right side of the neck, and external carotid artery being divided one vertebra was grazed. The description fits exactly with the characteristics which, according to Lyon are to be found in suicidal injuries, and it is impossible to say that the evidence excludes or indeed renders improbable the view that Ramlakhn may have committed suicide. The third charge is in respect of the accused's own alleged attempt to commit suicide. It is in evidence that he like Ram lakhan was found lying on his face on the floor. The razor was on the floor about one cubit distant from his right hand. There were three injuries on the neck of which two were incised wounds skin deep and the third was an incised wound on the front of the neck about 5" x 1 $\frac{1}{2}$" x muscle deep cutting the larynx and oesophagus and fracturing the cornea of the right hyoid bone. It can hardly be coincidence that these injuries should agree so closely with this observation of Lyon :

> A suicide may make more than one wound, but only one of these will be severe, the remainder will be tentative cuts made while he was screwing up his determination to the point of making the final fatal wound.

In the case of this accused, the medical opinion also is definitely to the effect that the injuries found on him were suicidal in nature. In coming to this conclusion the Assistant Surgeon had also had regard to the direction of the third i. e. severe injury on Sheo Chandra's throat ; it was deeper on the left side than on the right, the tail of the wound being towards the right. This would be expected assuming the suicide to have held the weapon in his right hand and drawn it across the throat from left to right. Mr. S. N. Sahay presses on us the possibility of some outsider having made an entrance and committed the homicidal assaults on Ramlakhan and Sheo Chandra. We have considered his argument but do not regard that as a possibility. The circumstances all seem to point unmistakably to the injuries on Sheo Chandra being due to an attempt by him to commit suicide.

I would therefore accept the reference so far as the charge under S. 309, I. P. C., is concerned, and convict Sheo Chandra of this charge while acquitting him of the charges under S. 302. He is liable on conviction under S. 309 to simple imprisonment for a term which may amount to one year. In considering what sentence is appropriate, it is material to remember that the crime was committed on 5th September 1936 and the accused has been in custody ever since. In the circumstances, a sentence of simple imprisonment for one month from this date will, in my opinion, meet the ends of justice, and I would sentence him accordingly.

Varma, J.—I agree.

D.S./R.K. *Reference partly accepted.*

A. I. R. 1937 Patna 654

WORT AND VARMA, JJ.

Sah Radha Krishna — Appellant.

v.

Mt. Bechni Debi — Respondent.

Appeal No. 215 of 1936, Decided on 2nd September 1937, from original order of Sub-Judge, Patna, D/- 14th July 1936.

Hindu Law — Maintenance — Decree in favour of Hindu woman declaring her right to maintenance and making it charge on some properties—Properties charged can be sold in execution without fresh suit for sale.

Where a Hindu woman has obtained a decree declaring her right to maintenance and also declaring that the maintenance would be a charge on certain properties, the properties may be brought to sale in execution of the decree without any fresh suit for sale. The reason is that the bringing of the action for the declaration of the right to maintenance and obtaining a decree to that effect would result in the decree having the effect of a decree for sale of the charged properties. The language used by the Court in declaring the charge is not relevant: *A I R 1916 Pat 252*; *A I R 1926 Pat 31* and *19 Cal 139 (F B)*, *Rel. on.* [P 655 C 2]

G. S. Prasad and *K. Dayal* — for Appellant.

Advocate-General and *Pande Nawal Kishore Sahay* — for Respondent.

Wort, J.—The question in this appeal is whether the respondent was bound to bring a separate suit or was entitled to execute the decree which she had obtained declaring her right to maintenance and also declaring that the maintenance be a charge on certain properties. It is the contention of Mr. Prasad who appears on behalf of the appellant that in the circumstances of the case, contrary to the decision of the Judge in the Court below, it was necessary for the respondent to bring a separate suit in which suit all interested parties including his client should be joined and the equities that arose, if any, would be worked out as between the parties. Whether the one argument or the other is correct depends entirely upon the question whether the decree for maintenance had the effect of a decree for sale. If the answer is in the affirmative, it is obvious that no further action would be necessary but that the decree-holder may proceed to execution. I say nothing nor decide anything with regard to the question whether the decree-holder was entitled to put up one property for sale out of many for the reason that there is no person before us who has any right to question the decree-holder in this regard. The appellant having purchased the property at a date subsequent to the date of the decree—to put it in other words—the purchase was subject to the charge, and the appellant therefore has got no right nor indeed any locus standi to question the decree-holder's action. There is, however, grave doubt whether the decree-holder was obliged in any way to make him a party to the execution proceedings. The question depends upon the manner in which the charge which is admitted to have existed was created. If the charge was created by the decree in the action, then of course it would be necessary to bring an action to enforce the charge by way of sale of the property that was charged. But it is admitted that the charge arose not by reason of the decree made in the action for maintenance but under the Hindu law. Therefore bringing the action for the declaration of the right to maintenance and obtaining a decree to that effect would result in the decree having the effect of a decree for sale of the charged property; and I do not think it is at all relevant what language was used by the Court in declaring the charge to exist. Authority for this proposition is found in a decision of this Court which has been relied, 2 Pat L J 55,[1] which was followed in 4 Pat 693,[2] and the Full Bench decision in 19 Cal 139[3] also supports the proposition. It is agreed no other question arises and therefore in my judgment the appeal fails and must be dismissed with costs.

Varma, J.—I agree. Mr. Rai Gurusaran Prasad appearing on behalf of the appellant attacked the order of the lower Court in two ways. The first is that the decree-holder should bring a fresh suit before she can put up this property for sale; and, secondly, that his client will suffer disproportionately inasmuch as the charge which was created was created with reference to the estate in possession of the family including a large number of properties besides the subject matter in dispute and, if the charge were distributed on all those properties, perhaps the charge with regard to village Makshudpur would be less. With regard to the first contention, it is clear from various authorities cited that it is not necessary to file a fresh suit in cases like this. Reliance was placed by Mr. Rai Gurusaran Prasad on the decision in 36 C W N 93,[4] but it was not a case of maintenance arising out of Hindu law. The Full Bench decision in 19 Cal

1. Brajasunder Deb v. Sarat Kumari, A I R 1916 Pat 252=38 I C 791=2 Pat L J 55.
2. Hari Sankar Rai v. Mt. Tapai Kuer, A I R 1926 Pat 31=88 I C 923=4 Pat 693=6 P L T 802.
3. Ashutosh Bannerjee v. Lukhimoni Debya, (1892) 19 Cal 139 (F B).
4. Hem Chandra Banerjee v. Annapurna Debi, A I R 1932 Cal 423=138 I C 64=36 C W N 93.

139,[3] which has been later on followed by more recent decisions, disposes of the first contention. With regard to the second point, nothing has been shown to us as to why the decree-holder was precluded from proceeding against one of the properties. There is nothing illegal in the matter and nothing has been shown to us in what way the order of the Court below is wrong or unjust. The appeal is therefore dismissed with costs.

D.S./R.K. *Appeal dismissed.*

A. I. R. 1937 Patna 656

MANOHAR LALL, J.

Anup Lal Mahto — Petitioner.

v.

Mahesh Jha — Opposite Party.

Civil Revn. Petn. No. 107 of 1937, Decided on 20th August 1937, from order of Munsif, Bhagalpur, D/- 9th February 1937.

(a) Promissory note — Original cause of action—Handnote not duly stamped — Suit on handnote can be converted into suit on original loan.

Where in a suit on a handnote, the handnote is found to be inadmissible in evidence for want of being duly stamped, oral evidence can be given of the original loan and the suit can be converted into a suit on the original loan. [P 656 C 2]

(b) Interest Act (1839), S. 1—Contract of interest must be proved before interest by way of compensation is allowed—Handnote, only basis of contract of interest, not being duly stamped—Handnote cannot be used to determine rate of interest—Interest cannot be allowed till date of suit—Interest can be allowed after such date under Interest Act.

Unless the contract for interest is established, interest by way of compensation cannot be allowed : *A I R 1933 Pat 196, Rel. on.* [P 656 C 2]

Where in a suit on a handnote carrying interest the handnote is found to be inadmissible in evidence for want of being duly stamped, the handnote being itself the only basis of the contract, cannot be used for the purpose of determining the rate of interest on the loan. Interest therefore on the handnote till date of suit cannot be allowed; but interest can be allowed under Interest Act after the filing of the plaint as the plaintiff must be taken to have made a demand for the loan before the filing of the plaint. [P 656 C 2]

S. C. Mazumdar — for Petitioner.

R. K. Jha — for Opposite Party.

Order.—This is an application in revision on behalf of the defendant in a suit brought upon the basis of a handnote dated 25th July 1933. The handnote is for a sum of Rs. 125 and carries interest at the rate of Re. 1-4-0 per cent. per mensem. The handnote was inadmissible in evidence because it was not duly stamped. (It bore postage stamp instead of revenue stamp.) But the learned Munsif nevertheless allowed oral evidence to be given on the basis of his view that the suit could be converted into a suit on the original loan. In this view the learned Munsif was correct. It is unnecessary to cite the large number of authorities which have clustered round this point. The learned Munsif however has awarded interest at the rate of 1 per cent. per mensem "by way of compensation". In this he was in error. Unless the contract for interest is established, interest by way of compensation cannot be allowed : *see* 12 Pat 216.[1]

In the present case, the basis of the contract was the handnote and the handnote being found inadmissible in evidence, it cannot be used for any purpose (except a collateral purpose) e. g. to determine the rate of interest payable on this loan. The result is that unless the plaintiff can invoke the aid of the Interest Act, he cannot get any relief by way of interest. Therefore the claim for interest up to the date of the suit is disallowed. The plaintiff however must be taken to have made a demand before filing the plaint. The written statement was filed on 13th August 1936. It may therefore be safely taken that the demand was communicated on 1st August 1936. I therefore direct that interest will run on the original sum of Rs. 125 at 1 per cent. per mensem from 1st August 1936 till the date of the decree and thereafter at 6 per cent. per annum. With this modification, the application is rejected. In the circumstances there will be no order for costs in this Court.

A.L./R.K. *Decree modified.*

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1. J. H. Pattinson v. Bindhya Debi, A I R 1933 Pat 196=146 I C 56=12 Pat 216=14 P L T 149.

S. N. Das
Advocate High Court
Jammu & Kashmir
Srinagar.

*** A. I. R. 1937 Patna 657.**

WORT AND DHAVLE, JJ.

Ambalal Khora and *another* —
Defendants — Appellants.

v.

Bihar Hosiery Mills Ltd. and *others*, Plaintiffs, and *others*, Defendants— Respondents.

Appeal No. 114 of 1932, Decided on 6th May 1937, from original decree of Sub-Judge, Dhanbad, D/- 3rd May 1932.

(a) Tort — Subsidence of surface of land —Action by owner of surface is one in tort (*Obiter*).

Obiter.—Every owner of surface has a right to the ordinary enjoyment of his land. If some one works up mines underneath his land and causes subsidence of the surface, the infringement of the rights is tortious : (*1878*) *3 Q B D 389* and (*1860*) *9 H L C 503, Rel. on.* [P 659 C 1]

*** (b) Tort—Damages—Subsidence of buildings—Buildings not contributing to their subsidence—Damages include their value.**

When it is established that the erection of the buildings on the land has not in any way contributed to the subsidence of the buildings, the damages recovered may include their value : (*1859*) *4 H & N 186, Rel. on* ; (*1881*) *6 A C 740, Dissent.* [P 659 C 2]

(c) Hindu Law—Joint family—Liability of sons—Father working mines as manager—Mines not worked for many years after death of father—Surface subsiding while sons in possession causing damage to building on surface—Sons held were liable to extent of assets of joint family but not personally.

The father as the head of a joint Hindu family carried on the work of mines for the family. After the death of the father the mine was not worked for some years. Later while the sons were in possession the surface of the land subsided causing destruction of the building constructed above it :

Held : that the liability of the sons for the damages to the buildings did not cease as members of the joint Hindu family but that their liability was confined to the assets of the joint family. The fact that the subsidence took place while they were in possession did not make them personally liable: *A I R 1928 Bom 232* and *A I R 1929 Mad 153, Ref.*; (*1860*) *9 H L C 503, Rel. on.* [P 661 C 1,2]

Manohar Lal and *S. C. Mazumdar* — for Appellants.

B. C. De and *N. N. Roy* — for Respondents.

Judgment.—This appeal is by the defendants and arises out of an action in which the plaintiffs claimed damages against the defendants for working their colliery in such a manner as to cause the surface to subside. The learned Judge in the Court below has decided the case in favour of the plaintiffs but allowed damages to the extent of Rs. 61,349.13.3 only out of a total claim of Rs. 1,09,500. The plaintiff is a company in liquidation engaged in the manufacture of hosiery, the factory being situate on survey plots Nos. 458, 463, 465 and 467. The proprietor of the land and of the colliery interest was the Jharia Raj. In August 1895, the coal mining rights were demised to one Bhoja Dhanji. The patta was in respect of coal mining rights in plots Nos. 458 and 463 which were 135 bighas in area under villages Fatepur and Jharia. Another 6 bighas were demised to the same person in June of 1901. In 1901 and 1902 Bhoja Dhanji sold 45 bighas to one P. D. Hamid and Gangi Dosha and 2½ bighas to the said P. D. Hamid; the remaining 93½ bighas were transferred by a deed dated 17th November 1902 to Khora Ramji deceased who was the father of defendants 1 to 3. There was an exchange in 1911 between Khora Ramji and the Jharia Raj under which Khora Ramji got 12½ bighas in exchange for 12½ bighas out of 93½ bighas held by him. But in the meantime on 17th January 1923 Khora Ramji acquired mineral rights with regard to an additional 32 bighas. The subsided area is confined to about 3 acres of which plots Nos. 458 and 463 have completely subsided and plot No. 465 has subsided in part. Plot No. 467 has not sunk. The plaintiffs acquired the surface rights by a registered deed (Ex. 2-h) from persons described as the Bauris and Malliks who were labourers.

It has been one of the contentions of the defendants that the plaintiff had no title to the land and that therefore the present action is not maintainable. The Record of Rights describes the predecessors-in-title of the plaintiffs as persons in possession rent-free, and it is the finding of the learned Judge in the Court below that there is nothing on the record which would indicate that the Bauris and Malliks had not such a permanent interest. The Judge in the Court below has entered into a somewhat elaborate examination of this point and has come to a conclusion in favour of the plaintiffs. It is true that the Record of Rights is not conclusive of the title of the predecessors of the plaintiffs, but in the absence of any evidence on the part of the defendants, especially with regard to any objection on the part of the Jharia Raj, in my judgment the plaintiffs have disclosed a sufficient title to enable them to claim damages in this suit if they have otherwise established their right.

There is no dispute about the subsidence, and apart from the question with which I have already dealt, the case was confined in the Court below and in this Court to the question whether defendants 1 and 2 were liable in damages to the plaintiffs. The facts as regards the position of the defendants is as follows: The father of defendants 1, 2 and 3 died in the year 1923. Defendants 1 and 2 were born in 1916 and 1918 and were therefore minors at the time of the death of their father. As far back as 1908 defendant 3 separated from his father, and it was the contention of defendants 1 and 2 that neither defendant 3 nor defendants 4 to 9, who claimed at one time to have been partners in respect of a 10 anna share in the colliery business with the defendants' father, had any interest in or in connection with this colliery. This has been accepted by the Judge in the Court below and now no question arises as to this. When the colliery business was started, it appears as I have stated that defendants 4 to 9 were share-holders to the extent of 10 annas, and of the remaining six annas share of the father, two annas were given to defendant 3. In February 1926 this two annas share was sold to the mother of defendants 1 and 2 as their guardian and again in 1927 the share of defendants 4 to 9 was purchased by defendants 1 and 2. At the time of the action defendants 1 and 2 owned the 16 annas interest in the colliery by reason of these purchases and the death of their father in 1923. In these circumstances the liability of defendants 1 and 2 alone arises.

In the written statement it was averred that the colliery under the land in question had not been worked for about 10 or 12 years. The action having been brought in 1930, that would mean that no work had been done since about 1920. Expert and other evidence has been called and the result has been that the learned Judge in the Court below has held that the working of the colliery which caused the subsidence was prior to 1923, the date of the death of the defendants' father. It is as a result of that finding (which is not disputed in this Court) that the question of the liability of defendants 1 and 2 arises. In addition to the above finding the Judge in the Court below has held that the pillars which were left to support the surface were at the time thought to be sufficient but proved to be insufficient, and that even if small quantities of coal were taken subsequently from the pillars, such working was insignificant and insufficient to contribute to the subsidence.

This being the case and it being thus established that the working which caused the subsidence was done in the life-time of the father of defendants, and not during the time in which the defendants were in possession, it was contended on their behalf, both in the Court below and in this Court, that they could not be held liable for damages. There is no contention on their behalf that the absence of any evidence that the working was negligent in any way assists them as it is admitted that the owner of the surface has a right to support, but the nature of that right is questioned. Nor is it contended that the weight of the buildings erected by the plaintiffs caused the subsidence. Leaving for the moment the question whether the defendants, although minors at the time, but being members of a joint Hindu family are liable as such, it is contended by the defendants on the authority of the cases in (1897) 2 Q B 165[1] and (1900) 2 Ch 493[2] that as the defendants were not in possession at the time of the workings and not having worked the colliery since the death of their father, they cannot be held liable in damages for the subsidence which took place in 1930. It is clear that if the defendants were not responsible for the working of the colliery which caused the subsidence, they are not liable in damages to the plaintiffs. The cases to which I have referred and which are relied upon by the appellants, are authorities for that proposition. The Subordinate Judge has held that the cause of action was the breach of an implied contract under which the defendants were under the obligation to support the surface and was of the opinion that the action was not in tort. Accordingly he has held that the principle *actio personalis moritur cum persona* did not apply and that therefore the defendants were liable for the payment of damages to the extent of the assets of the father which came into their hands on his death. The Judge is in error on this point and the question whether the action against the father died with him or not is irrelevant in the cir-

1. Greenwell v. Low Beechburn Coal Co., (1897) 2 Q B 165=66 L J Q B 643=76 L T 759.
2. Hall v. Duke of Norfolk, (1900) 2 Ch 493=69 L J Ch 571=82 L T 836=48 W R 565=64 J P 710=16 T L R 443.

cumstances of the case, and in any event the Judge is clearly wrong in holding that the action is not in tort. The owner of the surface may have a right in law of support, or to put it in the words of Lord Cranworth in the House of Lords in 9 H L C 503,[3] "in truth his right is a right to the ordinary enjoyment of his land" but the infringement of that right is tortious. A sufficient authority for that, if authority were needed, is found in 3 Q B D 389[4] at p. 402 referred to by Bruce, J. in (1897) 2 Q B 165.[1] But the question does not arise. There was no right of action against the father at the time of his death as nothing had happened which gave rise to any; he had done nothing other than that which he was entitled to do, namely, work his colliery, and no damage had resulted therefrom. This working did not become actionable until after his death, that is to say when the subsidence took place in 1930. On this view of the case, unless the defendants can be held to have done something to cause the subsidence, they are not liable to the plaintiffs. But it is said that as the subsidence was the cause of action, and as that took place during the time of the possession of the defendants, they are personally liable. This argument is based on the decision in (1860) 9 H L C 503.[3] This argument was discussed in the two cases to which I have already referred and upon which the defendants relied for another branch of their argument and, in the light of those decisions, the argument is untenable.

In connection with the general argument as to the liability of the defendants, it is contended that as the damage claimed is confined to the loss which the plaintiffs have sustained by the destruction of the buildings and the machinery therein, there being no proof that the plaintiffs have acquired an easement of support, the buildings not having been in existence for 20 years and upwards, the plaintiffs cannot recover : (1881) 6 A C 740.[5] However, a direct authority against this contention is found in (1859) 4 H & N 186.[6] When it is established that the erection of the buildings on the land has not in any way contributed to the subsidence of the buildings, the damages recovered may include their value. Another argument as to the liability of the defendants was that as they are now in possession of the land and the benefits of the original patta granting coal-mining rights to Bhoja Dhanji, they are liable under one of the clauses contained in the said patta. The document is Ex. E-1 in the case and reliance is placed upon cl. 14 which is in these words :

> That if any land and house, etc., or any other valuable property, is destroyed or rendered useless on account of your work, you will be bound to pay proper damages therefor ; and if any occurrence takes place within the leasehold land, you will be wholly answerable therefor.

Quite apart from the question whether the defendants not being parties to this lease are liable thereunder, or whether the covenant is a covenant which runs with the land and the defendants being in possession are liable, it seems to me that the clause adds nothing to the liability of any person bound thereby for whatever reason. The clause deals with the 'liability to valuable property' which may be destroyed or rendered useless; it in no way deals with the support of the surface, although it goes without saying that in the majority of cases buildings would be rendered useless unless the surface were supported. On the other hand, it might be said that the clause would make the persons bound thereby liable whether the damage was caused by subsidence or for any other reason. We have already dealt with the question of liability for buildings and this clause has not been used by the respondents except for the purpose of fixing the liability on the defendants for the subsidence. We are therefore not concerned with the question whether it has the wider application which I have suggested. In so far as the liability for subsidence is covered by the clause, it adds nothing to the defendants' liability at common law ; in other words, their liability would be just the same whether that clause existed or not.

We now come to the matter which we mentioned in the earlier part of our judgment. It was contended that the defendants being members of a joint Hindu family at the time of the working of the colliery by their father (the karta of the family) were bound by the acts of

3. Backhouse v. Bonami, (1860) 9 H L C 503 = 34 L J Q B 181=7 Jur (N S) 809=4 L T 754=9 W R 769.
4. Lamb v. Walker, (1878) 3 Q B D 389=47 L J Q B 451=38 L T 643=26 W R 775.
5. Dalton v. Angus, (1881) 6 A C 740=50 L J Q B 689=44 L T 844=30 W R 191=46 J P 132.
6. Brown v. Robins, (1859) 4 H & N 186=28 L J Ex 250=118 R R 382.

the karta and were therefore liable. On the other hand defendants urged that this was not so much as suggested in the lower Court. As a matter of fact the plaint made no distinction between one defendant and another as regards the liability for damages, but merely spoke of the "wrongful, negligent and improper working of coal by the defendants from the subjacent and adjacent areas", even denying that the defendants had any right at all to work the coal. In their written statement defendants 1 and 2 set out "the right of these defendants to work" the coal under the conveyance of 1902 in favour of their father (and later documents) and claimed that other defendants had been unnecessarily made parties. In para. 15 they denied removing any pillar coal (while claiming the right to do so) and said that they did not work coal in the affected area during the last ten or twelve years. They went on to repeat that they had kept substantial pillars for supporting the surface and worked in a workmanlike manner and with due care and attention; and they denied that they had at all contributed to the subsidence, adding that the subsidence was not due to any act on their part. It is clear that these defendants 1 and 2 did not deny working the subjacent coal before "the last ten or twelve years", though they denied negligence in such working and claimed to have left substantial pillars for supporting the surface. Nor was there any issue framed or any finding recorded in the lower Court on the point whether defendants 1 and 2 were or were not responsible for the working of the coal before 1923. There was no dispute on the point; it was probably not realized that on subsidence liability to damages would arise even without any negligence in the original working of the coal though the pillars may not have been improperly interfered with. Defendant 10 was added as a party by an application to amend the plaint which was filed long before the written statements of defendants 1 and 2 and which prayed for his addition as a member of an undivided Hindu Mitakshara family taking an interest in the colliery "from his very birth". The learned Judge says that it is mentioned in Ex. E-2, a deed of family arrangement which has not been placed before us, that at the separation between Khora Ramji and defendant 3 in 1908 or 1909, properties other than those given to defendant 3 were retained by Khora Ramji for himself and his other sons or such sons as might be born to him in future, and that no share in the coal lands of the colliery now in question was given to defendant 3. The colliery would thus appear to have been kept by Khora Ramji as joint family property. It was open to him to do so as the head of the family, even though the business may not have been ancestral : *see* 52 Bom 376[7] and 52 Mad 227;[8] and if debts had been contracted in the course of this business, the other members of the family would have been bound by them. The extraction of the coal, so far as Khora Ramji was a party to it, was in the interest of the joint family of which he was the karta and into which defendants 1 and 2 were born in 1916 and 1918. It was not tortious per se, but a liability for damages arose on the subsidence which occurred in 1930, long after Khora Ramji's death, but at a time when defendants 1 and 2 were the sole surviving members of the joint family that had extracted the coal and were in sole possession of the family interest in the colliery and had further bought out defendant 3 and defendants 4 to 9.

The learned Judge below says that it appears that Khora Ramji was carrying on the business of this colliery with some partners who had a ten-anna share in the business and that defendant 3 given a two-anna share out of his father's six-anna share in the profit and loss of the business. Later on, he comes to the conclusion that defendant 3 never had any share in the coal lands but only a two-anna share in the profit and loss of the colliery business from the date of his separation from his father up to the date he transferred his interest to defendants 1 and 2 in 1926. This finding is accepted by the appellants before us. The exact nature of Khora Ranji's partnership with defendants 4 to 9 does not appear. The learned Judge refers to the fact that the coal land was acquired by Khora Ramji and as regards the ten-anna share in the business he says that there is no evidence who the partners that owned his share

7. Annabhat Shankerbhat v. Shivappa Dundappa, A I R 1928 Bom 232=110 I C 269=52 Bom 376=30 Bom L R 539.
8. Venkatasami Naiker v. Palaniappa Chettiar, A I R 1929 Mad 153=117 I C 716=52 Mad 227=56 M L J 380.

were, though there is some indication that they were defendants 4 to 9 or their predecessors-in-interest. He did not regard the matter as one of any practical importance because the plaintiffs gave up their claim against these defendants towards the end of the hearing on the ground, as their learned advocate has shown, that they had been unable to prove the liability of these defendants. Upon this it was contended before us that the release of defendants 4 to 9 meant the release of defendants 1 and 2 as well; but this was not a case of release by way of accord and satisfaction and did not in any way destroy the cause of action, nor was it the case of defendants 1 and 2 that defendants 4 to 9 were in any way liable for damages for the subsidence. We do not know enough of the partnership which was only alleged by defendants 3 and 10 (claiming, however, as the learned Judge puts it, that "the workings under the affected area were made subsequent to 1926 and that pillars were also robbed from the subjacent soil and from below the adjacent lands" by defendants 1 and 2, to say how defendant 3 was given a share in it or what the relation of Khora Ramji was to the ten-anna partners. Probably defendants 1 and 2 who, as Mr. Mazumdar for the appellants informed us, took the entire family interest in the colliery by survivorship, were no parties to the partnership such as it was; but this will only prevent contractual relations from arising between them and the ten or twelve-anna partners in the course of the partnership without affecting their liability to others as members of the joint family of which their father was the karta and which had a six or four-anna interest in the colliery from 1908 or 1909 to the death of Khora Ramji. The liability that is sought upon defendants 1 and 2 is limited to what the learned Judge has called "the assets of their father's estate that has devolved on them by inheritance". The description is not quite accurate, and the learned Judge really meant no more than the assets of the joint family by Khora Ramji at his death. It is thus clear that the joint family represented by the karta was concerned in the working of the coal, whether or not it did so in partnership with others; and the joint family still continues in spite of the death of Khora Ramji in the persons of defendants 1 and 2. They cannot, therefore, escape liability on the ground that it was a personal liability of Khora Ramji, though the learned Judge is in error in holding them liable on the ground of an implied contract to keep up the surface.

A half-hearted attack was made by the appellants on the findings of the learned Judge as regards the quantum of damages. Damages have been awarded on three out of six accounts claimed. These include damages to furniture to the extent of Rs. 1,150 odd, as to which the learned Judge refers to certain ledgers and balance-sheets which have not been printed. It has been urged that the balance-sheets are no evidence against the appellants. Rs. 25,000 has been awarded as damage to machinery, and it has been contended that no evidence was given as to this damage. Plaintiffs' first witness, however, did say in reply to a Court-question that the damage to the Mill machinery was Rs. 18,000 and that to the machinery given by Government Rs. 7,000. As to this it was urged that the lower Court should not have put the question. But it is not suggested that the appellants were prevented from cross-examining the witness on the point after he had replied to the Court-question. Rs. 37,000 odd was awarded as damage on account of lands and buildings. This is based on a sale deed (Ex. 2-h) for Rs. 34,000 and vouchers for Rs. 5,000 or more for subsequent additions to the properties purchased besides the balance-sheets of the plaintiff company. Here again it is said that the balance-sheets are no evidence against the appellants. But the balance-sheets, whether in this connexion or in connexion with the furniture account, can be regarded in the light of claims made by the plaintiff company against the appellants, and it does not appear that the appellants could not have subjected these claims to cross-examination. In our opinion there is no room for interference with the quantum of damages awarded by the lower Court. The result is the appeal is dismissed with costs.

B.D./R.K. *Appeal dismissed.*

G. N. Dar
Advocate High Court
Jammu & Kashmir
Srinagar.

A. I. R. 1937 Patna 662

MOHAMAD NOOR AND DHAVLE, JJ.

Emperor

v.

Haria Dhobi — Accused.

Jury Ref. No. 6 and Cri. Revn. No. 408 of 1937, Decided on 31st August 1937, made by Asst. Sess. Judge, Bhagalpur, D/- 23rd and 26th June 1937.

(a) Criminal Trial—Evidence—Evidence of small boy—Manner of recording.

In a case where the guilt or innocence of the accused depends almost wholly upon the evidence of one small boy, the Court should take that evidence down in the form of question and answer. [P 663 C 1]

(b) Criminal Trial — Evidence — Duty of Court.

Where the public prosecutor fails to put to the doctor a question which the Court considers necessary, the Court should itself put it. [P 664 C 1]

(c) Criminal Trial — Accused tried under S. 397, I. P. C.—Jury returning verdict of non-guilty — Jury can find accused guilty under S. 323 or S. 325 even in absence of charge.

When an accused has been tried under S. 397, I. P. C., and the jury returns a verdict of non-guilty, it is open to the jury to find the accused guilty under the minor offence of S. 323 or S. 325, even though no charge had been framed under these sections: *A I R 1914 Mad 425* and *A I R 1921 Bom 59, Rel. on.* [P 664 C 1, 2]

(d) Criminal P. C. (1898), S. 307—Part of case tried with aid of assessors by Assistant Sessions Judge appealable to Sessions Judge —Case should be referred to High Court in its entirety.

The High Court, if it is to exercise its functions properly in a reference, cannot approach the transaction as a whole with its hands tied as to one or more aspects. Hence cases tried by Assistant Sessions Judges in which the part tried with the aid of assessors is appealable to the Court of Session should, if possible, be referred to the High Court in their entirety if an impossible position is to be avoided in dealing with references under S. 307, Criminal P. C. [P 665 C 2]

K. K. Banerji — for Reference.

Order.—Haria Dhobi was committed to the Sessions on a charge "under Ss. 392/397", Penal Code for robbing Baijnath Chokra of his silver mathias and gold lavangs and at the time of committing the robbery, causing grievous hurt to him in order to take away those trinkets. At the commencement of the proceedings in the Court of Session the Assistant Sessions Judge who tried the case added a charge under S. 325, I. P. C. The charge of robbery was triable by jury, and that of grievous hurt triable with the aid of assessors. The jury returned a unanimous verdict of not guilty, and the same gentlemen functioning as assessors were unanimously of opinion that Baijnath was assaulted neither by Haria Dhobi, nor by Gajkishore, P. W. 4 (as suggested by the defence), but by some third person. The learned Judge took it that the prosecution case was that the accused had caused grievous hurt to Baijnath, not at the time of committing the robbery, but subsequent to its commission. He, therefore, directed the jury that S. 397, I. P. C., was not applicable to the case and that the accused should be acquitted of that charge. He however considered the verdict of not guilty on the charge under S. 392 to be "perverse and against the weight of evidence" and has accordingly made this reference.

The prosecution story was that Baijnath, a boy of six, was taken from his house by Haria Dhobi after dusk, on a promise that sweets would be given to him, ostensibly to see a Kali Puja in mauza Belhar about four miles away. Near a bundh, called the Jamua bundh, 11 rassis away, Haria asked the boy for his mathias and lavangs, saying that thieves might (otherwise) snatch them away in the crowd, and on Baijnath's refusal, made him lie down on the bundh and took the trinkets by force. Baijnath grabbed at Haria's dhoti and was hit by him with the butt of an iron-bound stick on the right eye. Haria then fled with the trinkets, and Baijnath lay on the bundh crying in the dark until his cries brought on the scene Gajkishore Mahto, Baijal Pasban and Muhammad Rashid. These men took him to a mandap adjoining the house of Baijal; and Baijnath's father Sital Bhagat and the chowkidar of his village, Basu Prasad, soon came there. Questioned about the bleeding injury on his eye, Baijnath said that it had been caused by Haria; about his trinkets he said that Haria had taken them. Sital and Basu thereupon took the boy to the dispensary at Sangrampur and afterwards went and lodged an information at the thana of Belhar. There was no witness to the occurrence except Baijnath himself, the scene being a solitary bundh away from the busti, and the time after dark. There was also the evidence of the men who came to the mandap that Baijnath had named Haria as his assailant. The learned Judge below says that the boy gave "a clear and consistent narration of

the occurrence" and "impressed me in the witness-box".

On behalf of the defence, it was suggested that Gajkishore (P. W. 4) was the culprit and that Haria was away at the time in his father-in-law's village of Gonra, ten or twelve miles away, and had been falsely implicated on account of enmity. The learned Judge found that this defence was not made out, and considered that the jury had totally failed to appreciate and weigh the evidence, having regard to the fact that it was not suggested by the defence that some third person had committed the offence (the view expressed by them as assessors).

We have before us only the written record of the evidence of Baijnath and the two opposed estimates of that evidence formed by the learned Judge and the jury. That record, as it stands, is far from convincing; the evidence does not read like the evidence of a boy of six, and the cross-examination suggests that he merely went on saying "yes" to the questions that were put to him in examination-in-chief. In a case of this kind, where the guilt or innocence of the accused depended almost wholly upon the evidence of one small boy, the lower Court would in our opinion have done well to take that evidence down in the form of question and answer. On the record as it stands, it is difficult to see any reason to prefer the opinion of the learned Judge below to that of the jury on a simple question of fact.

We must also observe that several points arose in the case which do not appear to have received sufficient consideration below. Take, for instance, the injuries that the doctor found on Baijnath. The upper lid of the right eye was "detached for about a distance of half an inch" on account of a lacerated wound "beginning from the inner canthus" and the lower lid "split up into three pieces and all disorganised"; it is not very easy on the face of it to reconcile this with the absence of any injury to the eye-ball in view of Baijnath's allegation that these injuries were caused with the butt-end of an iron bound lathi. There were injuries on the upper and lower lids of the left eye and also on the lips and the right and left cheek, which cannot be explained by the other blows mentioned by Baijnath. Nor does the learned Judge appear to have adverted to such facts as that the accused belongs to the same village as Baijnath and is a young man aged about eighteen, and that the trinkets that Baijnath was wearing had been on his person for about two years, as Sital Bhagat tells us. The company that came to the mandap included Baijal, the Chowkidar of Dumarai, besides Basu, the Chowkidar of Baijnath's village Jamua; and it is not easy to believe that they all resisted what would appear to be the natural impulse in those circumstances, the impulse of going and getting hold of the accused in Jamua, even though it is true that Sital and Basu went to the dispensary and (as the learned Judge points out) had no authority to arrest the offender. The alibi set up by the accused was also by no means a last-moment defence. It was mentioned at once during the police investigation and was enquired into by the police of the neighbouring thana concerned, apparently in the absence of the accused, and found to be true. The learned Assistant Sessions Judge has criticised the evidence of the defence witnesses on lines which cannot fairly be applied to witnesses of their standing—Panchu Chowkidar, a Dome, and Phulo Raut, a simple villager. The jury may well have asked themselves the question whether there was any reason made out why these witnesses should tell lies on behalf of a person of the standing of Haria Dhobi or his father-in-law. As for the prosecution witnesses there was apparently not much scope for cross-examination in the circumstances of this case, though we cannot help observing that the committing Magistrate speaks of a witness (who was not examined in the Court of Session) stating

> that some mantras were whispered into the ears of the boy Baijnath to shake off the evil spirit, after which his father had noticed the ornaments missing and made enquiries from him, and that before the boy Baijnath gave out the name of accused Haria, he had spoken out something which he could not hear.

This apparently explains some of the meagre cross-examination in the case, and it is curious that the point was not further investigated below. On a consideration of the entire record, we are unable to accept the view of the learned Judge that the evidence of Baijnath ought to be acted upon. It seems to us on the contrary that the evidence of Haria's alibi is entitled to much more weight than the learned Judge gave to it. We are not prepared to hold that the jury took an unreasonable view of the evidence. The reference made by the learned Assistant Sessions Judge must,

therefore, be discharged and the accused acquitted in accordance with the verdict of the jury in respect of the charge of robbery.

The result of the trial with the aid of assessors on the charge under S. 325, I. P. C., was that differing from all the assessors the Assistant Sessions Judge found Haria Dhobi guilty, and on the ground that the doctor was not asked whether the disfigurement of the right eye of the boy would be permanent, recorded a conviction under S. 323 with a sentence of one year's rigorous imprisonment. It may be observed in passing that if the Public Prosecutor failed to put to the doctor a question which the lower Court considered necessary, the Court should itself have put it.

Having ascertained from the Sessions Judge of Bhagalpur that no appeal had been preferred to him by Haria against this conviction, and after coming to the conclusion that the alibi set up by Haria was at least as likely to be true as Baijnath's allegation that Haria was his assailant—an allegation which may even have been a pure mistake on account of the time and place of the offence—we issued a Rule calling upon the District Magistrate to show cause why the conviction under S. 323 should not be reversed and Haria acquitted. The learned Assistant Sessions Judge found authority for the trial of Haria on the charge under S. 325, I. P. C, in Illus. (m) to S. 235, Criminal P. C., but his view that the hurt to the boy was caused not at the time of committing the robbery but subsequent to its commission, overlooks the facts that robbery by its definition includes hurt caused not only in order to the committing of the theft or in committing the theft, but also in carrying away the property obtained by the theft, and that the hurt was caused to Baijnath during the effort of the offender to get away with the trinkets. The entire offence alleged against Haria—robbery attended with grievous hurt—was essentially triable by jury, and the view of the jury that the accused was away in his father-in-law's village and was not the offender ought really to dispose not only of the charge under S. 392, but also of that under S. 325 including the minor offence under S. 323. If the entire offence had (as it should have) been placed before the jury, it would have been open to the jury to find the accused guilty under S. 323 only, even though no charge had been framed under this section or under S. 325: *see* 37 Mad 236[1] and 45 Bom 619.[2] In the erroneous view that the learned Judge took of the relation of the hurt to the robbery, it was doubtless open to the learned Judge to try Haria under S. 325 with the aid of the jurors as assessors and to take his own view of the evidence. We have already said enough to show that the view of the learned Judge on the evidence cannot be upheld in the circumstances of this case. The Rule against which no cause has been shown must therefore be made absolute, and the conviction of Haria under S. 323 together with the sentence of one year's rigorous imprisonment must be set aside.

We desire to add a few words about a point that has occurred to us in this case. If Haria had appealed to the Court of Session against the conviction under S. 323, I. P. C., and if the Sessions Judge had accepted the alibi and allowed the appeal before this reference under S. 307, Criminal P. C., came up for hearing, the High Court would have been placed in the impossible position of being compelled either to take the same view of the alibi as the Sessions Judge, or if it took a different view in the reference under S. 307, to leave the acquittal by the Sessions Judge alone since it could not be interfered with in revision. Other anomalies that arise on the view that in a sessions case tried partly by jury and partly with the aid of assessors, the reference to the High Court under S. 307 must be confined to that part only which was tried by jury, have been noticed from time to time and recently in 40 C W N 1186[3] and 40 C W N 1374.[4] This view has been taken in this Court in 15 P L T 367,[5] following 55 Mad 715[6] in which it was held that an Assistant Sessions

1. In re A. Muthiyalu, A I R 1914 Mad 425 = 17 I C 51=37 Mad 236=13 Cr L J 730.
2. Emperor v. Changouda Pirgouda, A I R 1921 Bom 59 = 59 I C 195 = 45 Bom 619=22 Cr L J 51=22 Bom L R 1241.
3. Jogneswar Ghosh v. Emperor, A I R 1936 Cal 527=1936 Cr C 737=166 I C 418=38 Cr L J 212=I L R (1937) 1 Cal 306=40 C W N 1186 =65 C L J 351.
4. Cheru Sheikh v. Emperor, (1936) 40 C W N 1374.
5. Emperor v. Lachman Gangota, A I R 1934 Pat 424 = 1934 Cr C 928 = 154 I C 16 = 36 Cr L J 469=15 P L T 367.
6. Pachaimuthu v. Emperor, A I R 1932 Mad 512=1932 Cr C 430=137 I C 810=33 Cr L J 533=55 Mad 715=62 M L J 571.

Judge should have disposed of certain charges which were triable with the aid of assessors instead of submitting the whole case (which included a charge triable by jury) under S. 307. The view that such a reference was incompetent was rested on 8 Bom L R 599[7] and 9 Bom L R 1057,[8] though they do not quite support the proposition that the High Court cannot entertain a reference under S. 307 until the Court of Session has disposed of the charges which were triable with the aid of assessors. Reasons for such a view were however given in 33 Bom L R 1571[9] where Barlee, J. pointed out, in a case which consisted of a charge under S. 307, I. P. C., triable with the aid of assessors and another charge under S. 326 triable by jury, that if the Sessions Judge had not disposed of the charge under S. 307, I. P. C., before making the reference and if on the reference the High Court were to find "that there had been no attempt of murder, that is if we were to believe the accused's defence", the Sessions Judge "would have to give judgment in direct opposition to this view or adopted against his own judgment". The learned Judge pointed out that this difficulty could be avoided by taking the view that sub-s. (2) of S. 307, Criminal P. C., refers only to offences triable by jury. It is obvious that such a solution would not have been possible if in the present case there had been an appeal to the Sessions Judge from the conviction under S. 323 recorded by the Assistant Sessions Judge and if in dealing with the appeal the Sessions Judge had accepted the alibi of the accused. The words of sub-s. (2) of S. 307 are fairly general :

> Whenever the Judge submits a case under this section, he shall not record judgment of acquittal or of conviction on any of the charges on which such accused has been tried. . . .

The sub-section does not speak of a part of a case tried by jury or of a trial by jury, though the section occurs in a part of the Chapter headed "Conclusion of Trial in Cases Tried by Jury", while S. 309 occurs in the Part "Conclusion of Trial in Cases Tried with Assessors". S. 269 (3) provides for the trial of a part of a case by jury and of another part by the Court with the aid of the jurors as assessors. But there is no special provision for the "Conclusion of Trial" in cases so tried. In 15 P L T 367[5] reference was made to the reason given in 11 Pat 395,[10] for requiring all, and not merely some of the charges tried by jury to be referred under S. 307 :

> The High Court, if it is to exercise its functions properly in a reference, cannot approach the transaction as a whole with its hands tied as to one or more aspects.

It is clear that for the same reason cases tried by Assistant Sessions Judges in which the part tried with the aid of assessors is appealable to the Courts of Session should, if possible, be referred to the High Court in their entirety if an impossible position is to be avoided in dealing with references under S. 307. Whether headings F and H in Ch. 23 of the Code regarding the "Conclusion of Trial" are altogether decisive in cases of this kind or whether the words of sub-s. 2 of S. 307 should have a wider construction placed on them than has so far been the case, may require consideration on an appropriate occasion. It may perhaps be usefully added that we have not been referred to any reported case in which the point was considered and that in 55 Mad 715[6] the possibility of the difficulty now pointed out was not averted to.

D.S./R.K. *Accused acquitted.*

7. Emperor v. Kalidas, (1906) 8 Bom L R 599= 4 Cr L J 192.
8. Emperor v. Vyankatsingh, (1907) 9 Bom L R 1057=7 Cr L J 236.
9. Emperor v. Chanbasappa Baslingappa, A I R 1932 Bom 61=1932 Cr C 85 = 135 I C 495= 33 Cr L J 172=33 Bom L R 1571.
10. Emperor v. Hazari Lal, A I R 1932 Pat 156= 1932 Cr C 273=137 I C 190 = 33 Cr L J 505 =11 Pat 395=13 P L T 93.

A. I. R. 1937 Patna 665

COURTNEY-TERRELL, C. J. AND MANOHAR LALL, J.

Mahabir Prasad Poddar and *others* — Creditors — Appellants.

v.

Ram Tahal Mandar and *others* — Debtors — Respondents.

Appeal No. 164 of 1936, Decided on 17th August 1937, from original order of Dist. Judge, Darbhanga, D/- 9th April 1936.

(a) Provincial Insolvency Act (1920), S. 7— Application under cannot be rejected in limine as harassing or coercive — Court is bound to adjudicate upon facts stated.

Where an application is made by a creditor under S. 7, Provincial Insolvency Act, the Court is bound to adjudicate upon the facts stated in the application and on the facts, if established, grant the proper relief to the applicant. The

application cannot be rejected in limine on the ground that it was made to harass and coerce the debtor. [P 666 C 2]

(b) Provincial Insolvency Act (1920), S. 7—Joint family — Adjudication of members—Members if liable on joint debt can present joint petition or can be proceeded against on single petition of creditor—Minors must be excluded in any case—Test for joint application stated.

Although the manager of a joint Hindu family can act on behalf of the family, the recognized restriction on his power so to act in his representative capacity as to impose any personal liability on other members of the family render it impossible to treat any act of insolvency committed by him in relation to the affairs of the family, speaking generally, as an act committed by other members of the family also. It follows that the joint Hindu family as such cannot be adjudicated insolvent but that two or more members of such a family who have incurred a joint personal liability may present a joint petition in insolvency (itself an act of insolvency) or may be proceeded against on one creditor's single petition in case the joint act of insolvency can be brought home to them. Minors must however be excluded in any case from insolvency proceedings started at the instance whether of debtors or of creditors. The test to be applied is whether, if the application was treated as a suit, the suit would be bad for multifariousness, that is, for misjoinder of different causes of action against different defendants; if no such objection can be successfully advanced, a single application for adjudication is maintainable : *Case law referred.* [P 666 C 2; P 667 C 1, 2]

(c) Provincial Insolvency Act (1920), S. 75 (3)—Leave can be granted by High Court at hearing of appeal where it ought to be granted.

Where in an appeal the leave of the High Court is not obtained as required by S. 75 (3), Provincial Insolvency Act but the appeal is admitted, the irregularity can be cured in a case in which leave ought to be granted by granting such leave at the time of hearing of the appeal : *A I R 1928 Pat 338, Rel. on.* [P 667 C 2]

B. C. De and *R. Misra* — for Appellants.

Harihar Prasad Sinha —

for Respondents.

Manohar Lall, J.—This is an appeal by the creditors against an order of the District Judge of Darbhanga dated 9th April 1936 refusing on a preliminary ground their petition for an adjudication of the five respondents under the Provincial Insolvency Act. The learned District Judge was apparently under the impression that the applicants had asked that the respondents' joint Hindu family may be adjudged insolvent and upon that view called upon the applicants to state specifically whom they wanted to be declared insolvent. The applicants on being called upon made it perfectly clear by a petition dated 26th March 1936 that

> the adjudication prayed for on the allegations in the petition of insolvency is in respect of the five adult persons described therein as opposite party .....The debt is a joint debt of the family of the opposite party,

but still the Court was not satisfied and under the impression that the application was made in order to harass and coerce the debtors, rejected the application for adjudication. In my opinion the order of the learned District Judge was wholly erroneous. The Court was bound to adjudicate upon the facts stated in the application and on the facts, if established, grant the proper relief to the applicants. The application could not be rejected in limine on the ground stated by the District Judge. It is only necessary to draw attention to the decision in 44 Mad 810[1] which decides that the members of a joint Hindu family can be adjudicated insolvents on a single petition by a creditor, if they are liable on a joint debt and have been guilty of a joint act or acts of insolvency. The test to be applied is whether, if the application was treated as a suit, the suit would be bad for multifariousness, that is for misjoinder of different causes of action against different defendants; if no such objection can be successfully advanced, a single application for adjudication is maintainable. This case was followed in 50 Mad 256[2] and to the similar effect is the case in 2 Rang 309.[3] The Calcutta High Court has taken a similar view in 39 C W N 104.[4]

There seems to be some misapprehension as to the legal status of a joint Hindu family in regard to insolvency proceedings. A joint Hindu family as understood by the Mitakshara and Dayabhag schools of Hindu law is a perfectly well-known institution. It connotes that the ownership of the family property (in case when the family has a property) belongs to the individual members who are existing at the time, either in undefined shares (under the Mitakshara school) or in defined shares (under the Dayabhag school). If a creditor wants to enforce his claim against

1. Bolisetti Mamayya v. K. R. Rice Mill Co., A I R 1921 Mad 294=63 I C 916=44 Mad 810=40 M L J 570.
2. Punniah v. Sagarajee Kasarmal Firm, A I R 1927 Mad 124=99 I C 185=50 Mad 256=51 M L J 712.
3. Maung Kyi Oh v. Arunachallam Chetty, A I R 1925 Rang 36=84 I C 968=2 Rang 309.
4. Brojendra Nandan Saha v. Nikunja Behari Das, A I R 1935 Cal 174=154 I C 775=39 C W N 104=60 C L J 248.

a joint family, it is necessary to implead all the members of the family as defendants. As a rule, the father or in his absence ordinarily the next senior male relation is entitled to manage the affairs of the family on behalf of the entire coparcenary inclusive of adult or minor members. The manager has power to affect or dispose of joint family property in respect of purposes denominated "necessary purposes". Where estate or family necessity exists, that necessity rests upon the coparceners as a whole and in suits relating to such transactions the manager can represent the whole coparcenary, though there is no objection to joining the rest of the coparcenary with him. The manager cannot however by any act of his impose a personal liability upon the other coparceners. Adult members may incur such liability by actually joining him in transactions giving rise to such liability and this, whether there be any legal necessity or not, but minors cannot be thus made liable—as an instance, see the case in 49 Cal 560.[5]

Acts of insolvency as defined in S. 6, Provincial Insolvency Act, 1920 or in S. 6 of the earlier Act of 1907 under which the case in 44 Mad 810[1] was decided are acts—things done or suffered to be done creating personal liability. The Explanation to the section provides that the act of an agent may be the act of the principal. Although the manager of a joint Hindu family can act on behalf of the family, the recognized restrictions on his power so to act in his representative capacity as to impose any personal liability on other members of the family render it impossible to treat any act of insolvency committed by him in relation to the affairs of the family, speaking generally, as an act committed by other members of the family also. It follows that the joint Hindu family, as such, cannot be adjudicated insolvent but that two or more members of such a family who have incurred a joint personal liability may present a joint petition in insolvency (itself an act of insolvency) or may be proceeded against on one creditor's petition in case the joint act of insolvency can be brought home to them. Minors must, however, be excluded in any case from insolvency proceedings started at the instance whether of debtors or of creditors. Some confusion has sometimes arisen on account of the powers of a receiver to sell the interest of the sons in the joint family estate where the karta being the father has been declared insolvent. This matter has now been clearly decided authoritatively by their Lordships of the Privy Council in 17 P L T 717=17 Lah 644[6], where it has been pointed out that in cases where the father is adjudicated insolvent in a joint Hindu family, the shares of the sons can be seized by the receiver in insolvency on the ground of the son's pious obligation to pay the debts of the father.

The respondents raised a preliminary objection that this appeal is incompetent inasmuch as the leave of the High Court was not obtained under S. 75 (3), Provincial Insolvency Act. There is no merit in this objection, because the very fact that this appeal was admitted by this Court amounts to an indication that if leave had been asked for it would have been granted. To cure this irregularity, it is enough to state that we think that this is a case in which leave ought to be granted and the same is granted at this stage as was done in 9 P L T 329.[7] The result is that the appeal is allowed with costs. The District Judge will now take the case back on his file and proceed to determine whether the opposite party (or which of them) should or should not be declared insolvent as prayed for by the applicants in their application of 23rd March 1936.

Courtney-Terrell, C. J.—I agree.

S.C./R.K. *Appeal allowed.*

5. Sanyasi Charan Mandal v. Krishnadhan Banerji, A I R 1922 P C 237=67 I C 124=49 I A 108=49 Cal 560 (P C).

6. Sat Narain v. Sri Kishen Das, A I R 1936 P C 277=164 I C 6=63 I A 384=17 Lah 644 =17 P L T 717 (P C).

7. Gopal Ram v. Magni Ram, A I R 1928 Pat 338=107 I C 830=7 Pat 375=9 P L T 329 (F B).

A. I. R. 1937 Patna 667

COURTNEY-TERRELL, C. J. AND MADAN, J.

Babu Ramsewak Missra — Plaintiff — Petitioner.

v.

Choudhary Babu Jamuna Prasad Singh and *another* — Defendants — Respondents.

Civil Revn. Petn. No. 40 of 1937, Decided on 11th August 1937, from order of Small Cause Court Judge, Darbhanga, D/- 14th October 1936.

Hindu Law—Debts—Widow— Necessity — Reversioners not liable for debts of widow on hand-note—Widow having annual income of Rs. 10,000 borrowing Rs. 272 on hand-note for completion of temple—Debt held not for necessity and so could not bind reversioners.

In all cases of necessity, to prove the mere nature of the purpose for which the money is borrowed is hardly sufficient, the borrowing must also have been necessary for the particular purpose. [P 668 C 2]

A suit was brought on a hand-note for Rs. 272 executed by a widow in possession of an income of Rs. 10,000 a year bearing a statement that the loan was for legal necessity. The promisee set up a story that it was for completion of a temple under construction. The widow having died before the suit began, the reversioners were sought to be made liable :

Held : that the suit being based upon hand-note, the reversioners could not be made liable merely as persons succeediug to the interest of the widow, when that interest had ceased altogether. Moreover, the purpose for whioh the money was required was not in the nature of a legal necessity which would bind the persons succeeding to the estate. [P 668 C 2]

S. N. Ray and *R. Choudhary* — for Petitioner.

Baldeva Sahay and *G. P. Sahay*— for Respondents.

Courtney-Terrell, C. J. — This is an application in civil revision against a judgment of the Small Cause Court Judge of Darbhanga dismissing a suit by the plaintiff to recover Rs. 272 principal and Rs. 98 interest. The maker of the hand-note, Mt. Manrup Kuer, died before the suit was begun and her co-defendants are persons who have succeeded to the last male holder, i. e. her deceased husband, the lady having a mere life-interest in the estate at the time of the making of the hand-note. It is sought to make these defendants liable partly on the hand-note and also on the ground that they are bound to the extent of the estate which came into their hands, because the loan in respect of which the hand-note was made was advanced to the lady for legal necessity. The hand-note bears a statement that the loan was advanced for the expenses of the lady in connexion with the estate, but there is no statement in the plaint as to any particular necessity which might throw liability on those who succeeded to the estate on the death of the lady. No doubt, being impressed when they sought legal advice with the importance of showing some necessity of a character such that the expenses in connection therewith would be binding on the estate, the plaintiff set up a story to the effect that the lady required the money for the completion of a temple which was under construction. This was a case which was not set up in the pleadings and should not have been considered. Moreover, in all cases of necessity, to prove the mere nature of the purpose for which the money is borrowed is hardly sufficient ; the borrowing must also have been necessary for the particular purpose and a lady in possession of an income of Rs. 10,000 a year is under no necessity to borrow such a small sum as Rs. 272 for the finishing of the temple and no evidence was offered by the plaintiff, nor is there any finding of fact as to the necessity for the borrowing. It must also be remembered that the suit is based upon the hand-note and the persons liable on the hand-note are only the parties to the hand-note and the heirs of those parties. They cannot be made liable merely as the persons who succeeded to the interest of the maker of the hand-note when that interest has ceased altogether.

The learned Judge who decided this case dismissed it on the ground that the debt was an unsecured debt and therefore not binding upon those who succeeded to the estate. The question of the recoverability of a secured or an unsecured debt has given the Courts very great difficulty. Since the date of the decision of Saunders, J. in 15 P L T 583[1], there has been a decision of a Full Bench of the Bombay High Court in 60 Bom 311[2] which renders the soundness of the decision of Saunders, J. open to some doubt. The learned Judge was however right in following the decision of the learned Judge of this High Court in preference to any other decision. The real ground, however, upon which the suit should, in my opinion, have been dismissed as the learned Judge did in fact dismiss it, is that the purpose, even if we accept the story of the plaintiff, for which the money was required, is not in the nature of a legal necessity which would be binding upon those who succeeded to the estate.

In the result, the learned Judge's decision was in my opinion right and this

1. Baramdeo Singh v. Lal Bahadur Sah, A I R 1934 Pat 216=149 I C 152=15 P L T 583.
2. Dhondo Yeshwant Kulkarni v. Mishrilal Surajmal, A I R 1936 Bom 59=160 I C 1046 =60 Bom 311=38 Bom L R 6 (F B).

application should be dismissed with costs which we assess at two gold mohurs.

Madan, J.—I agree.

S.C./R.K. *Application dismissed.*

A. I. R. 1937 Patna 669

AGARWALA AND MADAN, JJ.

Sheikh Amiruddin and *others* —
Appellants.

v.

Sonelal Jha and *others* — Respondents.

Appeal No. 894 of 1934, Decided on 2nd April 1937, from decision of Sub.Judge, Darbhanga, D/- 7th February 1934.

Bihar Tenancy Act (8 of 1934), S. 4—Gair mazrua-am land — Landlord cannot settle it and has no control over it.

Gair mazrua-am land is that land which is not under the control of the landlord and which he has no right to settle upon others : *A I R 1937 Pat 388, Rel. on ; A I R 1923 Pat 346 held overruled by A I R 1937 Pat 388.* [P 670 C 1]

K. Hasnain and *Rameshwar Misra* —
for Appellants.

S. M. Mullick, R. Chowdhury, R. K. Choudhary, R. N. Jha and *D. L. Nandkeolyar* — for Respondents.

Madan, J. — This is an appeal by the defendants second party. The plaintiffs brought the suit alleging that in the year 1904 they took settlement from Bibi Wahidunnissa of 1 bigha 10 kathas forming part of plot No. 166 of village Bishunpur Fazila. This plot, the total area of which is 2 bighas 17 kathas, is said to have been in exclusive possession of Wahinunnissa as seven annas co-sharer landlord of the village, and settlement with the plaintiffs is said to have been made on a rental of Rs. 6.3.0. The defendants first party are the successors-in-interest of Wahidunnissa and defendants third party are the remaining co-sharer landlords. In the cadastral survey, finally published in about the year 1900, the entire plot was recorded as "gairmazrua-am" in possession of the Mahomedans of the locality for use as a graveyard. The plaintiffs suggested that owing to the decline in the local Mahomedan population, the landlords took possession of the surplus portion of the graveyard and settled it with them. The plaintiffs also claimed to have planted trees on the land and to have surrounded it with a fence. In the year 1929 the defendants first party interfered with the plaintiffs' possession, and there was a criminal case in which the defendants first party were discharged. In their written statement in that case, the defendants first party claimed that the land was in possession of the defendants second party who are Mahomedans of the village. The plaintiffs therefore sued for a declaration of their occupancy rights in the land and for confirmation or recovery of possession or for such relief as they might be entitled to. The defendants first party denied the alleged settlement and claimed that the land was part of the graveyard. Defendants second party also claimed it as graveyard. The trial Court dismissed the suit holding that the plaintiffs had not proved settlement or possession within twelve years of the suit. The Subordinate Judge on appeal decreed the suit, holding that the plaintiffs had taken settlement in the year 1904 and have remained in possession till the year 1929 when they were ousted illegally by the defendants first party.

The learned Subordinate Judge did not consider whether, assuming that Wahidunnissa did purport to settle the land with the plaintiffs, she had a right to do so. The land is recorded in the cadastral survey of the year 1900 as "gairmazrua-am" in possession of the Mahomedans for use as a graveyard, and this entry has not been seriously challenged. We were referred for the plaintiffs to the decision of a single Judge in 4 P L T 223,[1] where it is observed that there is nothing to prevent a landlord from settling "gairmazrua-am" land in his zamindari so long as he does not interfere with the rights which have been acquired by the tenants. With all respect to the learned Judge who decided that case, I am of opinion that the correct view of the law relating to gairmazrua-am lands is that expressed by the Chief Justice and James, J. in a recently decided case of this Court, Second Appeal No. 1379 of 1933.[2] In that case with reference to an argument that the landlord had complete right of control over a bathing pool situated in "gairmazrua-am" land in his zamindari, James, J. observed :

The entry in the Record of Rights cannot be read as warranting any presumption that the

1. Ram Das Sah v. Damodar Prasad, A I R 1923 Pat 346=72 I C 218=4 P L T 223.
2. Muhammad Waliul Haq v. Ludput Upadhya *Reported in* A I R 1937 Pat 388=169 I C 971 =16 Pat 389=18 P L T 348.

zamindar more than any other person has a right of control over these kunds. There are two forms of khatian for non-agricultural land or waste land. In one (gair mazrua malik), is entered land, waste or uncultivated or utilized for building or non-agricultural purposes, which is under the control of the zamindar. In the other (gair-mazrua-am or public waste) is land of that kind not under the control of the zamindar ; and the only presumption in that connexion which can properly be drawn from the entry in the Record of Rights is that this pool is not under the control of the zamindar.

It follows that Wahidunnissa had no right to settle the land which is the subject matter of the present case and that the plaintiffs acquired no tenancy right by virtue of such settlement, which is repudiated by defendants first party, the successors-in-interest of Wahidunnissa. All that the plaintiffs have been able to establish in this suit, as against the defendants, is that they have been in actual possession of the land since the year 1904. The decree passed by the learned Subordinate Judge must therefore be modified as follows : The plaintiffs' prayer for declaration of their occupancy right under the defendants first party is refused, but it is declared that the plaintiffs are entitled to possession of the land as against the defendants first, second and third parties. The decree is only binding on the defendants second party, who are Mahomedans, in their individual capacity. The question what rights, if any, the plaintiffs have acquired against the local Mahomedan community with respect to their claim to use the land for the purpose of a graveyard, is left for determination in a properly constituted suit. The parties will bear their own costs throughout this present litigation.

Agarwala, J. — I agree.

B.D./R.K. *Decree modified.*

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* A. I. R. 1937 Patna 670

COURTNEY-TERRELL C. J. AND MANOHAR LALL, J.

Shib Charan Sahu and *others* —
Appellants.

v.

Sarda Prasad and *another* —
Respondents.

Letters Patent Appeal No. 4 of 1936, Decided on 27th August 1937, from decision of Agarwala, J., in Appeal No. 84 of 1933.

*** Commission — Court dissatisfied with report of commissioner, can issue another commission — Report of first commissioner however cannot be wiped out of record.**

When a Court issues a commission but is dissatisfied with the report of the commissioner, it is entitled to issue another commission and ask for its report; but the report of the first commissioner cannot be wiped off the record : *A I R 1931 Mad 73* and *A I R 1932 Mad 482, Expl.*

[P 671 C 1]

S. K. Mitra and *P. B. Ganguly* —
for Appellants.

B. K. Prasad, K. N. Lal and *R. Misra* — for Respondents.

Courtney-Terrell, C. J.—This Letters Patent Appeal arises out of the following circumstances. The plaintiffs instituted a suit complaining of trespass by the defendants upon their land, and the substantial point in dispute between the parties was as to where the boundary between the two adjacent pieces of land really lay. The trial Court appointed a commissioner and he reported that the plaintiffs' contention as to the location of their boundary was correct and that the defendants had encroached on the plaintiffs' land. The Court seems to have been dissatisfied with this Commissioner's report and issued a second commission to another person who reported in the contrary sense. The Court believing this second commissioner's view of the matter dismissed the plaintiffs' suit. They then went on appeal to the Subordinate Judge who took into consideration both of the reports and the other evidence in the case and came to the conclusion that the defendants had encroached on the plaintiffs' land, and granted the plaintiffs a decree reversing the decision of the Munsif. The defendants then came in second appeal to this Court and the point raised before the learned Judge was that what ought to have been done in the circumstances was to issue a third commission. The learned Judge very properly rejected that suggestion, and the defendants have now come in Letters Patent Appeal.

Before us, the defendants now raise a new and even more extraordinary contention, and we have heard nothing of the contention raised before the learned Judge sitting singly. Relying upon the decisions of the Madras High Court in 54 Mad 239[1] and 55 Mad 656[2], it is argued

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1. Kunhi Kutti Ali v. Muhammad Haji, A I R 1931 Mad 73=130 I C 470=54 Mad 239=60 M L J 460.
2. Pazhancheri Panangat v. Achuta Menon, A I R 1932 Mad 482=138 I C 114=55 Mad 656=62 M L J 629.

that when a Judge issues a commission, if he is dissatisfied with the report of the commissioner and sees fit to direct a second commission to issue, he should wipe the first commissioner's report off the record entirely, treat it as not being evidence and decide the point on such evidence as may then remain in the shape of the second commissioner's report and such further evidence as may be available. Now the observations of the Madras High Court to which reference was made in the cases which I have referred to, were directed not to establishing this supposed principle at all. In those judgments, the Madras High Court was endeavouring to correct a very bad tendency on the part of the Munsifs of the Malabar districts who appeared to have got into the habit of sending out simultaneous commissions to investigate the same issue of fact and then taking all the commissioners' reports into consideration and deciding as between these various reports which of them was preferable; and this habit of sending out commissions whether simultaneous or consecutive had become a nuisance which the Madras High Court very properly desired to check and put an end to. I can find in those judgments no statement of a principle such as is contended for in this appeal. There is nothing in O. 26, R. 10, Civil P. C. to justify such a contention. It is in the power of the trial Court to send out a second or even a third commission, and when all the materials are before the Court it may at the time of delivering judgment attach very little or no weight to the first commissioner's report, but this is very far from saying that this amounts to requiring the first report to be wiped out of the record and not considered as evidence. That the argument is entirely unsound is seen on considering what, if it were true, would be the position in the case of an Appellate Court. The first Court's decision on the matter of fact is not final and if the contention were to be accepted, it would prevent an Appellate Court from taking into consideration the first commissioner's report : this consideration alone is sufficient to demonstrate the fallacy of the argument. It has been necessary to deal with this new point because of the misplaced interpretation of the Madras cases which in my opinion lay down no such proposition as has been contended for and it is necessary to prevent this argument being raised in future to the embarrassment of lower Courts; but as a matter of practice the argument was really not even open to the appellants who did not raise it before the Judge in the Court below. I would dismiss this Letters Patent Appeal with costs.

Manohar Lall, J.—I entirely agree.

B.D./R.K. *Appeal dismissed.*

A I. R. 1937 Patna 671

COURTNEY-TERRELL, C. J. AND MANOHAR LALL, J.

Basdeo Prasad — Creditor 1 — Appellant.

v.

Baiju Mandal, Debtor and *others* — Respondents.

Appeal No. 204 of 1936, Decided on 17th August 1937, from original order of Dist. Judge, Monghyr, D/- 23rd May 1936.

Insolvency—Adjudication—Want of notice to certain creditor is mere irregularity not affecting order of adjudication as between insolvent and another creditor.

In an appeal from an order declaring a person insolvent, one creditor contended that no notice was served on certain other creditor. It was however admitted that a notice was issued to him and also published in the Gazette, but it was stated that the creditor was dead on the date he was said to have received the notice :

Held : that this was a mere irregularity and did not affect the case between the insolvent and the appellant creditor. [P 671 C 2]

B. B. Saran — for Appellant.

M. K. Mukherjee — for Respondents.

Judgment. — This is an appeal by a creditor against an order of the District Judge of Monghyr, dated 23rd May 1936, declaring one Baiju Mandal as an insolvent. The first ground taken by the appellant is that no notice was served upon creditor 3 in the case. It is admitted however that a notice was issued to him and also published in the Gazette, but it is stated that the creditor was dead on the date he is said to have received the notice. In our view, this is a mere irregularity and does not affect the case between the insolvent and the appellant.

The next point taken by the appellant is that the learned District Judge ought to have granted him time on 23rd May 1936, which was the first date for hearing of the case. Ordinarily, time would have been granted if sufficient cause had been shown by the appellant on that date ; but

from the order sheet it appears that before disposing of the case, the learned District Judge wanted to deal with the appellant's application for time, but on repeated calls he was found absent. Under the circumstances, the learned Judge could only reject that application and proceed with the case by examining the insolvent and hearing the arguments. There is no substance in any of the points urged. The appeal fails and is dismissed with costs.

D.S./R.K. *Appeal dismissed.*

A. I. R. 1937 Patna 672

COURTNEY-TERRELL, C. J. AND MANOHAR LALL, J.

Nakchedi Sahu and *another* — Appellants.

v.

Bishun Lal Singh — Respondent.

Appeals Nos. 67 and 68 of 1936, Decided on 18th August 1937, from original orders of Sub-Judge, Hazaribagh, D/- 30th January 1936.

Civil P. C. (1908), S. 47 and O. 43, R. 1 (j) —Appeal—Compromise during execution of mortgage decree resulting in postponement of confirmation of sale—Breach of term of compromise—Injured party has remedy by suit — Executing Court refusing to direct other party to act up to compromise—No appeal lies from such order.

If during the execution of a mortgage decree the parties arrive at a compromise by which they postpone the confirmation of the execution sale and a term of the compromise has been broken by one of the parties, that is a matter which can only be remedied by a suit on the part of the injured party. The executing Court cannot be petitioned by the injured party to direct other party to act up to it. An executing Court has merely got the business of confirming or refusing to confirm a sale and no appeal lies in any matter other than a refusal to confirm the sale or an order confirming the sale. If therefore the executing Court refuses to make such a direction, no appeal lies from such a refusal. [P 672 C 2]

Sarjoo Prasad (in Appeal No. 67) and *Rajani Kant Sinha* (in Appeal No. 68) —for Appellants.

S. N. Ray — for Respondent (in both appeals).

Judgment.—This is an appeal by the judgment-debtors 3 and 4 against an order of the Subordinate Judge of Hazaribagh dated 30th January 1936, refusing to make an order on a petition by the defendants in the following circumstances. It seems that the decree-holder sued on a mortgage bond against the executants of the mortgage who were defendants 1 and 2 and impleaded the appellants, judgment-debtors 3 and 4, who were the subsequent mortgagees. The decree-holder sold the mortgaged property on 8th August 1934. There was a petition under O. 21, R. 90, Civil P. C. by all four of the judgment-debtors to set aside the sale. This matter was compromised on 31st May 1935 and the terms of the compromise are simple though somewhat peculiar. Under the terms, the arrangement was that the confirmation of the sale should be postponed until 30th September 1935. It was further agreed that if a sum of Rs. 11,550 should be paid on or before that date, then the decree-holder was to reconvey to the mortgagors the property in question. If on the other hand the amount was not so paid, then in that event also the sale was to be confirmed.

On 26th September, the judgment-debtors, the mortgagors, petitioned to say that they had found a purchaser and asked that the decree-holder might be ordered to execute the kobala and take the money and they further complained that the auction-purchaser had refused to take a copy of the petition. Defendants 3 and 4 stated that they had made a tender of payment on the 28th which was refused. The learned Judge on this petition declined to direct the decree-holder to execute the kobala mentioned and in this matter he was undoubtedly right. Under the terms of the compromise, he was bound to confirm the sale in any event whether the money were paid on the required date or not. He had no further powers, being limited to the mere question of either confirming the sale or setting it aside and by the arrangement between the parties even his powers in this choice were limited and he was compelled to confirm the sale. If a term of the compromise has been broken by one of the parties, that is a matter which can only be remedied by a suit on the part of the injured party. An executing Court has merely got the business of confirming or refusing to confirm a sale and there is moreover no power on the part of this Court to entertain an appeal in any matter other than a refusal to confirm the sale or an order confirming the sale. This appeal therefore necessarily fails and must be dismissed with costs. The appeal of the judgment-debtors has no merits of any kind and must also be dismissed with costs.

A.L./R.K. *Appeal dismissed.*

END

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